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Impact of International Arbitration Proceeding: Governmental Approach and Investment Climate in Bangladesh

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Content

1

INTRODUCTION

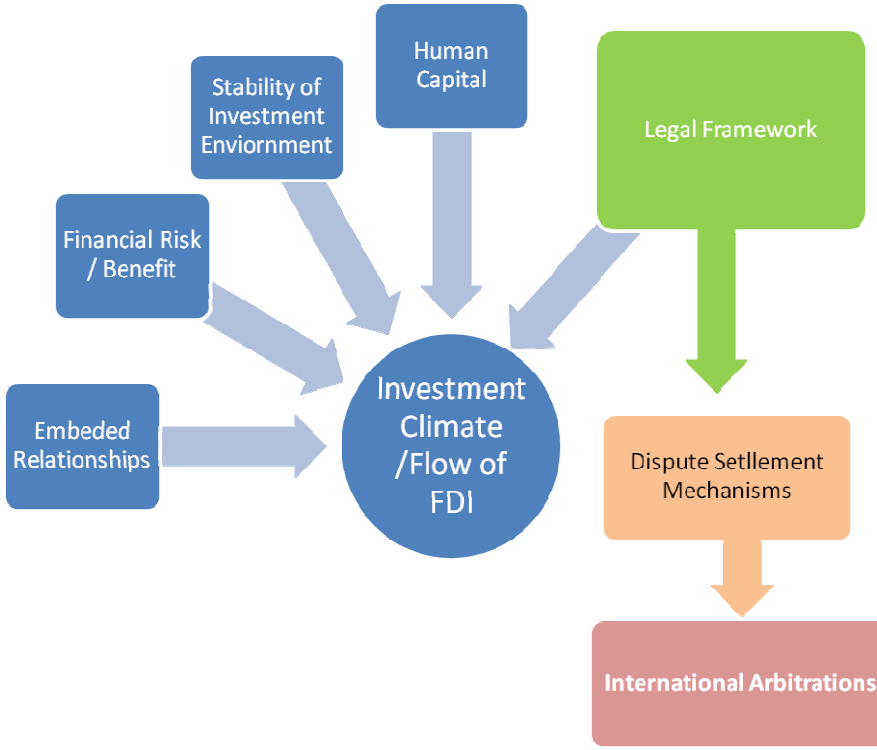
This research paper explores the role of the legal framework in promoting investment climate of Bangladesh through investment protection. In particular, this research has assessed Government of Bangladesh's (GOB) role and approach towards international arbitration proceedings as a means of investment protection and has evaluated the effects of such on inward flow of Foreign Direct Investment (FDI).

Among measures that attract FDI, an essential step is the establishment of a sound legal framework that can assure a stable investment environment and enhance investors' confidence. Other critical variables influencing investment choices can include, inter-alia, the potential financial risks and benefits to the investor, the stability of an investment environment, the availability of appropriate human capital, and any embedded personal and professional relationships.

While an efficient and friendly regulatory framework is important to attract FDI, dispute settlement mechanism is a vital aspect of protection of foreign investment. International arbitration is now almost universally preferred as a mechanism for dispute settlement.

Investors' Preference of International Arbitration

Most foreign investors view international arbitration as a reliable method for dispute settlement. The reasons for their preference includes the neutrality provided by the Tribunals, the relatively shorter period of time consumed, finality that is ensured by a single forum proceeding, easier enforcement mechanism for arbitral awards, and inexpensive means of dispute settlement.



Economic Impact of International Arbitration

Investors are assumed to be rational actors who seek to maximise their profits and minimise their risks. A reliable and predictable legal framework can boost investors' confidence by assuring protection of their investment. Further to this, compliance to such legal framework is also a determinative factor for premiums that investors have to pay for political risk insurance of their investment. And therefore, availability of an effective international arbitration mechanism has a positive impact on the investment climate.

Background of the Study

In its effort to promote FDI in Bangladesh, the Government has signed various treaties to guarantee investment protection through international arbitral proceedings. In particular, the Government has ratified 22 bilateral investment treaties and a number of relevant multilateral treaties including that of the New York[1] and the ICSID[2] Convention. Besides these, GOB has enacted a number of legislations including the Foreign Private Investment (Protection and Promotion) Act 1980, the Arbitration Act 2001, etc.

However, in recent years, there had been a number of international litigations that has raised considerable doubts on the Government's inclination in voluntarily complying with such proceedings. Such cases demonstrate Governmental intervention in dispute settlement procedure and have therefore created concerns about GOB's intentions.

Some of the recent significant International Investment Disputes involving Bangladesh are:

- Saipem S A v Bangladesh (USD 12.6 million) [Gas Pipeline]
- Chevron v Bangladesh (USD 127 million) [Gas Pipeline]
- Lahmeyer International Pally Power Services v REB for (USD 20 million) [Power Plant]
- HELM Dungemittel GmbH v Bangladesh Chemical Industries Corporation (USD 6.8 million) [Chemical Purchase Contract]
- LIPPS v Dhaka North Power Plant (USD 29 million) [Power Plant]

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1 United Nations Convection on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, available at www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf

2 The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1967; Also known as Washington Convention 1965, available at: www.worldbank.org/icsid

- Bangladesh v Niko (USD 100 million) [Environment]

In *Saipem S A v Bangladesh*, discussed in detail below, an eminent ICSID[3] Tribunal discussed GOB's intervention in the investment dispute mechanisms. In this case, a dispute arose between Saipem, an Italian investor in Bangladesh, and Petrobangla regarding additional costs and retention of bond guarantees. Following the contractual dispute mechanism, Saipem persuaded to go for arbitration under the Rules of International Chamber of Commerce (ICC), a premier institution for administering international arbitration. The ICC panel ruled in favour of Saipem and awarded US$ 6 million plus interest as damages.

However, Petrobangla moved to local courts in Bangladesh and the Supreme Court issued an injunction declaring that the ICC arbitral proceeding was "*illegal and without jurisdiction*". Subsequently, being frustrated with such interventions, Saipem is now seeking to enforce its contractual rights under the ITALO-Bangladeshi Bilateral Investment Treaty under ICSID and claiming US$ 12.5 million and interest from GOB. This legal saga has raised questions as to the suitability of investment protection in Bangladesh.

The Rationale

Foreign investors look for safe investment climates where they feel confident that the host state will conform to investment agreements. The researchers have explored whether GOB is moving away from its commitment, which is, not adhering to the international rule of law, and if so, how the foreign investors perceive this development. Finally, the researchers have suggested some steps GOB and its development partners may adopt to create an efficient dispute settlement mechanism that would bolster investors' confidence and improve investment climate of Bangladesh.

This paper, therefore, has sought to achieve the following objectives:

3 International Center for Settlement of Investment Dispute (ICSID) established by the Washington Convention 1965

- Reflect on the rational of GOB's approach;
- Appraise foreign investors' perception of investment protection in Bangladesh; and
- Suggest appropriate recommendations.

It is pertinent to mention that Bangladesh has been rated more than average (6.7/10) in the World Bank's ranking for investor protection[4]. However, it should be noted that this rating of investor protection considers legal framework relating to disclosures by companies, minority shareholder protection, and directors' liabilities. It does not reflect on GOB's willingness to comply with international arbitration proceedings. Therefore, Bangladesh's ranking in the World Bank index has no bearing on the concerns addressed in this research project.

Key Research Questions

The focus of this research was to determine (i) the approach of GOB as a Host State towards international arbitration proceedings, and (ii) its impact on foreign investment climate of Bangladesh. In particular, the research has answered the following questions:

Approach of GOB

1. What standpoint does GOB take when faced with international investment arbitration?
2. Is there any inclination of GOB to avoid international arbitration proceedings?
3. If so, what factors could be attributed for such negative approach of GOB towards international arbitration? In particular, we consider the following non-exhaustive list of possibilities:
    a. Fear of bias of foreign arbitrators
    b. Concerns for national sovereignty and integrity of local courts

4 Doing Business 2009, World Bank Publication, ISBN: 978-0-8213-7609-6

   c. Lack of local legal skills
   d. Access to foreign expertise
   e. Strength of individual cases
   f. Corruption at pre-investment contract negotiation or post dispute stage
4. What are the perceptions of the judiciary and other stakeholders in Bangladesh towards international investment arbitration?

Impact on Investment Climate

5. Does availability of an international standard dispute settlement mechanism influence investors' investment decisions in Bangladesh?
6. Can governmental actions/perceptions deter investors' confidence relating to investment protection and sustainability of investment in Bangladesh?

Direction for Development

7. Should it be necessary, can any or all of the steps from the following non-exhaustive list boost investors' confidence?
   a. Reforming laws relating to investment protection and promotion;
   b. Educating key GOB personnel on impact of international arbitration and investor confidence;
   c. Developing negotiation and legal skills of local lawyers and involved authorities;
   d. Implementing due diligence procedure to scrutinize international investment contracts.

2

RESEARCH METHODS

The research was directed at assessing the approach of GOB towards international arbitration proceedings and its impact on inward flow of FDI; and therefore, it entailed the challenging task of gathering information from individuals and entities, and analyse them to complete the qualitative assessment.

Document Analysis

Case Law Analysis

According to Fraenkel and Wallen[5], an advantage of document analysis is that the researcher can examine records and documents to get a feel for the context of the issue, in an unobtrusive manner. Of particular interest to this study was determining the judicial portrayal of GOB's approach towards foreign arbitration proceedings. Therefore to get an objective view of judicial understanding, analysis of primary case materials was important.

Hence, the first phase of the data collection process consisted of an analysis of relevant case law materials, both national and international, involving disputes between GOB and foreign investors regarding initiation/enforcement of international arbitrations. The cases analyzed were selected to represent the spectrum of pre-arbitration, during arbitration and post-award stance of GOB. Primarily, cases from ICSID and the Supreme Court of Bangladesh were examined. The sample also included awards from other institutional arbitration proceedings.

The primary purpose of this phase was to gain preliminary knowledge of the grounds on which GOB tends to rely in international arbitration proceedings. This process also ascertained whether GOB had been found

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[5] Fraenkel, Jack R. and Wallen, Norman E.. 1996. How to Design and Evaluate Research in Education. 3d. ed. New York: McGraw-Hill, Inc.

to employ delaying tactics in cases where the arbitration award had gone against them.

Comparative Studies

In order to determine the comparative standard of GOB's approach and the rationale behind such, the researchers have comparatively analysed the international arbitration proceedings in developing countries. In particular, the researchers looked into legal systems, policies and flow of investments to the selected countries.

The researchers relied on the Investment Climate Statement of US State Department of 2007 to identify countries with similar economic conditions and dispute resolution mechanisms and Sri Lanka and Vietnam were selected. The researchers acknowledge that the focus of the comparative analysis was limited to literature linking these countries' dispute resolution mechanisms and FDI flows.

This research method was applied to ascertain whether the rationale of GOB's approach is a familiar theme in these jurisdictions or not. In particular, the researchers have explored the following:

- The standard of investment protection and dispute settlement mechanism offered by selected countries;
- The initiatives such host nations have undertaken to enhance their legal framework to bolster investment climate.

Intensive Interviewing

One of the primary goals of intensive interviewing is to develop a comprehensive picture of the interviewees' approaches in his or her own terms[6]. An interviewing guideline was developed to provide a list of topics to suggest lines of inquiry[7]. At the second phase of this study, an intensive interview was conducted following a pre-planned outline of topics developed from literature review and case law analysis. The

6 Schutt, Russell K. 1996 Investigating the Social World: The Process and Practice of Research. Thousand Oaks, CA: Pine Forge Press

7 Weiss, Robert S. 1994 Learning From Strangers. New York: The Free Press.

interviews were conducted in a reasonably consistent manner, relying primarily on open ended questions.

Since the research method endeavoured to measure perception, the methodology applied had taken account of the common problems and biases associated with measuring perception and dealt with them accordingly.

The data collection involved 33 intensive interviews with samples from the three following groups:

Representatives of GOB

- Institutions that deal with international investments and related disputes often;
- Institutions that deal with Governmental Policies related to the Investment Climate;
- Legal representatives of GOB;
- Relevant Government Ministries.

Investors

- Foreign Investors that were involved in international arbitrations with GOB;
- Foreign Investors from other leading FDI recipient sectors that are not involved in international arbitrations with GOB;
- Potential Foreign Investors.

Relevant Individuals

- Independent counsels involved in foreign investment disputes;
- Judges who have directly dealt with local judicial proceedings involving foreign arbitration;
- Other individuals connected to foreign investment issues in Bangladesh.

Through the qualitative interview process, the researchers re-affirmed the findings of the case law analysis, and also explored how GOB resists foreign arbitration proceedings; the rationales behind the approach taken; how the investors see this affecting their decision making process; etc. At the end of the interviews the participants were asked to complete a questionnaire.

Round Table Discussion

At the final stage of data collection, the researchers conducted two mini-focus group sessions with government officials, practitioners/academics, and investors.

The researchers moderated and cross-referred the discussions in light of the interview guideline and the responses received from the interviews. The discussions generated specific suggestions for enhancement of investor confidence by improving legal framework for investment protection in Bangladesh.

Data Analysis

The data analysis phases of the project were completed sequentially as the data collection methods were employed. The researchers used both qualitative and quantitative data analysis methods. The records of data collected at the various stages were read and classified under the pre-determined variables. At the final stage of each cycle, the researchers examined the data under each variable in order to (i) determine any existing patterns and relationships both within a collection, and also across collections, and (ii) make general discoveries about the approach, and effects of international arbitration on investment protection in Bangladesh.

3

LITERATURE REVIEW

Foreign Direct Investment and Its Role in Developing Economies

Arthur and Steven define investment as "…the active redirecting of resources from being consumed today so that they may create benefits in the future; the use of assets to earn income or profit."[8] When such investment involves the transfer of tangible or intangible assets from one country into another for the purpose of their use in the latter to generate income or profit under the control of the owners, it is termed as Foreign Direct Investment ("**FDI"**). The countries from which such assets are transferred and received are colloquially referred to as the Capital Exporting State and the Host State respectively. Historically, developed western countries have been the major Capital Exporting States, while the Host States tended to be the least developed or developing countries from around the world.

Since nearly the last three decades, the concept of FDI has come to play an important role in the economic development of many countries around the world. It is generally accepted that foreign investment provides a net benefit to the Host state. The World Bank's Guidelines on the Treatment of Foreign Direct Investment issued in 1992 recognizes**:**

> *"…that a greater flow of foreign direct investment brings substantial benefits to bear on the world economy and on the economies of developing countries in particular, in terms of improving the long term efficiency of the host country through greater competition, transfer of capital, technology and managerial skills, and enhancement of market access, and in terms of the expansion of international trade."*

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[8] Sullivan, Arthur & Sheffrin, Steven M. (2003). Economics: Principles in action. Upper Saddle River, New Jersey 07458: Pearson Prentice Hall. pp. 271. ISBN 0-13-063085-3.

Importance of Protection of FDI

Focus on the beneficial aspects of FDI inflow builds the case in favour of the policy-oriented argument that FDI must be protected by international law. Shihata[9] argues that offering tax holidays and other favourable treatments to foreign investors are not sufficient to attract FDI. It is much more important to provide a framework which provides investors with reliable protection for their property and contractual rights. These rights of an investor encompass firstly, the ownership of tangible and intangible assets, and secondly, the administrative rights relating to the operation of the investment project. Given the role of FDI in developing economies, Sornarajah[10] points out that the necessity of such protection is important both from the point of view of the host state in generating more FDI inflow and from the point of view of the investors in determining whether his or her investment has adequate safeguards against governmental interference with his rights.

Risks of FDI

An investor primarily wishes to ensure maximum profit and mitigate the risk factors surrounding the investment. On top of ordinary business risks which has to be accepted and mitigated in any type of business, the issue that would trouble a foreign investor the most during risk assessment is the threat of state intervention with the investment[11]. Neutralising such risk is of paramount concern to the foreign investor.

Protection from Risks as a Component of Investment Climate

Attractiveness of a host state to foreign investors from Capital Exporting States largely depends on conduciveness of the legal framework it offers for the protection of FDI against state intervention. Thus, legal framework, along with *economic and financial framework; and the*

9 Shihata, F I Ibrahim, 1993 Legal Treatment of Foreign Investment: the World Bank Guidelines, Dordercht: Boston.

10 Sornarajah, M., 2007, The International Law on Foreign Investment, Cambridge.

11 ibid

political and cultural conditions of a country play a significant role in defining investment climate of a host state[12]. To attract more foreign investment, host states should endeavour at establishing, *inter-alia*, transparent and efficient institutional framework, political stability, investor friendly regulations, and reliable legal system. From the host state's perspective, this, in turn, will ensure the development of its economy with increased flow of foreign investment. The Arbitral Tribunal in the case of AMCO v Indonesia asserted that "*to protect investments is to protect the general interests of development and developing countries*".

Forms of Protections

The host state may provide such protection to foreign investors by promising (i) that it will not interfere with propriety rights of the foreign investor; and (ii) that effective dispute settlement mechanisms in relation to the investment will be used.

Interference with Property

Interference with property rights of a foreign investor can be in three forms, namely confiscation, nationalisation and expropriation. Sornarajah has explained these three forms and has concluded that the modern law on protection of foreign investment surrounds expropriation by host states. The term confiscation implies the capricious takeover of the property by the ruler of the host state for personal gain of the ruler, whereas nationalisation is confined to across-the-board takings that are designed to convert the foreign investment in the economy or in sectors of the economy to the state's property. Although confiscation, because of its very nature, is accepted as unlawful, in the modern world it is unlikely that such interference would occur. Nationalisation is generally accepted as a right of the host state subject to prompt, adequate and effective compensation (Iran-US Claims Tribunals). However, in the present world, it is unlikely that nationalisation will occur unless there is a complete ideological change in a state or an extraordinary economic

[12] FN 10 above

crisis takes place. Therefore, in today's terms the investors are most weary of expropriation, which is a specific term that could be used to describe the targeting of individual businesses for interference for specific, economic or other reasons, as a result denying the foreign owner of expected financial gains.

In recent times, law concerning expropriation generally refers to three types of taking of property: direct, indirect and anything 'tantamount to taking' or anything 'equivalent to a taking'. The latter in many cases are referred to as 'creeping expropriations'[13]. The concern with 'creeping expropriation' is that a state could sometimes diminish property rights of a foreign investor without affecting direct ownership of the investment. In other words, although it does not involve an overt taking, it effectively neutralises the enjoyment of property (Lauder v Czech Republic).

Effective Dispute Settlement

Foreign investors want a way to resolve disputes that does not depend upon the courts of the host country because they fear that they will not receive fair and equal treatment in local courts, when the opposing party is the host state or a host state entity. Therefore, arbitration in a neutral state in front of a neutral tribunal is traditionally seen as the best method of securing impartial justice for foreign investors. One study revealed that, in their investment decisions, investors tend to add a substantial legal risk premium "to reflect the contingent risk of subjection to a foreign court rather than a neutral international forum."[14] Besides the neutrality offered and reduction of risk premiums, investors prefer arbitration proceedings due to the relatively shorter period of time consumed, finality that is ensured by a single forum proceeding, easier enforcement mechanism for arbitral awards and inexpensive means of dispute settlement.

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[13] Dolzer,R , 1986, Indirect Expropriation of Alien Property 1 ICSID Rev 41;

[14] Paulsson, J, 1987, Third World Participation in International Investment Arbitration, ICSID Rev. - Foreign Investment L.J. I, 20-21

Means of Ensuring Investment Protection

Host states generally ensures the protection required by foreign investors by means of unilateral guarantees or by international treaties. Unilateral guarantees are provided through promulgation of Acts of Parliament of the host state or enunciating similar commitments in the Constitution of the State. However, with the growth of FDI in the last few decades, host nations are more inclined towards offering protection to foreign investors by providing guarantees by entering into Investment Treaties as "*a means to satisfy the need to promote and protect foreign investment and with a view to enhancing the legal framework under which foreign investment operates*[15]."

Bilateral Investment Treaties

Investment Treaties, mostly entered between two states, are referred to as Bilateral Investment Treaties (**BIT**s). A BIT is an agreement establishing the terms and conditions for private investment, in the form of FDI, by nationals and companies of one state in another. Currently, there are more that 2500 BITs in force, involving most countries in the world[16].

The essence for such a treaty is the promise made by the host state of protection for the inbound capital. Though, generally, most BITs contemplate a two-way flow of investments between the signatories of the treaty, it is usually only a one-way flow that is feasible in reality in the context of disparities of wealth, resources and technology between the two parties. Thus, a feature of BITs is that they are made between

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[15] Salacuse, Jeswald W. & Sullivan, Nicholas P., 2005 , *Do BITS Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 75-79 (suggesting the purposes of investment treaties are to (1) protect investment, (2) liberalize markets, and (3) promote investments).

[16] Dolzer, R and Schreuer, C, 2008, *Principles of International Investment Law*, Oxford, p. 2. Also see UNCTAD, *World Investment Report* (2006) XVII, 26

unequal partners[17] i.e., a capital exporting developed state and a developing state keen to attract capital from the former.

As Asante points out, the host state which enters into such treaties does so freely, in the belief that the existence of such treaties will promote the flow of foreign investment from the other contracting state[18]. Similarly, Neumayer and Spess suggest that developing countries that sign more BITs with developed countries receive more FDI[19]. This, as many researchers suggest, is due to the fact that the existence of BITs provide foreign investors with the comfort they seek to ensure protection of their interests.

Most BITs grant investments, made by an investor of one Contracting State in the territory of the other, a number of guarantees, including protection against nationalisation or expropriation. Additionally, the promises under BITs cover issues such as standards of treatment of the investor, rights of repatriation of profits, etc.

Additionally, they allow for an alternative dispute resolution mechanism, whereby an investor whose rights under a BIT is violated can have recourse to international arbitration, often under the auspices of the ICSID (International Center for the Settlement of Investment Disputes), rather than suing the host state in its own courts.

International Arbitration under ICSID Convention

In 1965, the World Bank sponsored a treaty to promote foreign investment by establishing a neutral forum for the resolution of investment disputes between states and nationals of other states. Known

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17 Salacuse, J W, 1990 BIT by BIT 24 Int Lawyer 655

18 Asante, S.KB., 1991, 'International law and investemnts' in M. Bedjaoui (ed.), International Law: Achievements and prospects 667

19 Neumayer, Eric & Spess, Laura, 2005, Do Bilateral Investment Treaties Increase Foreign Direct Investment in Developing Countries?, World Development Elsevier, Vol. 33 (10), pgs 1567 -1585

as the Washington Convention[20], and also the ICSID convention, the treaty created ICSID to deal with investment disputes. ICSID is an autonomous international organization with close links to the World Bank. ICSID has an Administrative Council, chaired by the World Bank's President, and a Secretariat. It provides facilities for the conciliation and arbitration of investment disputes between member countries and individual investors. Given that the number of countries adhering to ICSID convention is 155[21], ICSID is playing an important role in the international investment community. All ICSID Contracting States, whether or not parties to the dispute, are required by the Convention to recognize and enforce ICSID arbitral awards. Such enforceability of arbitration award is another incentive for investors to demand ICSID arbitrations. Given these benefits, most BITs stipulate settlement of dispute through international arbitration proceedings under the auspices of ICSID. In fact, many scholars attribute the recent rise of numbers of ICSID arbitrations to the increased number of BITs between the contracting states[22].

ICSID arbitration can also be provided under the contracts entered into by host states with foreign investors.

Investment Arbitration & Developing Countries

Sornarajah argues that BITs creating obligations on the host state to submit to any arbitral proceedings brought against it by the foreign investor is a major step taken towards investment protection. As a result such steps enhance a nation's credibility as a reputable international actor[23] and bolster their investment climate. However, in reality, host states deviate from their promises made in the BITs particularly in

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[20] The formal name for the Washington Convention is the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.

[21] As of March 9,2009

[22] As of August, 2008 ICSID had registered 263 cases concerning investment related disputes.

[23] FN 11 above

relation to investment disputes[24]. Therefore, it is important to discuss the reasons attributed to opposition by developing countries to investment arbitrations.

Bias against Developing Countries

Many scholars have attributed such divergence of developing countries to the concern that arbitration has tended to resolve international trade and investment disputes in favour of the economic interests of the developed countries[25]. Sonarjah explained the concern of developing countries by identifying certain in-built deficiencies of international arbitration system. He pointed out that:

> *"Arbitration is intended to be a neutral system but investment arbitration has emerged where most arbitrators come from commercial backgrounds, without a prior experience of dealing with disputes involving sovereign states. These arbitrators are prone to extend notions of commercial dispute resolution without adequate consideration of public law issues involved in the dispute."*[26]

Rashid has identified the cultural differences between the west and the east as one of the reasons for which most developing states of the east perceive international arbitration as biased or non-reliable[27]. This is not without support from other writers. Karen Mills highlighted out how various factors such as body language, attire, manner of address, etc. of an arbitration lawyer/arbitrator can affect the outcome of a proceeding and thereby detract parties from opting for international arbitration[28].

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[24] Peterson, Luke Eric, 2004 Bilateral Investment Treaties and Development Policy-Making, International Institute for Sustainable Development, available at htttp://www.iisd.org/pdf/2004/trade_bits.pdf

[25] Shalakany, A. A., 2000, Arbitration and the Third World: A Plea for Reassessing Bias Under the Spectre of Neoliberalism, Volume 41, Number 2, Spring 2000, Harvard Int. Law Journal

[26] Sonarjah, M , 2006, A law for need or a law for greed?: Restoring the lost law in the international law of foreign investment, Int Environ Agreements vol. 6, pp 329 - 357

[27] ibid

[28] Mills, Karen, 2006 Cultural Differences & Ethnic Bias in International Dispute Resolution: An Arbitrator/Mediator's perspective, Chartered

Therefore, there is a general agreement that perception of bias has led many developing countries, mainly from Middle East and Asia to avert from international arbitrations.

Other scholars have identified the small and closely knitted community of arbitrators and arbitration practitioners, who are primarily WCM (White, Christian, Male) dominated, to be a reason for developing states to lose reliance in neutrality of international arbitration and therefore, attempt to avert such proceedings. Sonarjah points out that:

> *"Arbitrators also ''deal in virtue'' as they bring about decisions that ensure their reappointment to future tribunals. Like-minded persons promote each other as ''highly qualified'' publicists. This small group of persons plays a multitude of roles: opposing counsel, act as arbitrators, teach the subject at universities and write on it in journals they run. No area of international law is so controlled by such a small group of persons who also talk of democratic governance and the rule of law in the same breath as being the reasons for the existence of the present system of investment arbitration."* [29]

However, Maniruzzaman[30] argues that in the future such reactions may be unwarranted as international arbitration institutions are increasingly realizing the wisdom of taking a more balanced approach, and as more and more arbitrators are appointed from developing countries. These arbitrators are expected to provide a fresh vision into the arbitral decision making process from the realities of the third-world and will not simply be biased like their many counterparts from the developed world.

Not all Investors Deserve Same Level of Protection

Whilst most foreign investments are of immense benefit to the economic development of poorer countries and deserve protection, some have

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Institute of Arbitrators, Malaysia Branch, International Arbitration Conference, Kuala Lumpur 31 March – 1 April, 2006

[29] supra, at FN 24

[30] Maniruzzaman, A.F.M , 2006, The international law of foreign investment in the age of globalization: from panic to panacea, Int Environ Agreements vol. 6, 365-369

proved to be harmful to the host states. For example, Magur-Chora and Tangra Tila blasts in Bangladesh, and Bhopal disaster in India, demonstrate the capacity for absolute lack of concern for the values of environmental protection, human rights and sustainable development by many foreign investors - who have come and invested primarily in search of profit. Often, developing countries choose to come down hard on such investors and decide to ignore their contractual and treaty rights. Scholars have generally endorsed such actions on the ground that not all foreign investors should be accorded the same protection as committed by the developing states. Maniruzzaman observes that:

> *"Foreign investment that violates human rights norms and causes environmental degradation and devastation can hardly bring any blessing for the host country and its people, not to mention the curse it may often bring them. If the protection of international law is offered to foreign investment irrespective of these facts of life, then international law is certainly bereft of justice and good sense."*[31]

Dine, J also accorded to similar propositions stating that, "If Investors have been detrimental to the host state's environment, human rights etc, those investors should not get the protection promised in the treaties"[32]. Therefore, as Sonarjah argues:

> *"The law should approach the issue of foreign investment with balanced perspectives. Those who advance the cause of sustainable development are conscious of the advantages and disadvantages that foreign investment can bring. They would like to ensure that the law is fashioned in such a manner as to promote sustainable development so that global interests such as those in the environment, poverty reduction and the protection of human rights are enhanced."*[33]

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[31] ibid

[32] Dine, J. 2004, Companies, international trade and human rights. Cambridge

[33] Supra, FN 24

Deficiency in Legal Infrastructure

Many scholars have pointed out lack of infrastructural development and resources of host developing nations to be one of the primary reasons for them to avert from international arbitration proceedings. García-Bolívar points that although arbitration is an alternative mechanism for dispute settlement, it cannot replace a weak local judicial system. In his discussion of the local judicial system of the Central American countries, the author discussed how weak judicial systems, as existing in many developing countries, hinder the development of arbitration as a very suitable alternative mechanism for dispute settlement.[34]

Gottwald identifies lack of affordable access to legal expertise as barrier to the effective participation of developing nations in international arbitration process[35]. He points out that developing nations' unequal access to legal authority and expertise threatens to undermine the legitimacy of the investment treaty arbitration process. Indeed, defending investment treaty arbitration claims poses a number of challenges for developing nations, including the cost of litigation and the possibility of a large adverse award.

Arbitration Undermines Sovereignty of Host State

Governments of developing countries traditionally have been reluctant to submit disputes to international arbitration as they see it conflicting with the states' sovereignty principles. The Calvo doctrine, which has been popular among developing countries, states that investments within host country's territory are internal affairs, to be governed solely by national laws, and are under the sole jurisdiction of domestic courts. A debate has emerged about whether international arbitration creates an enclave that prevents domestic development of the rule of law. Commentators like

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[34] Omar E. García-Bolívar, 2006 "Dispute Resolution Process and Enforcing the Rule of Law: Is Arbitration a Viable Alternative to Solving Disputes in Central America?", SouthWestern Journal of Law and Trade in the Americas, Vol. 12, p. 102

[35] Gottwald, Eric , 2006-07, Leveling The Playing Field: Is it time for a legal assistance center for Developing Nations in Investment Treaty Arbitration?, 22 Am. U Int'l L. Rev. 237.

Mark Halle & Luke Eric Peterson suggest that international arbitrations remove significant disputes between foreign investors and government agencies from the purview of local courts and tribunals while relegating locals-including domestic businesses that may be the lifeblood of domestic investment- to the mercies of these foreign institutions.

Summary

There is a wealth of literature that draws on the co-relationship between investment climate, investment protection and inflow of FDI. The general agreement seems to be that FDI is a positive force in the domestic economies and development planning of developing countries and commitment to effective dispute resolution process is necessary to provide investment protection and thereby facilitate FDI (The former U.S. Treasury Secretary, John Snow, Financial Times, November 8, 2005). This research has considered the relationship between investment treaty arbitrations and flow of FDI. The general notion seems to be that while international arbitration may not directly trigger investment, the availability of this dispute resolution mechanism is a factor in the overall decisional matrix.

Despite the unique innovation in offering investors a *neutral* forum to remedy their substantive claims, there has been little analysis of impact of international arbitration on inward flow of FDI in Bangladesh. Therefore, this research draws on these debates and using the empirical evidence gathered, qualitatively assesses the impact of GOB's approach towards international arbitration proceedings on inward flow of FDI in Bangladesh.

4

CASE ANALYSIS

SAIPEM SPA VS. GOB

Saipem spa
Vs.
The People's Republic of Bangladesh

International Chamber of Commerce (ICC)

ICC arbitration case no. 7934/ck.

International Centre for the
Settlement of Investment Disputes (ICSID)
ICSID case no. Arb/05/07

Facts

Petrobangla, being the state entity of GOB and established by the Bangladesh Oil Gas and Mineral Corporation Ordinance 1985, entered into a contract with Saipem S P A (Saipem), an Italian company, in 1990, for the installation of a pipeline of about 205 kilometers under the Second Gas Development Project of GOB. Under the contract, Saipem was required to install a pipe line from Kailashtilla to Ashuganj which was known as the North-South pipe-line. The contract price to be made was USD 34,796,140.00 plus Bangladesh Taka 415,664,200.00.

The contract provided for arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce (ICC).

The entire project work was to be completed by 30th April 1991. Later, Petrobangla extended this up to 30th April 1992. Upon completion of the pipeline it was formally taken over by Petrobangla on 14th June 1992. A dispute arose concerning the respective responsibilities of the parties for the delayed performance and the maintenance work.

Procedural History

The dispute involved complex history of litigation before two international arbitration tribunals and various local courts starting from the 1st Sub-Judge Court to the Appelate Division of the Supreme Court of Bangladesh. This is an example of a dispute, going on for over 15 (fifteen) years, where Petrobangla and GOB first submitted before an arbitration tribunal, then subsequently complained of various irregularities and applied to the local courts for anti-suit injunctions to restrain the tribunal from proceeding. Finally, this case went before the International Centre for Settlement of Investment Disputes ("ICSID") where the tribunal assumed jurisdiction over the dispute. It is still pending before ICSID and at present the parties await final award on merits.

In 1993, Saipem, pursuant to the dispute resolution procedure set forth in the Contract referred this dispute to ICC arbitration by filing a request for arbitration. Petrobangla submitted its reply and counter-claim in the total amount of USD 10,577,941.98 soon after. The Tribunal was constituted of three foreign arbitrators and it commenced its hearing in July 1997 in Dhaka. The Tribunal decided that all hearings would be tape recorded. At the outset, Petrobangla informed the Tribunal that although it would like to have the copies of the tapes it did not feel necessary to have the records done by a court transcriber.

Saipem submitted the witness statements of 3 witnesses but before the hearing commenced gave notice that one of the witnesses would not be available for examination and cross-examination before the Tribunal at the hearing in Dhaka. In response, Petrobangla made a request to strike from the record the statement of a witness produced by Saipem who could not attend the hearing. Additionally, it requested that all witnesses to be heard during the hearing be allowed to stay in the hearing room; that a letter from Petrobangla which was not on record be filed during the cross-examination of a witness; that a "draft aide-mémoire" of the World Bank and certain unilaterally prepared calculations of costs are excluded from evidence; and that written transcripts to be made of the tape

recordings of the hearing. The Tribunal rejected all the requests except the one relating to the letter from Petrobangla.

Aggrieved by the decisions of the tribunal, Petrobangla, in November 1997, filed Arbitration Miscellaneous Case No. 49 of 1997 under s.5 and/or s.41 of Arbitration Act 1940 challenging the procedural orders in order to revoke the authority of the ICC Tribunal and stop them from continuing with the arbitration. Additionally, it also filed an application for an order of temporary injunction restraining Saipem from proceeding with the arbitration. The court issued a show-cause on Saipem as to why the authority of the Tribunal would not be revoked but refused to grant the interim injunction.

Petrobangla filed an application before the High Court Division of the Supreme Court of Bangladesh against the decision of the trial court refusing Petrobangla's request for interim injunction. The High Court Division granted an ad-interim injunction restraining the proceedings of the Tribunal for a period of eight weeks. Subsequently the High Court, in May 1999, granted ad-interim injunction restraining Saipem from proceeding with the ICC arbitration.

In June 1999, Saipem preferred a Civil Petition for Leave to Appeal in the Appellate Division of the Supreme Court against the Judgment dated 2 May 1999 passed by the High Court Division in First Miscellaneous Appeal. However, the Appellate Division refused leave to appeal filed by Saipem.

In April 2000, the 1st Sub-Judge Court, Dhaka, in the Arbitration Miscellaneous Case No. 49 of 1997, revoked the authority of the ICC Tribunal on the following grounds: a) improper proceedings, b) disregarding the law of the land, c) misconduct by rejecting its procedural orders.

Disregarding the order of the 1st Sub-Judge Court, the ICC Arbitral Tribunal decided to resume the proceedings on the ground that the challenge or replacement of the arbitrators in an ICC arbitration falls within the exclusive jurisdiction of the ICC Court and not of the Bangladeshi courts. It thus held that the revocation of the authority of the

ICC Arbitral Tribunal by the Bangladeshi courts was contrary to the general principles governing international arbitration. On 9th May 2003, the tribunal declared award in favour of Saipem holding that Petrobangla had breached its contractual obligations by not paying the compensation for time extension and additional works and ordered the latter to pay to Saipem the total amount of USD 6,148,770.380 plus EUR 110,995.92 (which included the Retention Money which remained unpaid) plus interest at 3.375% from 7 June 1993.

Immediately thereafter, Petrobangla filed an application to set aside the ICC award before the Supreme Court of Bangladesh, High Court Division (Special Statutory Jurisdiction) and on 21st April 2004 the High Court Division rejected the application filed by Petrobangla with the observation that since the award of the Tribunal was passed without jurisdiction, the question of annulling such award does not arise.

Failing to enforce the Tribunal's award in Bangladesh, Saipem in October 2004, filed a Request for Arbitration with ICSID. The parties agreed on an ICSID Tribunal composed of three arbitrators with one arbitrator to be appointed by the two parties each and the presiding arbitrator to be jointly nominated by the two party-appointed arbitrators. Saipem appointed a renowned Arbitration Practitioner as their nominated arbitrator. However, Bangladesh objected to his nomination on the ground of bias. But this objection was overruled by the other two arbitrators. The Arbitral Tribunal held the hearing on jurisdiction from 21 to 22 September 2006 in London.

Observations

The dispute is spanning over 15 years and still the final award has not yet been reached, while it is often argued that arbitration is a quicker method of dispute resolution. However, the Saipem saga flies on the face of this proposition and markedly demonstrates how an arbitration proceeding can be stalled and delayed by a host state government. This case sends exactly the messages which the GOB does not want prospective investors to see.

Frivolous Nature of Procedural Motions

Firstly, it is necessary to deal with issues arising out of the proceedings before the ICC Tribunal. It has been discussed that Petrobangla made certain procedural motions during the hearing in Dhaka. The primary one of those was a request to strike from the record the statement of a witness produced by Saipem who could not attend the hearing. As it will be seen, this was one of the major grounds advanced by Petrobangla to prove that the proceeding before the ICC Tribunal was unfair and pre-judicial.

However, the ICC Tribunal had during the hearing on 22nd July 1997 ruled that

> *"[name of the witness] is no longer a witness and it will give his witness statement the appropriate wait in the circumstances".*

Indeed the ICC Tribunal had made it clear, in writing, that it was not their intention to attach significant weight to a witness statement of a person who does not appear before it. Moreover, it had invited Petrobangla to attack the contents of the document and ask the witnesses any question relating to such.

Therefore, there was an explicit guarantee by the tribunal that this 'witness statement' will not be prejudicial to Petrobangla's case. However, Petrobangla was insistent on this document to be formally taken out from record. It is difficult to see any justification for this insistence though. The document was already distributed to all parties, including the tribunal. Therefore, formally taking it out of records would have made no difference. The conclusion that can be drawn for this incessant irksome behaviour is that Petrobangla was using this as a tactic to frustrate the arbitration proceedings.

Furthermore, it is a standard rule of procedure, that in a contested proceeding when a witness gives evidence, other witnesses are not present. This is to prevent collusion of witnesses. Therefore, a request to keep other witnesses present was another clear and rather frivolous delaying tactic employed by Petrobangla.

The "draft aide-mémoire" of the World Bank and certain unilaterally prepared calculations of costs were only introduced by Saipem as a

response to the ICC Tribunal allowing Petrobangla to introduce the letter which was not on record be filed during the cross-examination of a witness. The tribunal was very clear in asserting that they were not willing to impose any restrictions on the parties concerning qualification of documents which they wished to file in the proceedings.

Finally, the request for written transcripts to be made of the tape recordings of the hearing was contradictory to Petrobangla's own letter dated 6th May 1995 where they refused the offer of written transcripts of the proceedings. Therefore, it can be seen that all the requests made by Petrobangla were without substance, and can only be termed as tactics to lengthen the progress of the arbitration. They clearly demonstrate Petrobangla's reluctance to proceed with the arbitration. Resorting to such actions in the middle of an international arbitration proceeding may signal the investors about the unwillingness of GOB entities such as Petrobangla to adhere to their contractual obligations of arbitration.

Possibility of Miscarriage of Justice?

Petrobangla moved before the 1st Sub-Judge Court for revocation of authority of the ICC Tribunal under section 5 of the Arbitration Act 1940 (1940 Act). Their application was based on the fact that the ICC Tribunal was biased and there was a possibility of miscarriage of justice. It was alleged by Petrobangla that based on the refusal of their procedural motions by the tribunal:

> *"… [Petrobangla] had reasons to believe that the Tribunal was biased and there would be a serious miscarriage of justice if the arbitration was allowed to proceed in view of the gross misapplication of mind by the Tribunal and disregard of the law governing the arbitration, that is the law of Bangladesh. The Tribunal was also acting in manifest disregard of the laws of evidence and the requirement of conducting the arbitration in a fair and just manner."*

Section 5 of the 1940 Act dealt with authority of appointed arbitrators. It stated that:

> *"The authority of an appointed arbitrator or umpire shall not*

> *be revocable except with the leave of the Court, unless a contrary intention is expressed in the arbitration agreement shall not be revocable except with leave of court."*

However, there is no statutory guideline about the courts which shall exercise this authority. It has been held in Pakistan Trading Co v MM Ispahani Ltd 11 DLR 405 that section 5 should not allow a party to an arbitration agreement to get out of the bargain, but the courts should revoke the authority if substantial miscarriage of justice would take place unless leave is granted.

Based on the facts, can it be said that there was a possibility of a substantial miscarriage of justice? The procedural motions forming the basis of Petrobangla's allegations have already been discussed. In light of that, it is difficult to discover any possibility of miscarriage of justice before the ICC Tribunal. However, the 1st Sub-Judge Court held that the tribunal had conducted the arbitration proceedings improperly and it committed misconduct. It is important to note that the courts did not invite comments from the ICC Tribunal before allowing the application of Petrobangla.

Breach of Obligations under the New York Convention

Such unilateral allegations bear a serious negative impact on Bangladesh's standing as an investment friendly state. Furthermore, the power to revoke authority of arbitrators under section 5 of the 1940 Act went against Bangladesh's obligations under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958). According to Article II of the Convention, each contracting state shall recognize arbitration agreements in writing. In the present case, the parties had agreed to arbitration under the ICC rules which are valid under Bangladeshi law. The ICC rules stipulate that if a party alleges misconduct of a tribunal, it should address itself exclusively to ICC Court of Arbitration in all such matters. Therefore, under the Convention, the courts should have made Petrobangla and Saipem adhere to their contractual obligation to arbitrate.

Section 5 of the 1940 Act has been replaced by a much limited 'Termination of Arbitrators Mandate' provision under section 15 of Arbitration Act 2001 (2001 Act). Under this section, the authority of an arbitrator can only be revoked if the arbitrator is 'unable to perform his obligations'. Any grounds of bias/miscarriage of justice have to be dealt with either with the tribunal or at a later stage under the very limited provisions of s43 of the 2001 Act.

Non-recognition of Award

The ICC Tribunal's award was declared '*void ab initio*' (void from the beginning) by the High Court in Arbitration case No. 2 of 2003. It was held by the High Court Division that:

> *"It is thus clear and obvious that the Award dated 9.5.2002 passed by the Arbitral Tribunal … is a nullity 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. Therefore, the impugned Award is no Award in the eye of law and it is a nullity in its entirety as it has no sanction of law."*

There is a clear concern for the sovereignty of jurisdiction of the local courts, implicit in the reasoning of the High Court Division. The High Court took issues with the fact that the ICC Tribunal proceeded with the Award despite the ruling of the 1st Sub-Judge Court of Bangladesh. However, it is important to note that the proceeding before the High Court was *ex parte* and there was no submission before the High Court on Bangladesh's international obligations under the Convention. The GOB, through the Attorney General's Office, should have intervened and deliberated on this issue. This again highlights GOB's negligence in upholding its obligation to protect investment.

The case before the ICSID Tribunal is still pending awaiting final award on merit. Therefore, the analysis would be limited to the question on jurisdiction of the Tribunal under the ICSID Convention, to which Bangladesh is a signatory.

Allegation of Bias against Arbitrators

At the outset of the hearing on jurisdiction, GOB objected to the arbitrator nominated by Saipem on the grounds that he had professional contacts with the counsel for Saipem in unrelated cases; and that he had already formed an opinion on the outcome of this dispute. The said arbitrator, while accepting his nomination, had made a declaration that he had acted as counsel for Saipem in two unrelated cases as legal expert and had been remunerated by the respective clients in those cases.

Article 57 of the ICSID Convention provides that a party may propose the disqualification of any of its members to a tribunal due to any fact indicating a *manifest* lack of the qualities required by paragraph (1) of Article 14 of the ICSID Convention. There are three qualities listed in Article 14 (1), namely, high moral character, recognized competence and reliability to exercise independent judgement.

On the first ground, the ICSID Tribunal held that since the relationship alleged was with the counsel of Saipem in unrelated proceedings, it amounted to mere speculation and lacked substance. On the issue of the arbitrator's doctrinal opinions, the ICSID Tribunal was of the view that an arbitrator's doctrinal opinions expressed in the abstract without reference to any particular case do not affect the arbitrator's impartiality and independence, even though the issue on which the opinion is expressed may arise in the arbitration.

It is a well accepted fact that a challenge to an arbitrator is often used as a delaying tactic by a party. However, a loss of a challenge may leave the particular arbitrator, as well as the tribunal, with some resentment against the challenging party, particularly if they believe the challenge was merely a strategy to create a delay. Parties whose intention is to create delays can expect that the challenge will probably slow down the proceedings, but should understand that their own actions could be damaging to their case if it causes them to lose credibility before the tribunal.

In the Saipem proceedings, the allegations of GOB against "*an outstanding academic of the highest repute*" were held to be "*devoid of*

substance". Such allegations, without any proof, question the motive of GOB, which, as discussed above, could affect its credibility before the entire tribunal.

Expropriation through Judicial Actions

At the hearing on jurisdiction, Saipem alleged that Petrobangla had resorted to the local courts which colluded with the state entity to sabotage the ICC Arbitration and deny the foreign investor's right to arbitrate under the contract and obtain satisfaction of its claims.

It based its allegation on the fact that the local courts merely acceded to Petrobangla's requests, alleging collusion, conspiracy, bias and bad faith by the ICC Tribunal, and that there was manifestly no basis in law or fact for the decision.

Therefore, the ICSID Tribunal had to consider whether the Local Courts' actions amount to expropriation. Definition of expropriation as set out in Metalclad v Mexico includes: "covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property". Thus, although the ICSID Tribunal reserved its conclusion on this issue on the facts of the case, it expressed that as a matter of policy, there is no reason why a judicial act could not result in an expropriation.

Impact on Bangladesh's Standing as a Host State

The allegations made in the Saipem case have had significant impact on Bangladesh's standing as a host state. It implicated the whole of Bangladesh's judiciary in collaborating with GOB for the purpose of expropriating Saipem's investment. Bangladesh guarantees foreign investment protection through section 7 (1) of the Foreign Private Investment (Promotion and Protection) Act, 1980 (1980 Act). Section 7 of the 1980 Act states that:

> "*Foreign private investment shall not be expropriated or nationalised or be subject to any measures having effect of expropriation or nationalisation except for a public purpose*

> *against adequate compensation which shall be paid expeditiously and be freely transferable."*

Therefore according to Saipem's allegation, GOB, with the courts in Bangladesh acting as perpetrators, breached its obligations under section 7 of the 1980 Act and the Italo-Bangladesh BIT. Should ICSID Tribunal accept this argument, it will show to investors that our state, including its highest judiciary, is not only disrespectful to investors' concerns in protecting their investment, but that GOB rather actively tries to expropriate investment. This in turn will make the investor community cynical about the judicial system of Bangladesh.

CHEVRON VS. GOB

Chevron Bangladesh Block Twelve, Ltd. and
Chevron Bangladesh Blocks Thirteen and Fourteen, Ltd.,
vs.
The People's Republic of Bangladesh,

International Centre for the
Settlement of Investment Disputes (ICSID)
ICSID case no. Arb/06/10

Facts

This arbitration concerned an investment dispute between Chevron Bangladesh Block Twelve, Ltd. ("**Chevron Block 12**") and Chevron Bangladesh Blocks Thirteen and Fourteen, Ltd. ("**Chevron Blocks 13 and 14**") (collectively "Chevron"), on the one hand, and the People's Republic of Bangladesh ("GOB", the "Government" or "Respondent") on the other.

This arbitration involved an investment by Chevron in relation to the exploration, development and production of natural gas resources in Bangladesh. Chevron's investment was in excess of US$ 850 million at the time when they initiated the arbitration proceeding at ICSID. This investment was actively encouraged and approved by the GOB. The Bangladesh Oil, Gas and Mineral Corporation ("Petrobangla") entered into a Production Sharing Contract (PSC) with Chevron's predecessors

in 1995 and subsequently entered into number of Gas Purchase and Sale Agreements (GPSA) relating to few of the Gas fields.

Once Chevron had expended hundreds of millions of dollars of investment in the Bangladeshi natural gas sector, Petrobangla, began to assess a 4% transportation tariff on Chevron's natural gas production which as Chevron alleged, was in breach of the GPSAs. Such tariff assessment allegedly deprived Chevron of a sizeable portion of the economic benefits of its investment, which was approximately US$ 150 million.

Procedural History

Chevron and Petrobangla apparently endeavoured to resolve the dispute amicably; failing which, Chevron, in April 2006, lodged an arbitration suit with the ICSID, an institution of the World Bank group, demanding payment of four percent of the gas sale proceeds from Jalalabad gas field as wheeling charge over the years. Chevron made the Government of Bangladesh (GoB) a defendant, along with Petrobangla, in the international arbitration centre.

However, Petrobangla sued Chevron in the District Court of Dhaka soon after the ICSID proceeding, alleging that Chevron has breached its obligations by not opting for settlement of the dispute in line with provisions of the PSC and the GPSA. The District Judge's court issued an injunction on Chevron to prevent it from approaching ICSID to settle its dispute with Petrobangla. The Court also ordered Chevron to follow the GPSA and PSC to settle the dispute. While this local case was pending, Chevron also appealed for quashing the case filed by Petrobangla, which was turned down by the District Court. Chevron's attempt to seek relief from High Court was also futile as the apex court sent back to the lower court the appeal made by Chevron for quashment of the case.

However GOB contested ICSID's jurisdiction to hear the dispute on grounds that are discussed further below. Chevron made its submission as to why ICSID should allow the proceeding to further under its forum. Upon considering written submissions of both parties, ICSID Tribunal

assumed jurisdiction of the dispute on the grounds that are further discussed below.

In the meanwhile, through diplomatic interventions, GOB decided to withdraw its locally filed case against Chevron and subsequently participated in the ICSID proceeding. However, since GOB's discourse to local court caused significant delay in the proceeding, GOB had to apply to the panel for further extension for its submission and hearing. The hearing is scheduled to take place this year.

Observations

This case still being ongoing and therefore, many of the issues are *sub judis.* However the focus has been solely on the jurisdictional issues of the case, which provides, to some extent, an insight of GOB's approach, reasons thereof, and findings of international forums. This case provides an illustration how GOB attempts to avoid international arbitration by means of arguments which are self-contradictory and unsound in law. The most damaging observations were to the effect that whilst GOB promises to prospective investors and Capital Exporting States that it will abide by international standard of protection, when faced with an international arbitration, GOB defends its case by opting for a rather narrow interpretation of law.

GOB's stance against ICSID Arbitration

In order to defeat jurisdiction of the ICSID Tribunal, GOB raised objections on the following grounds:

> *The dispute in question is "not even [an] investment dispute" as the term "investment" should be interpreted in "its ordinary dictionary meaning" (although it did not cite the dictionary from which its meaning was allegedly derived). According to GOB, the ordinary meaning of investment refers to the "investing of money" which it defines as "to use money to . . . develop a business enterprise, etc [sic] in order to earn interest or bring profit." GOB contended, without any supporting argument or contextual reference that, neither the "exploration, development, production and other operations" nor "the sale of gas constitute*

investments."

The dispute was not between a Contracting State and a national of another Contracting State as Pertobangla was not a part of the GOB;

Chevron being incorporated in Bermuda under Bermuda Company law and as such, they are having Bermudian nationality and cannot therefore, claim as of right / automatically that they are the citizens of the United Kingdom which is a contracting state under ICSID Convention. Because Bermuda is not within the territory of the United Kingdom.

An opinion rendered by a Bangladeshi Lawyer was a binding arbitration award.

ICSID Jurisdiction, Applicable law and Decisions

For purposes of the Government's jurisdictional objections, the applicable legal framework is provided by the ICSID Convention itself, which states as follows:

"The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."

Definition of Investment: ICSID Jurisprudence

ICSID tribunals have established certain criteria for determining whether an investment exists within the meaning of Article 25(1) of the ICSID Convention. In *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco*, the Tribunal noted that the term "investment" generally implies four elements: (1) a contribution of money or other assets of economic value; (2) a certain duration; (3) an element of risk; and (4) a contribution to the host state's development. This standard has been followed by many tribunals for determining whether an investment exists for the purposes of Article 25(1), namely *Saipem S.p.A. v. Bangladesh, Bayindir Insaat Turizm Ticaret ve Sanyai A.S. v. Pakistan,* etc.

Professor Schreuer notes that "certain features are typical" to most investments. These features include: (1) a certain duration; (2) a certain regularity of profit and return; (3) the assumption of risk; (4) a substantial commitment; and (5) significance for the host state's development. The need for the last element is doubtful as noted by the Tribunal in the case of Saipem S.p.A. v. Bangladesh (citing L.E.S.I. - DIPENTA v. République Algerienne Démocratique et Populaire, Decision on Jurisdiction, 12 July 2006). Professor Schreuer further notes that "these features should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments under the Convention".

Based on the above mentioned jurisprudence, the Tribunal accepted Chevron's argument that its investment in Bangladesh falls squarely within the purview of the *Salini* standard. Chevron had significant contributions in terms of financial, technical and human resources in Bangladesh that amounted to more than US$ 750 million to fund natural gas exploration, development and production activities. Thus, even under GOB's own definition of "investment", Chevron has invested significant sums of money "*to.. develop a business enterprise, etc in order to earn interest or bring profit."* This demonstrates the lack of legal skills of GOB.

Self-Contradictory Arguments forwarded by GOB

In the ICSID decision of *Saipem v. Bangladesh*, Bangladesh itself agreed that a two-year period is generally sufficient to meet the durational requirement of what constitutes as investment under the *Salini* standard, which Chevron met quite easily – having had the PSC signed in 1995 for 25 years.

Furthermore, Bangladesh defines investment broadly in executing International Agreements, but when it comes to international arbitration, GOB defends its case by suggesting that the subject matter of the dispute was not an investment. For example, the UK-Bangladesh Investment Promotion and Protection Agreement ("UK-Bangladesh IPPA") illustrates Bangladesh's own previous definition and understanding of

the notion of an investment. Under that IPPA, the term "investment" is defined as "every kind of asset". This definition includes, *inter alia*:

> *"(iii) claims to money or to any performance under contract having financial value.*
>
> *(v) Business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources"*

Bangladesh's definition of "investment" in the Treaty Between the United States of America and the People's Republic of Bangladesh Concerning the Reciprocal Encouragement and Protection of Investment (the "US-Bangladesh BIT") is equally broad. Under the US-Bangladesh BIT, "investment" is defined as "every kind of investment owned or controlled directly or indirectly, including . . . investment contracts." This definition includes, inter alia:

> *"(iii) a claim to money or a claim to performance having economic value, and associated with an investment; and*
>
> *(vi) any right conferred by law or contract, including rights to search for or utilize natural resources . . ."*

Such contradictory arguments not only expose the legal skills of GOB draftsmen, but also significantly undermine GOB's standing before international tribunals.

Contradiction with Constitution of Bangladesh

Additionally, under the principles of state attribution, Petrobangla's actions — including its execution of the GPSAs containing ICSID provisions — are attributable to the Government. Therefore the GOB's opposition to ICSID jurisdiction based on the assertion that 'GOB was not a party to the contract' is legally unsound. Petrobangla's consent to ICSID arbitration was neither accidental nor confined to the instances of the PSCs and GPSAs. The Government also reviewed and approved ICSID arbitration provisions in several ancillary Side Letter Agreements. Separately and cumulatively, Petrobangla's consistent and deliberate consent to ICSID arbitration with Chevron, and the Government's

approval of such consent, demonstrate that the parties intended the actions of Petrobangla to be attributable to the Government.

The Bangladeshi Constitution expressly recognizes the status of all minerals, including natural gas, as falling within the exclusive sphere of the state:

> *"There shall vest in the Republic, in addition to any other land or property lawfully vested — (a) all minerals and other things of value underlying any land of Bangladesh . . . ."*

This provision, which grants ownership of all minerals in Bangladesh to the Government, elevates the minerals in Bangladesh to a governmental issue. In fact, the PSCs at issue in this dispute also recognized the Government's exclusive authority over the country's petroleum resources:

> *"[T]he Government under the People's Republic of Bangladesh . . . has the exclusive right and authority to explore, develop, exploit, produce, process, refine and market Petroleum resources within the territory, continental shelf and economic zone of the People's Republic of Bangladesh, and it has also the exclusive right to enter into any Petroleum Agreement with any person for the purpose of any Petroleum Operation."*

The Government, in exercising its sovereign power, created Petrobangla through the enactment of The Bangladesh Oil, Gas and Mineral Corporation Ordinance ("Ordinance No. XXI") of 1985 (the "1985 Ordinance"). GOB delegated its authority over state-owned minerals by creating Petrobangla to carry out various functions with respect to the country's minerals. As detailed by the ICSID jurisprudence: Governmental participation in an entity's creation is a strong indication that the entity is authorized to exercise governmental authority. Thus, just like SODIGA in Maffezini v. Spain, and EGOTH in Helnan v. Egypt, the Government created Petrobangla through an ordinance in order to delegate its governmental authority over its natural resources. Therefore, Petrobangla is controlled by the government and its actions are attributable to the Government.

An example of a Frivolous Argument

The tribunal noted that the legal expert's opinion was never intended to bind, nor did it ever bind, the parties. This is because: (1) Chevron never agreed to have the legal expert issue a binding opinion; (2) there is no documentation or proof that Chevron agreed to be bound by such opinion or retained his services; (3) the language of the opinion does not purport to bind the parties; (4) the opinion was only addressed to Petrobangla; (5) the parties' conduct after the legal opinion was issued remained unchanged; (6) Chevron was not provided with a copy of the opinion until long after it was issued; and (7) it would have been illogical for Chevron to agree to settle its dispute with Petrobangla by employing a legal expert with close affiliations with the Government. This captures GOB's ill-motives to divert the course of justice using untruthful facts.

HELM VS. BCIC

Helm Dungemittel GMBH
vs.
Bangladesh Chemical Industries Corporation

High Court Division of the Supreme Court of Bangladesh
Arbitration Application no 4 of 2008

Facts

This case involved a dispute between HELM DUNGEMITTEL GMBH ("HELM"), a German company, and Bangladesh Chemical Industries Corporation ("BCIC"). BCIC, established in 1976 by a Presidential Order, is fully owned by the Government. It manages 13 large and medium size industrial enterprises engaged in producing a wide range of products like urea, TSP, paper, cement, insulator, sanitary ware, etc. on behalf of GOB.

HELM and BCIC entered into two contracts for the supply of Prilled Urea (Urea formed into pellets) pursuant to two tenders. Both the contracts provided for amicable resolution of any disagreement or dispute by direct informal negotiation and, failing that, by recourse to international arbitration under the Arbitration Act 2001.

Common Clause 14.01 of the contracts required that BCIC provides confirmed and irrevocable letters of credit for the supply of urea in favour of HELM for the full value. The letters of credit were sent without confirmation and contained various inaccuracies. This led HELM to request BCIC to amend the letters of credit to make them workable before shipment of the urea. Without fulfilling this demand, BCIC remained insistent upon HELM's timely performance under the contracts threatening to call on or draw on the bank guarantees provided by HELM.

This led to the dispute as to whether BCIC could assert that non-shipment of the goods by HELM, under the aforementioned circumstances, would amount to a breach of the contract following which BCIC is legally allowed to encash the performance guarantees.

Procedural History

Upon cancellation of the purchase orders by BCIC, HELM filed Arbitration Application No. 1 of 2007 under section 7 (a) of the Arbitration Act 2001 for restraining BCIC from cashing in the performance guarantees pending arbitration under the dispute resolution clause in the contracts. Section 7 (a) gives power to courts to grant interim remedies with respect to the subject matter of the arbitration proceedings. The High Court Division of the Supreme Court of Bangladesh held that these issues would be best resolved by an arbitral tribunal and issued the interim in junction requested by HELM.

Subsequently, pursuant to the arbitration clause in the contracts, HELM and BCIC amicably appointed the Arbitration Tribunal comprising three members. The tribunal essentially dealt with two broad questions, namely, whether the letters of credit opened by BCIC as per agreement were confirmed and whether HELM was or was not under any legal or contractual obligation to ship any goods as BCIC failed to open any confirmed letters of credit. After several contested hearings where both parties made elaborate presentations on these issues, the tribunal passed Interim Award in respect of these issues of liability. In the said interim award, the tribunal held that BCIC was in breach of contract and

therefore was obliged to return the performance guarantees back to HELM within one (1) month from the date of passing of the interim award.

In response to this award by the tribunal, BCIC filed Arbitration Application No. 4 of 2008 seeking to set aside the Tribunal's award by invoking provisions of Sections 42 and 43 of the Arbitration Act 2001. Section 42 provides power to the courts to set aside an arbitral award, whereas section 43 details the grounds upon which such awards could be set aside. The opposition to the award of the tribunal was made on two grounds, firstly that the arbitral award dealt with a dispute not contemplated by or not falling within the terms of the submission to arbitration or it contains decision on matters beyond the scope of the submission to arbitration; and secondly that the award was *prima facie* opposed to the law for the time being in force in Bangladesh.

The High Court refused to interfere with the award of the tribunal on the grounds that the issues complained of by BCIC had been decided by the tribunal conclusively and that the Act does not allow the courts to act as a court of appeal on those very issues. Furthermore, it was held that BCIC, having consensually participated in the arbitration proceedings, should now be stopped from rearguing the merits of their side of the dispute.

Observations

This is a landmark decision of the High Court regarding the scope of challenging arbitral awards under the Act. It is a well recognized principle in international law that a party that has lost an arbitral tribunal faces an uphill battle if it wishes to set aside or vacate the award. One of the touted advantages of arbitration is the finality of the award, and internationally accepted arbitration laws and rules support finality by making it difficult to set aside an award. The Arbitration Act 2001 purported to achieve this standard by providing a very limited scope to challenge arbitral awards. The High Court, in this case, rose to the occasion and interpreted the law of Bangladesh in line with the internationally accepted standard.

However, this case also demonstrates how GOB or its entities, in this case BCIC, tries to frustrate arbitral awards by various interventions through local court. They, as a matter of automatic practice, challenge an award both on jurisdiction and merit. Often, as has been seen in this case, the grounds of challenge are unsound in law and policy; and only delay the proceedings. Such delays (in enforcement of arbitral awards) generally frustrate investors. To better understand the tactics employed by BCIC, it is important to analyze BCIC's grounds of challenge to the tribunal's award.

Jurisdictional Challenge as Delaying Tactics

The challenge was primarily based on jurisdiction of the tribunal. In essence, BCIC argued that the tribunal dealt with issues that were not within their terms of reference. Section 43(1) (a) (iv) of the Act deals with jurisdictional challenges to arbitral awards. It states that an arbitral award can be set aside if '*the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or it contains decision on matters beyond the scope of the submission to arbitration'*.

Jurisdictional challenges may be made to an award, but usually at the beginning of the arbitration tribunal, rather than after an award has been rendered. Under the English and French arbitration legislations, if a party does not challenge the jurisdiction at the beginning of the arbitration, it loses the right to object. This is because it is obviously more efficient to determine whether jurisdiction is proper at the beginning of an arbitration procedure, rather than after parties have expended time, effort, and resources to reach the final award.

BCIC based its jurisdictional challenge on the ground that the tribunal did not have jurisdiction to decide on whether the condition of confirmation imposed by the confirming bank was necessary and as such the tribunal went beyond the scope of its jurisdiction. However, this very issue was duly framed by the tribunal at the suggestions of both the parties and BCIC voluntarily took part in the arbitration proceedings and deliberated on these issues, *albeit* unsuccessfully.

Since BCIC was well aware of the issues being framed by the tribunal, the organization not only consented to them being within the jurisdiction of the arbitration, but acted upon them by participating and making submissions on those issues in the arbitration proceedings. It was manifestly unfair for BCIC to raise such objections at the enforcement stage. Indeed, BCIC having to face the award made against it was seeking to avoid honouring the award by delaying proceedings and raising points on the tribunal's substantive jurisdiction - an objection it should have raised at an earlier stage. This clearly demonstrates that BCIC attempted to use the provisions of the Act relating to challenge arbitral awards with an ulterior motive of taking a fresh chance and also frustrate the legitimate claim of the investor in the process. The High Court highlighted this delaying tactic by BCIC and held that:

> *"… this Court, in applying the ratio decidendi of the judgment in Hussain Textile Mills Ltd v. Dada Sons Ltd reported in PLD 1973 Kar 413 finds that BCIC having voluntarily been part of the clearly consensual arbitration proceedings should now be stopped…"*

Argument based on Misinterpretation of Law

Secondly, BCIC challenged the arbitral under Section 43 (1) (b) (ii) which empowers the courts to set aside an arbitral award which is *prima facie* opposed to law in force in Bangladesh. This section is similar to the public policy exception under Article 2 (a) (b) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958). This exception was never meant to be an all embracing provision; rather a circumscribed public policy doctrine contemplated by the framers of the Convention.

Under the Convention jurisprudence, public policy exception requires more than a mistake or misunderstanding of law by the arbitrator. It was held by the Hong Kong Court of Appeal in the case of *Polytek Engineering Co. Ltd v Hebei Import & Export Co, XXIII YB Comm. Arb.666* that:

> *"The test we would therefore adopt for the conventions public*

> *policy exception is whether in all circumstances of the case it would violate the most basic notions if morality and justice of the Hong Kong system if the award in question is to be enforced. We would be slow to condemn what happened before an arbitration tribunal as having violated the most basic notions of morality and justice unless it is quite clearly the case."*

BCIC argued before the High Court that "*prima facie opposed to law in force in Bangladesh*" in Section 43 (1) (b) (ii) referred to "*error or law*" committed by arbitrators, i.e., the tribunal had misdirected itself as to the law on requirement of a confirmed letter of credit and as such it allowed the courts to look into the merits of the award. If this interpretation was right, then it would fly on the face of the 'finality of arbitral awards' argument and the High Court would be treated as a court of appeal over the decision of an arbitrator making a shifting investigation of the entire proceedings before the arbitrator.

Therefore, the High Court rejected this submission and held that Section 43 (1) (b) (ii) of the Act should not be interpreted as allowing an effective appeal from an award passed by the tribunal chosen by the parties agreeing implicitly to exclude jurisdiction of local courts. Rather, like Article 2 (a) (b) of the New York Convention, this section contemplates and enjoins against contracts that fall to be considered to be illegal otherwise.

This again highlights GOB's willingness to misuse the provisions of the Act and resort to tactics aimed at frustrating arbitral awards given even at consensual proceedings. Often this section is used as a backdoor appeal procedure. Therefore the Act should be amended in favour of a decisive public policy exception.

5

INTERVIEWS

As part of this project, a series of intensive interviews were conducted following the pre-planned outline of topics developed from literature review and case law analysis. These were primarily conducted to re-affirm the findings of the case law analysis and further explore how GOB's reaction towards international arbitration impacts the investment climate of Bangladesh. The interviewees were asked about the importance of availability of international arbitrations in the investment decision making matrix; their impressions of international arbitration proceedings and proceedings in Bangladesh's local courts; satisfaction with the outcome of cases; evaluation of counsel used; and level of satisfaction in other jurisdictions compared to Bangladesh. Between October 2008 and January 2009, 33 interviews and 2 focus group discussions were organised. Amongst the interviews, 10 were GOB officials, 13 were present or prospective investors in Bangladesh and 10 were stakeholders in the arbitration proceedings held in Bangladesh.

A quantitative analysis of the responses to the questionnaire is annexed as Annexure A of this report.

Bangladesh as an Investment Destination

The interviewees were first asked about the reasons which may lead to Bangladesh being chosen as an investment destination. Low cost of labour and availability of raw material came up as the two most important factors. At the same time, Bangladesh was termed as having relative political stability compared to other countries in the region. Moreover, some of the investors, especially from the non-resident Bangladeshi community, were attracted by the open door policies championed by the Board of Investment.

However, there were suggestions that Bangladesh is perceived as a place of natural calamity, corruption and ferry disasters by foreigners. Thus

much of the positive aspects of Bangladesh as an economy is not well publicised before the potential investors. Furthermore, there is a serious concern with the predictability of the legal system of Bangladesh. Although the higher judiciary is well respected by the international community, there are concerns of delays and frivolous governmental influence on the lower judiciary.

GOB's approach towards International Arbitration

The next part of the interviews was the issue of GOB's approach towards international arbitration. As expected, most of investors agreed that GOB is either hostile or, in the least, reluctant towards international arbitration. However, the most striking discovery of the research was the extent to which GOB officials and members of the judiciary came to the same conclusion. Many of them were candid in accepting that GOB has often failed to be consistent towards their commitment made in international contracts with investors.

It was generally accepted that GOB obstructs arbitration both at hearing and enforcement stages. There were several references made to the Chevron case and one Petrobangla official admitted that when the dispute with Chevron arose, GOB did not adhere to the procedure for dispute resolution laid down in the Product Sharing Agreement signed with Chevron. Rather GOB preferred to apply before the local courts for anti-suit injunction against the proceedings at the ICSID Tribunal.

Reasons for GOB's Approach

Stigma of Corruption

However, the interviewees could not agree upon one particular reason behind such approach of GOB. The investors complained of the reluctant approach of GOB officials in resolving disputes in accordance with the contracts. However, various reasons were suggested as key behind such reluctance. One of them was the fact that GOB officials are often unwilling to resolve disputes without exhausting all available appeal avenues including the ones before local courts. Otherwise, there would

be suggestions that the officials involved from GOB's side have lost a good case. Such possibility of the stigma of corruption discourages pro-activeness from the officials concerned. Rather GOB chooses to leave the issues to be settled in courts, albeit, at the risk of facing a large award including interest payments and legal costs.

Lack of Belongingness

The investors complained that often they have to deal with different GOB officials on the same issues because of their frequent transfers. This creates a havoc in the decision making process. Such frequent transfers prevent development of expertise and technical specialization of GOB officials. At the same time, the officials do not feel responsible for being proactive in making decisions. The cumulative effect of these is the general lack of belongingness and lack of a sense of ownership on part of majority of GOB personnel and they are, in most cases, inclined to leave difficult decisions to be made by successors. GOB officials broadly accepted these issues and suggested that assertive and time-bound decision making responsibility would greatly motivate the whole administration.

It was interesting to note that, according to investors, despite the negative approach of GOB as a whole – there are individual officers within GOB who understand the importance of resolving disputes in a way that makes investors confident. However, the general understanding is that such officials are the minority.

Ineffective Legal Advice

Another important reason that was identified from the interviews was the lack of proper legal advice and resources. The officials complained that, in most cases, they act on the basis of legal opinions rendered by their lawyers. However, most of these opinions do not contain specific reference to legal authorities relating to international arbitration law and practices. It appeared that the officials concerned are aware of the weaknesses in such opinions, but due to governmental regulations it is often not possible to act outside these legal advices. On the other hand, some of the investors were not convinced that legal experts of GOB

officials were to blame for such attitude and termed it as a "convenient excuse".

Infrastructural Deficiencies

When the GOB officials' suggestion of ineffective legal advice was brought up, lawyers and the members of judiciary agreed upon the fact that there is a serious deficiency in the legal training of government lawyers and legal fraternity of Bangladesh in general in regard to international arbitration. Furthermore, it was agreed upon by the interviewees that international arbitration is a specialized area of law requiring vast legal resources, most of which are not available in Bangladesh. Therefore, the key personnel running the show from GOB's end are often unaware of the developments and practices in other jurisdictions. One eminent ex-member of the judiciary commented that there is a general lack of awareness in Bangladeshi legal professionals, lawyers and judges alike, about how their actions affect trade and commerce. Therefore, they fail to appreciate the wider impact of anti-suit injunctions on the investment climate of Bangladesh.

The conclusion seemed to be that GOB personnel and legal advisors need to know how international disputes are handled and at the same time be willing to live up to acceptable global standards. In order to solve this, there was a suggestion for building capacity of the judges and lawyers, both formally and informally.

Additionally, it was identified by the interviewees that GOB fails to fruitfully resolve any dispute through diplomatic negotiations prior to the arbitration proceedings due to a general inadequacy of legal skills and failure to appreciate the benefits of amicable settlements.

Allegations of Bias against Arbitrators

As anticipated, GOB officials tried to justify their negative Approach towards international arbitration by pointing towards perceived inbuilt deficiencies of international arbitration. It was suggested by a retired GOB official that Bangladesh should try to resolve disputes through amicable settlement as they will never win international arbitration.

When asked about the reason behind this, he said "*because foreign arbitrators are biased and corrupt*".

This was echoed by several GOB officials. It appeared that their fear is not entirely without substance. At least two interviewees referred to an international arbitration case regarding the setting up of a gas pipeline in Sylhet where, despite having committed breach of contract, the arbitrators supported the foreign contractor. The officials were convinced that the arbitrators completely disregarded evidence forwarded by GOB and unfairly penalised them. This is indicative of the common understanding in the developing countries that international arbitration is biased towards western investors.

However, there appears to be a lack of appreciation that such instances of bias are going down in numbers and that arbitral institutions are becoming more and more multicultural. This was another indication that the GOB officials and stakeholders lack access to modern jurisprudence in international arbitration law.

Concern for Sovereignty

The interviewees also felt that the approach of GOB could be explained as being defensive about the sovereignty of state institutions, particularly the judiciary. It was interesting to note that the comparatively senior officials were more concerned with preserving the supremacy of state institutions, compared to newer recruits. This perhaps explains the differences in the decision making approach of modern governments who are more aware of the need for better flow of FDI into the country.

Alongside the negative attitude of GOB discussed above, there were some indications that the investors are aware of the limitations GOB faces in keeping the balance between inward-looking and outward-looking ideologies. On one hand Bangladesh needs foreign investment; on the other hand there is a constant political pressure on regulators to come down hard on foreign investors who are thought to be damaging the country's greater interests. One major investor in the energy sector supported the GOB by saying that its approach is realistic and that GOB is trying to achieve the right balance.

Level of Protection to Foreign Investors

Another issue that was highlighted primarily by the stakeholders and GOB officials was the level of protection that is to be offered to foreign investors. Number of interviewees referred to a recent dispute instigated by GOB against a foreign investor in the energy sector concerning blowouts of gas in gas fields located in Sylhet. The interviewees were particularly aggrieved at the gravity of loss of natural resources, destruction caused to the environment and fore mostly, the economic suffering of the local inhabitants.

A pool of interviewees, which included a foreign investor, was of the view that such damages can only be rightfully assessed by local courts. Given the cultural differences, a tribunal consisting of foreign arbitrators may not be able to fully appreciate much of these concerns, let alone understand the underlying sufferings of local people. One of the interviewees strongly pointed out as an example that "…*it may well be beyond the contemplation of a foreign arbitrator from a developed country to assess the gravity of losing a pair of goats by a very poor father who might have been relying on these to get his daughter married*." Hence, offering the right to settle such claims in an international arbitration under contractual commitments of GOB may not ensure fairness and justice, and be detrimental for Bangladesh.

On the same note, number of stakeholders and foreign investors expressed another view with regards to compliance and maintenance of a general standard by foreign investors. They were of the view that, a foreign investor also has an implicit obligation to enhance the socio-economic condition and environmental quality of the locality of his investment in the host state. However, if the investor, exploiting laxity in the legal system, is manifestly disregarding or being negligent towards such obligations, he must not get the equal protection that is offered to a foreign investor whose practices meet standard compliance requirements.

Interviewees, perhaps not against offering protection to foreign investors, questioned the validity of offering the same level of protection to all foreign investors. These concerns could have stemmed from a sense of state sovereignty or protectionism within the interviewees. Whatever the

case may be, it is apparent that many interviewees believe that equal protection should not be accorded to such foreign investors who, instead of contributing to the development of the economy, act to the detriment of Bangladesh's social and environmental interests and profiteer instead of just making expected profits. Therefore, a wide spectrum of the interviewees supports GOB's actions in avoiding international arbitrations in exceptional cases.

Impact on Investor Confidence

The next part of the interviews related to impact of GOB's approach on the investors and their levels of confidence. Generally, investment decisions are based on business profitability and associated risks. However, it is important for prospective investors to feel confident that their investment will be protected by the host state. This becomes more of an issue when an existing investor has to decide on re-investment in that host state. Investors prefer to timely resolve any disputes through an impartial tribunal outside the host state.

It was generally accepted by the full spectrum of interviewees that disregard for international arbitration is damaging Bangladesh's reputation as a host state. There has been a lot of antagonism surrounding the Chevron saga. Embassy officials of a major Capital Exporting State commented that the repeated interventions by GOB in the Chevron dispute left a "chilling effect" on foreign investors. This was confirmed by other interviewees and it appeared that GOB officials are aware that at least two potential investors were deterred from investing because of the damaging reports concerning the legal disputes involving GOB. This shows that confidence levels of foreign investors have fallen following GOB's approach towards international arbitration.

A related issue that was discussed was the standard of the Arbitration Act 2001 and its acceptability to foreign investors. Petrobangla is insisting on arbitration under the Act in future Product Sharing Agreements with investors. The reason advocated is that the Act has integrated globally accepted arbitration procedures into our legal system. However, investors unanimously agree that the 2001 Act is a "non starter" and that

provisions for arbitration under the Act instead of ICSID or ICC arbitration would further deter the investors from coming to Bangladesh.

The opposition to arbitration under the procedures laid down in the Act seemed to be two fold. Firstly, the Act requires arbitration to be held in Dhaka, whereas it is customary for arbitrations to be held in neutral venues. The second reason is more specific to Bangladesh. It was agreed that due to the problem with enforceability of arbitration agreements by GOB, arbitration in Dhaka will not be something what investors would want. The conclusion was that unless there was a successful arbitration in Dhaka under the procedures of the 2001 Act where a foreign investor is fairly treated and the finality of the arbitral award is ensured, it will not be acceptable to investors to have a 2001 Act arbitration clause in their contracts.

The conclusion seems to be that the foreign investors have little or no confidence on the prospect of a hindrance free international arbitration with GOB. Therefore, they are genuinely concerned with the protection of their investment and as such they are paying more risk insurance premium. This is likely to cause a lot of investors to choose alternate destinations instead of Bangladesh, and take their investment to countries which are competing with Bangladesh in terms of attracting investment.

The Way Forward

It is generally accepted that Bangladesh cannot depend on the benevolence of the non-resident Bangladeshi's for long. It desperately needs current foreign investors to commit their long-term future investments here. At the same time, it needs to attract new investors in various sectors. In order to do so Bangladesh needs to demystify the perception problems surrounding the legal system and investment climate in general, and thereby improve investors' confidence. Its legal system has to be elevated to a level which will provide the necessary predictability, transparency and confidence for businesses to perform. The interviewees had some specific recommendations for this change to occur.

GOB's pro-activeness in improving Bangladesh's branding as a state which unequivocally guarantees investment protection and an efficient dispute resolution system was stressed upon a lot. Considering the ongoing and protracted disputes with different foreign investors, the first step towards such branding would be to resolve these disputes without delay. At the same time it was suggested that there is a dire need for development of capacity of lawyers and judges and that GOB should seek help from its development partners in this regard. Finally, there were some specific recommendations for reform of the judicial system by establishing dedicated commercial courts and arbitration support centres.

6

Comparative Studies

This chapter is aimed at identifying the standard of investment protection and dispute settlement mechanism offered by Sri Lanka and Vietnam. It will further discuss the initiatives these two countries have undertaken to enhance their legal framework to bolster their respective investment climates.

COUNTRY: DEMOCRATIC REPUBLIC OF SRI LANKA

Overview

Prior to economic liberalization, Sri Lanka had followed inward-looking economic policies, which created restrictions for foreign investors and flow of FDI. Although there were limitations during the period of 1950-1977, some measures had been taken to attract FDI. For instance, a white paper for FDI was presented in 1966 and a foreign investment advisory committee was set up in 1968 in order to investigate and manipulate policies regarding foreign direct investment in Sri Lanka.

With market-oriented economic policies accepted as being the most effective engine of growth, political entities of Sri Lanka have made it their top priority to create an investment friendly economic climate since 1977.

Based on Foreign Investment Act in 1978, investment policies in Sri Lanka have been engineered to attract foreign investment. In addition, Sri Lanka over the past 20 years, successive governments have followed free market policies and continued to liberalize the economy.

For foreign investment to Sri Lanka, there are no restrictions on the repatriation of earnings, profits, and capital proceeds (BOI Report, 2002). Sri Lanka offers an attractive package of fiscal incentives to both foreign and local investment. The Government of Sri Lanka has also signed investment protection agreements with various Capital Exporting Countries.

Foreign investment inflows to Sri Lanka continued to increase over the last decade as a result of investment friendly policies adopted by successive governments. Although, the following factors adversely affected the investment inflows to Sri Lanka in the past few years: the downturn in world economic activities, deterioration of investor confidence due to the civil war, political interventions causing uncertainty and the stagnation of the Japanese economy. Since the beginning of the 1990s, the annual value of FDI inflows to Sri Lanka has started to increase at an increasing rate when compared to the 1980s.

This kind of upward movement of FDI is interpreted as an outcome of the second liberalization reforms initiated in 1989. The most observed transformation is the relocation of labour-intensive production activities from rapidly growing East Asian newly industrialized countries to labour surplus countries in South Asia. Following these transformations, Hong Kong, Taiwan and Korean investors became prominent in the participation of FDI projects recently.

Treatment and Protection of FDI

Investment Protections

Sri Lanka does not set out principles of foreign investor treatment and protection in their national laws. However, it has an extensive BIT network, including treaties with almost all major Capital Exporting States. These BITs guarantee fair and equitable treatment and full protection and security of investments. Both national treatment (post-establishment) and most-favoured-nation treatment are guaranteed.

The BIT guarantees are fairly standard, providing investors protection against nationalization, expropriation or restrictions that amount to constructive expropriation, except for a public purpose, and in such an event they guarantee “prompt, adequate and effective compensation” based on the market value of expropriated property before the expropriation came into effect or such an eventuality became public knowledge (similar to the concept of ‘indemnification’ in insurance compensations). The affected investor also has the right to a judicial review. However, the Board of Investment of Sri Lanka stipulates that

there has not been any recent instances of expropriation. Sri Lanka is also a member of the Multilateral Investment Guarantee Agency.

Repatriation of capital and profits is guaranteed, but in a weak format since transfers are subject to the exigencies of foreign exchange. In practice, there is ready access to foreign exchange and the prospect of nearly full abolition of exchange rate controls.

Constitutional Guarantees

Sri Lanka has an enviable record of political credibility in the international arena. All major political parties are committed to free enterprise and individual freedom. This is evidently reflected in the Sri Lankan Constitution which provides guarantee for bilateral investment agreements. Article 157 of the Constitution states as follows:

> *"Where Parliament by resolution passed by not less than two-thirds of the whole number of Members of Parliament (including those not present) voting in its favour, approves as being essential for the development of the national economy, any Treaty or Agreement between the Government of Sri Lanka and the Government of any foreign State for the promotion and protection of the investments in Sri Lanka of such foreign State, its nationals, or of corporations, companies and other associations incorporated or constituted under its laws, such Treaty or Agreement shall have the force of law in Sri Lanka and otherwise than in the interests of national security no written law shall be enacted or made, and no executive or administrative action shall be taken, in contravention of the provisions of such Treaty or Agreement."*

Therefore the agreements enjoy the force of law and no legislative, executive or administrative action can be taken to contravene the provisions of a bilateral investment agreement otherwise than in the interests of national security. However, most importantly through this provision, Sri Lanka has unequivocally manifested its intention to bind its obligations under international conventions. Sri Lanka has ratified the ICSID Convention and the BITs provide for referral to ICSID if any dispute cannot be resolved through negotiations within a reasonable time.

Therefore, the Constitutional guarantee greatly assures the investors that in the case a dispute arises, the Sri Lankan Government will not recourse to judicial actions domestically to frustrate arbitration.

Statutory Guarantees

Simultaneous with BITs and constitutional guarantees, arbitration has been statutorily recognised in Sri Lanka. Arbitration is governed by the Arbitration Act, No. 11 of 1995. The enactment of the Arbitration Act was a response to the need for expeditious resolution of commercial disputes. The Act provides for a regime which recognizes autonomy of parties, devoid of court intervention, other than in a few and exceptional circumstances. Section 5 of the Act provides that:

> *"Where a party to an arbitration agreement institutes legal proceedings in a court against another party to such agreement in respect of a matter agreed to be submitted for arbitration under such agreement, the Court shall have no jurisdiction to hear and determine such matter if the other party objects to the court exercising jurisdiction in respect of such matter."*

> *"Recognition or enforcement of a foreign arbitral award, irrespective of the country in which it was made, may be refused:*

> *(b) if the Court finds that the subject matter of the dispute is not capable of settlement by arbitration under the law of Sri Lanka; or Sri Lanka follows the New York convention with regards to grounds of challenges to arbitral awards. Section 34 (b) of the Arbitration Act, No. 11 of 1995 provides that: the recognition or enforcement of the award would be contrary to the public policy of Sri Lanka*

Other Forms of Dispute Resolution

Sri Lanka has also been a pioneer in the region in promoting the concept of 'mediation' in commercial disputes. Mediation is less official than arbitration for which a courtroom hearing is not mandatory, and mediators are usually not required to be legal professionals (they are rather known as negotiators), meaning that mediation is even faster than arbitration. This initiative was taken as a response to private sector needs

for a more expeditious and efficient dispute resolution mechanism in relation to commercial matters. It has been institutionalized through the Commercial Mediation Centre of Sri Lanka Act, No. 44 of 2000. The Commercial Mediation Centre of Sri Lanka (CMCSL), established under this Act, is statutorily mandated to promote the wider acceptance of mediation and conciliation for the resolution and settlement of commercial disputes; to encourage parties to resolve commercial disputes by mediation and conciliation; and to conduct the settlement of commercial disputes by mediation and conciliatio

Comparison with Bangladesh

Sri Lanka provides similar investment guarantees against expropriation as Bangladesh. However, Sri Lanka has more appeal in the spheres of dispute resolution. The constitutional guarantee provided in Article 157 of the Sri Lankan constitution provides an indirect offer to submit to ICSID jurisdiction. It has been discussed in the Saipem case how Bangladesh has damaged its image before the investors through various challenges aimed at frustrating ICC Tribunal's arbitration award. The allegation from the investor was that GOB, in collaboration with the judiciary in Bangladesh, has expropriated its investment guaranteed under the Italo-Bangladesh BIT by various anti-suit injunctions against the ICC arbitration. On the contrary, Sri Lanka has expressly guaranteed that it would not take any administrative or executive action to breach any protection provided under a BIT. Thus, to an investor with an option to choose between Sri Lanka and Bangladesh, the differences in commitment towards investment protection and international arbitration of the two countries would be stark.

Furthermore, it has been discussed how GOB tries to annul arbitration awards based on arguments surrounding "errors of law". They do it using incorrect interpretation of section 43 of the Bangladesh Arbitration Act 2001. Sri Lanka has avoided such ambiguity and has adopted the narrower gateway suggested in the New York Convention.

Finally, Sri Lanka, with its dedication to mediation in commercial arbitration, has opened up a new front for providing efficient and reliable

dispute resolution. With its less formal approach, mediation presents an attractive forum for the investors to settle their disputes with government entities. In Bangladesh, mediation is not a well-developed concept and is mainly confined to family disputes. However, statutory recognition of mediation in commercial disputes, in the same manner as in Sri Lanka, can go take Bangladesh a long way in establishing an efficient alternative dispute resolution culture.

COUNTRY: SOCIALIST REPUBLIC OF VIETNAM

Overview

Foreign direct investment has been responsible for a significant portion of Vietnam's enviable achievements in economic development in recent years. Sectors which have received foreign investment account for around 45 percent of Vietnam's import/exports in value, which employ about 1.42 million people directly, not including connected/ linked industries. Furthermore, these sectors procure the latest technology and use modern management techniques, enabling the country to fulfill its socioeconomic development targets.

FDI in 2008 is estimated to be around $60 billion and the amount disbursed is around $12 billion. Since the enactment of the Law on Foreign Direct Investment in 1987, 82 countries and territories have invested in Vietnam. There are 9,637 ongoing projects with a capitalization value worth $144.5 billion. Huge amounts of FDI have been injected into the industrial sector and there are a number of large-scale technology-intensive projects in oil refinery, metallurgy, property development, seaport development, new urban zones, and resorts and luxury hotels.

One reason for good inflow of FDI to Vietnam is that the Vietnamese Government has policies that attract investment, and domestic investment funds work closely with foreign investors through economic alliances. In addition, the legal environment is being constantly improved and both domestic and foreign investors now operate on a somewhat level playing field. Investment regulations have been simplified and resemble international practices more closely. Vietnam’s recent real

GDP growth rates, 8.5 percent in 2007 and 6.2 percent in 2008 (ranked 55 amongst fastest growing countries in 2008), have also served as a catalyst in attracting foreign direct investment.

Treatment and protection of FDI

Investment Protections

Historically, foreign investment in Vietnam has principally been governed by the 1987 Foreign Investment Law (1987 FIL), which has been amended in 1990 and 1992 and is implemented by Decree No. I8-CP. In addition to a general "guarantee of fair and equitable treatment", Vietnam's 1987 FIL specifically guarantees that foreign investments shall not be expropriated.

Constitutional Guarantees

Vietnam's commitment to protection of foreign investment is enshrined in its Constitution. Article 25 of, the Hien Phap, Vietnam's 1992 constitution, states that:

> *"The state encourages foreign organizations and individuals to invest capital and technologies in Vietnam in conformity with Vietnamese law and international law and practice; it guarantees the right to lawful ownership of capital, property and other interests by foreign organizations and individuals. Enterprises with foreign investments shall not be nationalised."*

The constitutional guarantee to uphold "international law and customs" - not just domestic laws is unique and unequivocally demonstrates Vietnam's willingness to promote and protect foreign investment according to the internationally accepted standards.

Dispute Settlement

Vietnam has always been seen as having protectionist policies with regards to dispute resolution mechanisms. The 1987 FIL was almost silent on dispute resolution between foreign investors and the Vietnamese government, providing only for international arbitration to resolve disputes among foreign and Vietnamese parties in the case of a joint venture. Article 24 Stated as follows:

> *"Any dispute between the parties to a business co-operation contract, between the parties to a joint venture contract, or between enterprises with foreign owned capital or parties to a business co-operation contract and Vietnamese enterprises must firstly be resolved by negotiation and conciliation.*
>
> *Where the parties fail to settle the dispute by way of conciliation, the dispute shall be referred to a Vietnamese arbitration body or a Vietnamese court in accordance with the law of Vietnam.*
>
> *With respect to disputes between parties to a joint venture enterprise or a business co-operation contract, the parties may agree in the contract to appoint another arbitration body to resolve the dispute.*
>
> *Any disputes arising from a Build-Operate-Transfer, a Build-Transfer-Operate or a Build Transfer contract shall be resolved in accordance with the dispute resolution mechanism agreed by the parties and stated in the contract."*

On the issue of disputes between foreign investors and the Vietnamese government, Article 102 of Decree No. I8-CP provides:

> *"Disputes between enterprises with foreign owned capital, foreign parties to business co-operation contracts and state bodies of Vietnam shall be resolved through conciliation. If a dispute is not resolved through conciliation, the parties shall refer the dispute to a competent state body".*

It was generally accepted that in refusing to submit the disputes between state bodies and foreign investors to international arbitration, Vietnam had gone against the international trend. This approach threatened to undo much of the goodwill generated by the 1987 FIL's strong protection against expropriation and changes in law. Because Decree No. r8-CP forced investors to submit not just to domestic courts, but to a competent state body, i.e., the administrative discretion of an agency of the very government with which the investors are in dispute, the risk premium and the impact to investment decisions was always likely to be high.

In its BITs, however, Vietnam has allowed disputes between itself and foreign investors to be referred to international arbitration. Although such a BIT provision was expressly contradicting Decree No. r8-CP, it was nonetheless probably valid both under international law principles and under Vietnam's own investment laws. This is because Article 40 of the 1987 FIL provides that

> *"the Government . . . may conclude with foreign governments' agreements on co-operation and investment," and Article 99 of Decree No. r8-CP provides that "[a]ny treaty on investment incentives and protection signed by the Government of Vietnam with the government of another country shall prevail with its agreements."*

In 2003, a new era in dispute settlement in Vietnam began. Recognizing its lacking in creating a provision for investment arbitrations involving Vietnamese State or State entities, Vietnam enacted an ordinance on Commercial Arbitration which is a comprehensive arbitration law. It contains detailed provisions on arbitral procedures, the selection and challenge of arbitrators, the content of awards and procedures and grounds for challenging awards. However, the ordinance is unhelpfully complicated with regard to the choice of arbitrators. In summary, the ordinance permits appointment of foreign arbitrators in disputes where one participating party or all participating parties are foreigners or foreign legal persons. However, it contains restrictions on the appointment of foreign arbitrators in other disputes.

The ordinance does not authorise arbitral tribunals to issue interim relief orders which are often essential for efficient arbitral proceedings. It requires parties to seek such interim relief from the relevant court. The likely delay in such a court application may make the objective ultimately futile.

If the losing party does not comply with the award voluntarily, it may be necessary to apply for official enforcement against the debtor's assets. The strength of the enforcement regime is therefore a vital factor; investment decisions are likely to be affected negatively if it appears that enforcement against a local partner will be uncertain in practice. Under

the ordinance, all arbitration awards (local and foreign) are enforceable in Vietnam by means of a request for assistance from the relevant provincial office of Judicial Enforcement with jurisdiction over the debtor. However, in the case of foreign arbitral awards, it is first necessary to obtain formal recognition and approval of the award by the Vietnamese Court, in accordance with the Code of Civil Procedure (CCP) of 2005. Prior to the CCP revision in 2005, Vietnamese courts appeared reluctant to enforce foreign awards. For example, in one high-profile case, a Singapore company sought to enforce an award given in an Australia-based arbitration. The Court of Appeal of the Supreme People's Court of Vietnam refused enforcement on the grounds that (i) a construction contract was not "commercial" and hence not arbitrable, and (ii) the contract stated that the Singapore company was not subject to Vietnamese tax law, and therefore it contradicted the basic principles of Vietnamese law. Both the reasons for refusing enforcement surprised foreign investors. Even with the enactment of the revised and updated CCP, it is too early to know whether the courts will adopt a more sympathetic approach to recognition of foreign awards. Further, for both local and foreign awards, the official process of enforcement through the provincial enforcement authority may be slow, complicated and uncertain in practice.

Draft Arbitration Bill

Recognising problems with the ordinance, Vietnamese law makers are now drafting a new Arbitration Law, to be enacted in late 2009 (effective in late 2010). This draft law indicates a much higher degree of faith in the arbitration system. It recognises that foreigners can act as arbitrators in Vietnam and can be admitted to panels of Vietnamese arbitration centres. This means that foreign parties, joint ventures and wholly foreign owned companies in Vietnam will be more likely to arbitrate in Vietnam as they can appoint non-Vietnamese arbitrators. The second important improvement is that the draft law authorises an arbitral tribunal to, on the application of a party, issue interim relief orders. Thirdly, it provides for the immunity of arbitrators from liability in connection with the proceeding. Fourthly, this draft law extends beyond commercial

arbitration and contemplates arbitration in respect of non-commercial activities, subject to a narrow exclusion list. The draft arbitration law appears to be very conducive to the development of arbitration activities in Vietnam.

However, some problems do remain. The draft law still does not allow parties in an ad-hoc arbitration to agree on an appointing authority to appoint arbitrators where the parties disagree. As in the ordinance, the draft law requires parties to apply to the relevant court for such appointment. Unless addressed in a subsequent draft, this provision will continue to deter ad-hoc international arbitrations in Vietnam. In the next decade, before Vietnamese arbitration centres develop sufficiently to win the confidence of the public, foreign parties choosing to arbitrate in Vietnam will be more likely to use ad-hoc arbitrations. If so, they will need full flexibility in conducting their arbitrations, including particularly the freedom to appoint arbitrators or, in case they cannot agree, to entrust such appointment to an internationally recognised arbitral institution. Without this freedom, parties will simply continue to arbitrate in other jurisdictions where such freedom is well recognised.

In addition, a few other issues remain in the draft law. For example, similar to the ordinance, the draft law allows the tribunal, in case of a dispute involving a foreign party, to apply foreign law if chosen by the parties; but only to the extent of such choice of foreign law and its application not being inconsistent with fundamental principles of Vietnamese law. Such qualification seems vague and inconsistent with international practices. On top of this, according to the draft law, an arbitration centre may only appoint arbitrators from its own panel. This unnecessarily fetters the flexibility of an arbitration centre.

Overall, it must be recognised that the draft Arbitration Law, compared to its predecessors, places considerably more faith in the arbitration system. The problems discussed above in the current draft law hopefully will be addressed in subsequent drafts and amendments so that the Arbitration Law, once enacted, will constitute a satisfactory foundation for arbitration activities in Vietnam. At the same time, it is also unrealistic to expect too much. In the context of a legal system very

much in its infancy, and a judiciary which is in need of reform, it will not be easy for Vietnamese lawmakers to pass provisions potentially seen as "too favourable" to arbitrators. For example, how can it be expected that an arbitrator will be made immune from liability while, at the moment, even the judges are personally liable if their decisions are overturned on appeal?

Arbitration Centre

Vietnam has established an International Arbitration Centre in 1993 following an order from the Prime Minister. It is not an independent organization and is formally attached to the Vietnam Chamber of Commerce and Industry, which is an independent corporation. Although the certificate of incorporation expressly provides that it is non-governmental, it could be considered to be a kind of national institution indirectly controlled by the government since it is a lower-level organization annexed and controlled by the chamber.

The headquarters of the centre is located in the Chamber's headquarters in Hanoi and the branch is also located in the Chamber's branch in Ho Chi Minh City. Its income from arbitration being small, it is dependent on the Chamber for both its finance and human resources.

Initially the power of the Centre was quite limited. Its power only covered disputes which arose from international economic relations, such as foreign trade contracts and contracts concerning investment, tourism, international transportation, insurance, transfer of technology, services, international credits and payments, etc. and where one or all of the parties were foreign nationals or foreign corporations.

In February 1996, the Prime Minister decided to extend the Centre's jurisdiction over disputes arising from domestic business transactions, in case the parties have agreed to submit their dispute to the Centre's arbitration. Consequently, the Centre's current power covers both international and domestic business disputes. This was an important improvement in the eyes of foreign investors as this change made it possible for them to refer not only international but also domestic disputes in Vietnam to the Centre's arbitration. Before this improvement,

in the case where a dispute arose between a joint-venture or a 100% foreign corporation (incorporated as a Vietnamese corporation) and a Vietnamese corporation or a Vietnamese individual, the dispute would be out of the power of the Centre.

Comparison with Bangladesh

In a new world setting in which the interests of Capital Exporting and Capital Importing countries are aligned to better protection of FDI, an international consensus has developed on a standard of use of international arbitration and full compensation for expropriation. It can be seen that Vietnam's strong desire to promote FDI has spurred it to go farther than most other developing countries in protecting FDI - not only against outright expropriation, but also against subsequent changes in laws. The constitutional guarantee provision has immensely helped Vietnam in assuring foreign investors that, as a state, it is wholly committed to investor protection. Practically speaking, such constitutional guarantee does not give the investors any additional right. However, it has improved Vietnam’s branding as an investor-friendly state. In comparison to Bangladesh, therefore, Vietnam has a head start in the mind of a prospective investor.

Furthermore, through the changes brought about in the dispute resolution mechanism, Vietnam has brought itself in line with the current worldwide trend toward international arbitration. Vietnam’s consent to international arbitration, not only in BITs with selected countries, but also in its foreign investment statute (which is another noted difference in comparison with Bangladesh) are much more visible to the world. The series of laws promulgated in the last 15 years has the effect of showing to the world that it has truly implemented its *Doi Moi* policy. The arbitration legislation contains special features dedicated to protecting and advancing interests of foreign entities. While there have been resistance by the judiciary of Vietnam in enforcing foreign arbitral awards, the Vietnamese legislature has shown its willingness to listen to investor’s concerns by committing itself to a world-class arbitration statute by the end of 2009. In a stark contrast, it took Bangladesh almost 61 years to enact its own arbitration legislation and since then there has

been no movement in amending its features for the better or to accommodate special needs of the foreign investors in line with international best practices.

Through the establishment of dedicated Arbitration Centres by statutory provisions, albeit limitations, Vietnam has again taken a step ahead in assuring investors that is committed towards arbitration. At the same time, such centres play a major role in developing not only the Vietnamese jurisprudence in arbitration, but also the required skills and experiences of government officials/ attorneys to represent the state before international arbitration tribunals. Inclusion of domestic disputes within the ambit of such centres is also like to have a positive impact on the acceptance of arbitration amongst the Vietnamese population as an effective dispute resolution mechanism. Where businessmen in Bangladesh are likely to find arbitration to be quite obscure a concept, to their Vietnamese counterpart, it is becoming more and more common.

7

Research Findings

Bangladesh as an Investment Destination

Bangladesh is regionally competing with countries like Vietnam, Sri Lanka, Pakistan, Nepal, etc. to attract FDI. It is generally considered to be an attractive investment destination due to the availability of cheap labour, apparent availability of natural gas, existing preferential relationships with developed markets, relative political stability, etc. However, a lot of its competitors offer similar incentives to foreign investors. Therefore, when an investor has to choose from a pool of host states, besides profitability and risk assumption, legal protection of his investment plays a major part in the decision making matrix. Additionally, upholding of such protection offered plays an equally significant role in the sustainability or expansion of investment in that host state. Investors consider reliable and efficient dispute settlement mechanisms, such as arbitration and mediation, as a major component of investment protection.

GOB's Commitments towards International Arbitration

GOB has signed more than 22 Bilateral Investment Treaties (BITs) with major Capital Exporting countries of the world. Most of these BITs were promulgated in an effort to offer foreign investors guarantees in respect to minimum standards of treatment, protection against expropriation or nationalization, etc. Most importantly (for the purpose of this research), GOB, through these treaties, guaranteed to effectively settle all investment disputes through international arbitration proceedings.

Also, GOB entered into various contracts, such as Product Sharing Contracts (**PSCs**), Gas Purchase and Sale Agreements (**GPSA**), International Purchase Agreements, etc with foreign investors. Typically,

arbitration clauses in such contracts stipulate settlement of disputes through international arbitration through the auspices of ICSID or ICC's Court of International Arbitration.

These clauses are fairly standard and in line with practices of other developing countries. Additionally, the Foreign Private Investment (Promotion and Protection) Act 1980 guarantees similar protection for foreign investors. It has been seen that countries like Sri Lanka and Vietnam get head starts compared to Bangladesh in assuring foreign investors that their investment will be protected through the unilateral guarantees provided in their constitutions. Although in practical terms, guarantees provided by the 1980 Act has a similar legal effect as a guarantee enshrined within a constitution, the latter has a greater symbolic effect and as such can provide more assurance to a prospective investor.

Compliance to International Arbitration Commitments

It is evident that GOB willingly commits to resolve all investment related disputes in international arbitration forums. But once the foreign investor has walked into the web, the original bargain that had enticed him gets forgotten. Faced with claims for breach of its contractual or investment obligations in international arbitrations, GOB either, at the outset, vehemently denies taking part in the dispute settlement proceedings, or deploys tactics to frustrate the arbitration proceedings by raising issues that can, at best, be termed as frivolous, unjustifiable and unsound in law. Also, from the cases analyzed, it is further evident that GOB often manifestly exploits its own judicial system and local laws to obtain anti-suit injunctions or to evade international arbitration awards rendered against it.

In its effort to avoid international arbitrations, GOB pleads certain common grounds in all cases. These include allegations that the dispute falls outside the scope of the arbitration agreement; or that GOB is not a party to the contract and that the arbitration obligation under a BIT do not apply. Most international arbitration tribunals, however, have denied

entertaining such allegations as being devoid of any substantial merit. For example, given the established principles of international law concerning state liability of entities controlled by it, none of the international tribunals were ever satisfied with GOB's contentions that GOB cannot be held liable for actions taken by state owned entities like Petrobangla or BCIC.

It is rather unfortunate to see GOB repeating the same arguments to avoid jurisdictions over and over again. Often, international tribunals have made references to decisions made earlier concerning failed contentions of GOB. Such actions lead to additional litigation costs imposed on Bangladesh. At the same time, international tribunals perhaps generally draw a negative inference as to GOB's intentions.

Not only prior to or during arbitration proceedings, GOB clearly tries to avoid international arbitration awards rendered against it. By virtue of international conventions, awards rendered by international tribunals are almost universally enforceable, subject to limited exceptions. Provisions reflecting such propositions also exist within the Arbitration Laws of Bangladesh. However, in a couple of the cases analyzed above, it has been noted that when GOB was faced with enforcement of awards rendered against it by international tribunals, it has attempted to exploit the judiciary and local laws to stop the enforcement of the award.

Therefore, it is apparent that GOB's approach towards its obligations of submitting before international arbitration tribunals is not positive. This, in turn, frustrates the underlying benefits of arbitration, which are: relatively shorter period of time consumed, finality ensured by a single forum proceeding, easier enforcement mechanism for arbitral awards and inexpensive means of dispute settlement.

Reasons for GOB's Approach

The reasons for such defiance of GOB towards its international commitments have already been identified and discussed in detail in the 'interviews section' of this research report. It is noted that GOB officials sometimes justified not adhering to arbitration agreements and

guarantees on the following grounds: lack of cultural awareness, bias of the arbitrators, disregard to environmental regulations, and human rights.

It is indeed the case that the arbitration system had traditionally harboured bias against host states. Also, it is possible that foreign arbitrators would not be aware of (and not be able to fully evaluate) the cultural issues of a given host state. However, with the diversification and harmonisation of arbitration practice, in the modern world, it is not possible to wiggle out of an international obligation by simply alleging fear of bias or cultural differences.

More convincing is the justification of differing approaches towards investors who are detrimental to Bangladesh. When an investor comes to a host state, it is implicit that they would adhere to its laws and regulations. Furthermore, it is expected that they will be respectful to the inhabitants and resources of the locality where they operate. Therefore, if an investor is negligent in these aspects, there is a strong argument for the host state to deviate from its general standard of investment protection with regards to that particular investor.

Apart from the perceived justifications discussed above, specific deficiencies have been identified as contributing towards the negative attitude of GOB. Lack of legal skills and resources, weak legal system and local laws, reluctance of GOB officials on various grounds, lack of commercial awareness of lawyers and judges, etc are attributable to GOB's apparent aversion from international arbitration proceedings. It has appeared that the stakeholders involved consider arbitration proceedings as unconnected individual events. Thus they fail to grasp the underlying broader picture that connects international arbitration to the investment climate of a developing state like Bangladesh. These in accumulation make Bangladesh a '*not so arbitration-friendly state'* and frustrate all the attempts made by GOB in making commitments to bolster its image as an investor-friendly state and attract more FDI.

Effect of GOB's Approach on the Investment Climate

GOB's reluctance to participate in international arbitration has effects of various degrees. Through the frivolous applications and delaying tactics

GOB often antagonises the tribunals and, as a result, suffers costs. More importantly, such actions expose GOB to negative inference drawn against it by international tribunals, affecting GOB's credibility and to some extent, the very outcome of the proceedings. Furthermore, reputation of being "opposed to arbitration" can also affect future proceedings against GOB.

GOB's reluctance to participate in arbitration proceedings and enforce awards rendered against it has a detrimental effect on its standing as an investor-friendly state. Such action causes investors to lose confidence in GOB's commitments and in turn discourage existing investors to invest further in Bangladesh. Simultaneously, it will generate bad publicity amongst prospective investors and deter future foreign investments to Bangladesh.

8

Policy Recommendations

These policy recommendations are aimed at GOB and its development partners.

These policy recommendations are based on the findings of this research undertaken to evaluate the impact of GOB's approach towards its commitments relating to international arbitration proceedings.

The primary focus of implementation of the following recommendations is expected to serve two overarching purposes. Firstly, these recommendations are expected to change the general skills, psyche and approach of the relevant stakeholders that will enable them to appreciate the broader picture of the investment climate and economic development of Bangladesh. Secondly, the changes that these policy recommendations attempt to bring about would bolster the branding of Bangladesh as an investor-friendly state. In the case of the latter, the recommended reforms should be well-publicized simultaneously with their implementation, particularly the tangible ones (i.e. changes in law and legal framework).

The recommendations are grouped into 'Infrastructural Developments' and 'Change in Legal Framework and Existing Laws'.

Infrastructural Developments

Establishing Alternative Dispute Resolution (ADR) Training & Support Centre

A self-sustaining ADR training and support centre should be established, possibly through joint collaboration of GOB, a development partner (e.g. World Bank / IFC), and the Bangladesh Bar Council.

The role of this centre would be the following:

Training Services:

- To provide training and certification on various methods of

alternative dispute resolution to lawyers and stake holders;

- To provide specialized training and certification programs on international treaty based investment arbitration;
- To organize special events for the members of the judiciary on international arbitration laws and practices;
- To organize special awareness programs for relevant GOB officials on international and local practices relating to investment protection;
- To promote Continuing Legal Education (CLE) for lawyers and legal consultants;
- To build-up strategic alliance with established foreign law firms to train local lawyers in international law through exchange programs;
- To organize regional and international conferences/ seminars on issues pertaining local, regional and international legal issues.

\Support Services:

- To establish a resource centre accessible to member lawyers, law students, GOB officials and other stakeholders;
- To maintain and regularly update judgements of international tribunals books, statutes, law journals, periodicals, databases, etc. relating to commercial and investment arbitration laws and practices;
- To create and maintain liaison with regional and international arbitration centres who share common interests;

Establishing International Arbitration and Mediation Centre

An international arbitration centre should be established in Dhaka in collaboration with an internationally renowned arbitration institution. The primary objective of such a centre would be to put Bangladesh on

the global map as an arbitration-friendly state. This centre should aim at attracting both Bangladeshi and foreign litigants.

The role of this institution would be as follows (non-exhaustive):

- To provide logistical and secretarial services to local and international commercial and investment related arbitrations in Bangladesh;
- To maintain a database of specialized pool of arbitrators and act as an appointing authority (should the parties opt for it).
- To provide support services for other alternative dispute settlement mechanisms including mediation and conciliation.
- To maintain liaison with the ADR Training and Support Centre to coordinate and provide cooperation on the development of ADR practices in Bangladesh.

Developing Pre-contractual and Pre-arbitration Negotiation Skills

In order to enhance negotiation skills of GOB officials and legal personnel, training programs should be carried out. Such programs should be aimed at building confidence of the participants by providing skill based training. This would, in turn, allow them to appreciate and protect governmental interest and at the same time resolve issues without resorting to litigation or arbitration.

This program can either be executed through the ADR Training and Support Centre; or by independent day-long courses organized by GOB in collaboration with development partners.

Creating a Specialized Pool of lawyers

GOB should take initiatives to create a specialized pool of lawyers having specific expertise in international arbitration practices to provide advice to GOB or the state organs on matters pertaining investment disputes.

It will be necessary to include foreign lawyers and law firms specializing in international investment arbitration in this pool, until local expertise has developed. To bolster GOB's chances of succeeding in international arbitration proceedings, advice from such legal experts should be obtained from the inception of the dispute.

Establish Courts with Specialized Jurisdiction

In light of the burden placed on the existing single Company Bench of the High Court Division of Supreme Court of Bangladesh, a bench dedicated to arbitration matters needs to be established. The Honourable Chief Justice of Bangladesh should be requested by GOB accordingly.

Change in Legal Framework and Existing Laws

Constitutional Guarantee for Investment Protection

The Parliament of Bangladesh should provide similar constitutional guarantee as article 157 of the Sri Lankan constitution with respect to international treaty obligations.

Amendments to Arbitration Act 2001

To avoid exploitation of Section 43 of the Arbitration Act 2001, which deals with grounds for setting arbitral awards aside, the Act should be amended to bring it in line with the New York Convention. The proposed amendment of section 43(B) (ii) should replace the words *'opposed to the law for the time being in force in Bangladesh'* with *'contrary to the public policy of Bangladesh'*.

Scope for Further Research

GOB should take appropriate measures to create a sense of belongingness and accountability among government officials. GOB may also wish to ease the process of collective decision making by vesting more leverage on government officials without the fear of forestalling reprimands. It is, however, beyond the purview of this research work to assess and recommend the infrastructural reforms in public service that can change the general approach of GOB in upholding its international

commitments and thereby, improve the overall investment climate of Bangladesh. Further research can be undertaken in that respect.

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ANNEXURES

Annex A

A.1 Basic Profile of Respondents

Figure A.1: Profile of the respondents

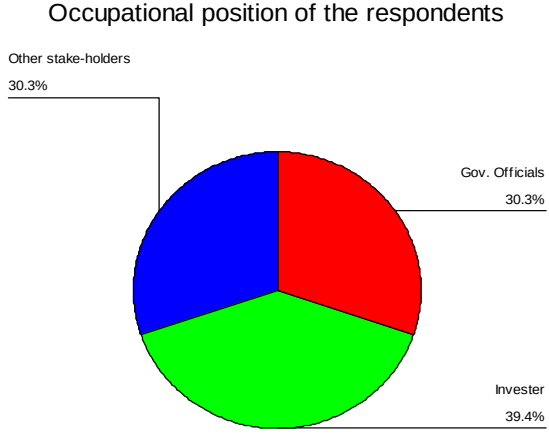
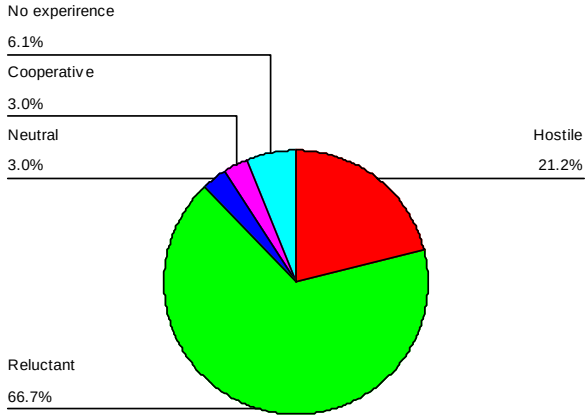
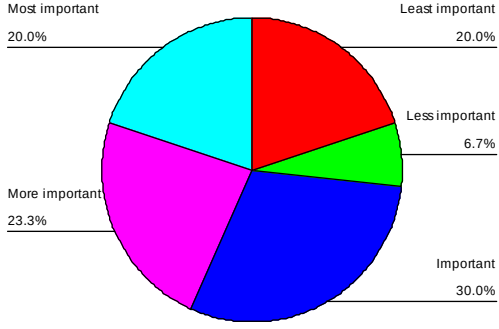


Figure A.2: Respondents perception regarding GOB's attitude towards International Arbitrations



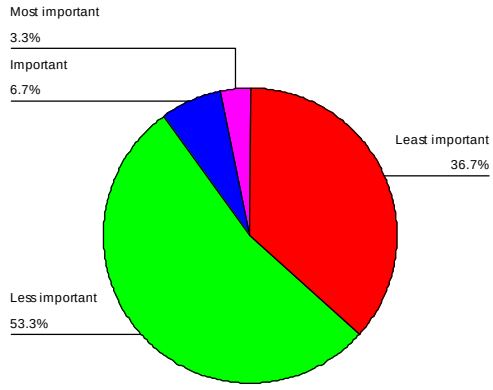
A.2 Analysis of factors attributed to GOB's attitude towards international Arbitrations.

Figure A.2.1.: Notion of foreign Arbitrators being biased against host



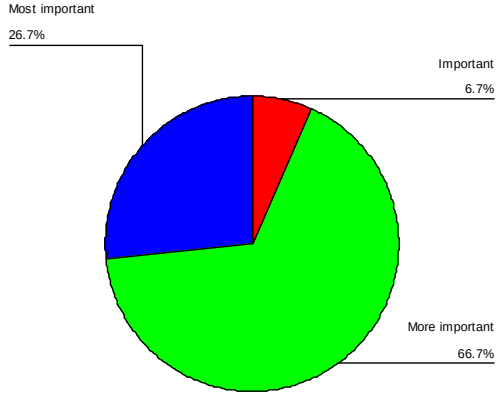
The pie diagram shows that almost 73% considers Biasness of the foreign arbitrators at least an important factor.

Figure A.2.2: Foreign Arbitration proceedings are in contravention of sovereignty



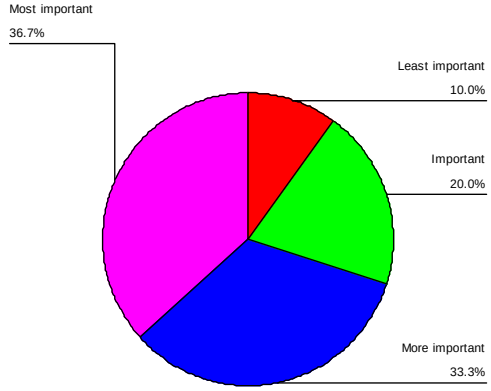
Almost 90% of the respondents consider foreign arbitration proceeding are in contravention of sovereignty of Bangladesh is less to least important factor that possibly make the GOB's attitude towards foreign arbitrators hostile or reluctant.

Figure A.2.3: Inadequacy of legal skills in conducting international Arbitration



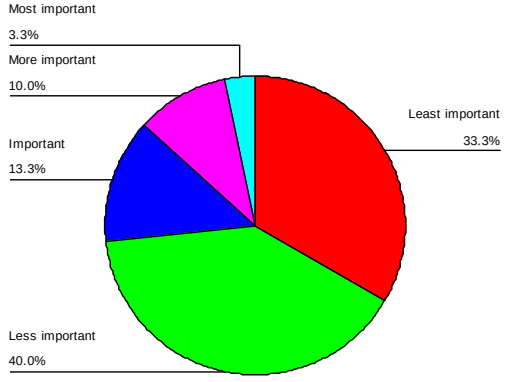
100% of the respondents consider inadequacy of legal skill is at least an important factor while almost 70% of the respondents consider it as a more important issue.

Figure A.2.4: Reluctance of Government officials



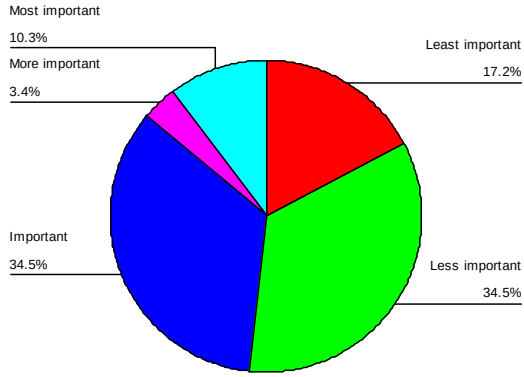
The above diagram shows that almost 70% of the respondents consider the reluctance of government officials are at least a more important factor.

Figure A.2.5: Corruption at pre-investment negotiation



The pie diagram shows that almost 70% of the respondents consider corruption at less important factors.

Figure A.2.6: Red tape Bureaucracy



The above diagram shows that almost 85% of the respondents consider red tape bureaucracy at most an important factor.

A.2.1: Statistics used for the importance of various factors

Also we use Likert scale to measure the importance of factor affecting Foreign Direct Investment (FDI) flow to Bangladesh. Here five point scales were used to measure the important factor affecting the FDI. The mean of the score is used as the basis of evaluation criteria. With five point scale, the intervals for breaking the range in measuring each variable are calculated as follows.

1-1/5=0.8

Thus the scales can be considered as.

Range	Criteria
4.20-5.00	Most important
3.40-4.19	More important
2.60-3.39	Important
1.80-2.59	Less important
1.00-1.79	Least important

(Source: ISBN 994-677-577-4-UTCC)

The data obtained from questionnaire through the personal intensive interview were processed by SPSS (Statistical Package for Social Science). Here each of the variables are measured with five level of identification such as 1=”least important”, 2=”less important”, 3=”Important”, 4=”More Important”, 5=”Most important”.

These variables are compared along with their levels in terms of frequencies, arithmetic mean and standard deviation. Also the possibility interdependence of the different response is measured with the profile of the respondents through correlation analysis.

The following table shows the mean, standard deviation and the importance of the factors.

Table A.2.1.1: The importance levels of different factors

Attributes	Mean	Standard deviation	95% Confidence interval	Importance level
Biased against host	3.17	1.39	2.63-3.71	Important
Contravention of sovereignty	1.80	0.85	1.47-2.12	Less important
Inadequacy of legal skill	4.2	0.55	3.99-4.42	Most important
Reluctance of government officials	3.87	1.22	3.36-4.29	More important
Corruption	2.10	1.09	1.72-2.55	Less important
Red tape bureaucracy	2.55	1.15	2.11-2.99	Less important

Source: Field Survey, 2008

Thus table 5.2.1.1.indicates the respondent's opinion about the government attitude towards international arbitrations based on the importance of various factors such as 1. Notion of Foreign arbitrators being biased against developed country like Bangladesh, 2. Foreign arbitrations proceedings are in contravention of sovereignty of Bangladesh. 3. Inadequacy of the legal skill and resources in conducting international arbitration. 4. Reluctance of Government to take positive steps. 5. Corruption at pre invested negotiation and post –dispute stage. 6. Red tape bureaucracy.

Among the six factors Inadequacy of legal skill is considered most important factor with rank mean score 4.20 and standard deviation 0.55. The factor Reluctance of government to take positive step is considered more important factor with mean rank score 3.86 and standard deviation 1.22. Notion of foreign arbitrators being biased against developed countries are considered as an important factor with mean rank score 3.17 and standard deviation 1.39. All other factors e.g corruption, foreign arbitration proceedings are in the contravention of sovereignty are considered less important factor with mean 2.10,1.80,2.55 and standard deviation 1.09, 0.55 & 1.15 respectively.

A.3 Correlation analysis

The correlation is a useful statistical tool for measuring the strength of linear relationship between two variables. The coefficient of correlation denoted by 'r' can vary between -1 and 1.When it is positive, one variable tends to increase as other variables. When it is negative, one variable tends to decrease as the other increases. When r=0, the variable are said to be uncorrelated, when r= ± 1, the correlation is perfect. The closer the value of r to +1 or -1, the stronger the linear relationship, the closer it is to zero the weaker is the relationship.

There is two way to calculate the coefficient of correlation r, pearson's correction and spearman rank correlation. Pearson correlation is used for measuring association between two continuous variables but some times it is very difficult to measure the variables but they can be easily ranked. The coefficient of correlation between the ranks is measured by spearman's rank correlation. Here we have ranked data, so we use spearman's rank correlation.

Table A.3.1: Correlation coefficients

		Foreign arbitration proceedings are in contravention of sovereignty	Reluctance of government officials	Biasness of the foreign Arbitrators	Inadequate of legal skills	Corruption at pre-investment negotiation	Red tape Bureaucracy
Foreign arbitration proceedings are in contravention of sovereignty	Correlation Coefficient	1.000	-.246	**.456**	-.073	.003	-.224
	Sig. (2-tailed)	.	.190	**.011**	.701	.987	.242
Reluctance of government officials	Correlation Coefficient	-.246	1.000	-.290	-.343	-.310	-.114
	Sig. (2-tailed)	.190	.	.120	.063	.096	.557
Biasness of the foreign Arbitrators	Correlation Coefficient	**.456**	-.290	1.000	-.324	.170	-.128
	Sig. (2-tailed)	**.011**	.120	.	.081	.368	.507
Inadequate of legal skills	Correlation Coefficient	-.073	-.343	-.324	1.000	.118	-.231
	Sig. (2-tailed)	.701	.063	.081	.	.536	.228
Corruption at pre-investment negotiation	Correlation Coefficient	.003	-.310	.170	.118	1.000	-.268
	Sig. (2-tailed)	.987	.096	.368	.536	.	.160
Red tape Bureaucracy	Correlation Coefficient	-.224	-.114	-.128	-.231	-.268	1.000
	Sig. (2-tailed)	.242	.557	.507	.228	.160	.

Source: Field Survey, 2008

* Correlation is significant at the .05 level (2-tailed).

This table shows that the response on factor 2 influences factor 1. That is the respondents who consider notion of the foreign arbitrators being biased against host as less important factor also considered foreign arbitrations proceedings are in contravention of sovereignty as less important.

A.4 Analysis of the factors influencing FDI

The pie diagram shows that almost 94% of the total respondents consider low cost labor as at least more important factors influencing FDI flow into Bangladesh. Among this almost 55% of the total respondents considered low cost labor as most important factor.

Figure A.4.1: Low cost labor

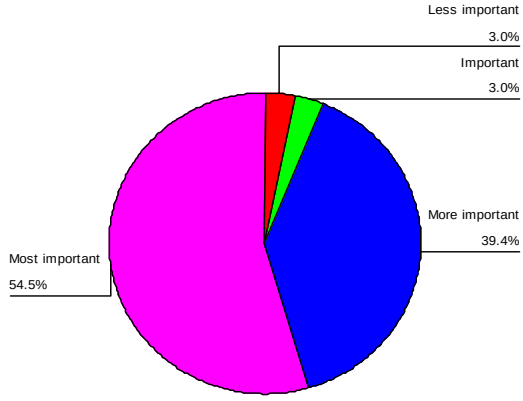
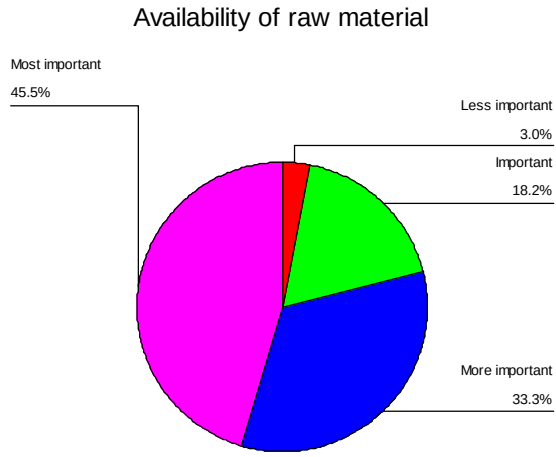


Figure A.4.2: Availability of raw material



The pie diagram shows that almost 78% of the total respondents consider Availability of raw materials as at least more important factors influencing FDI flow into Bangladesh. Among this almost 45% of the total respondents considered Availability of raw materials as most important factor.

Figure A.4.3: Political Stability

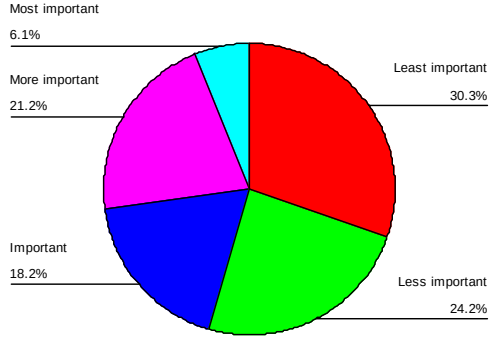


Figure A.4.4: Government open door policies towards FDI

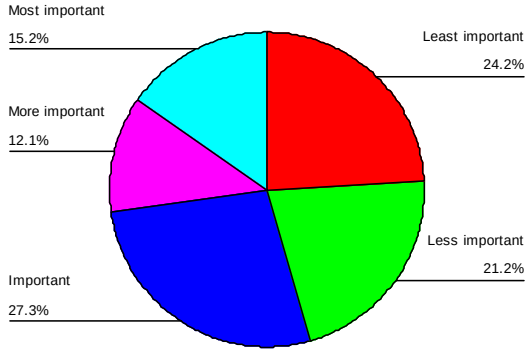


Figure A.4.5: Availability of land

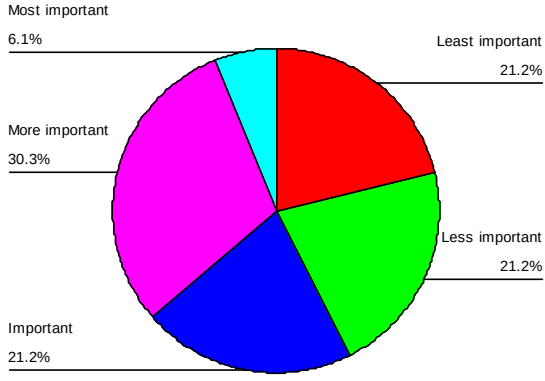
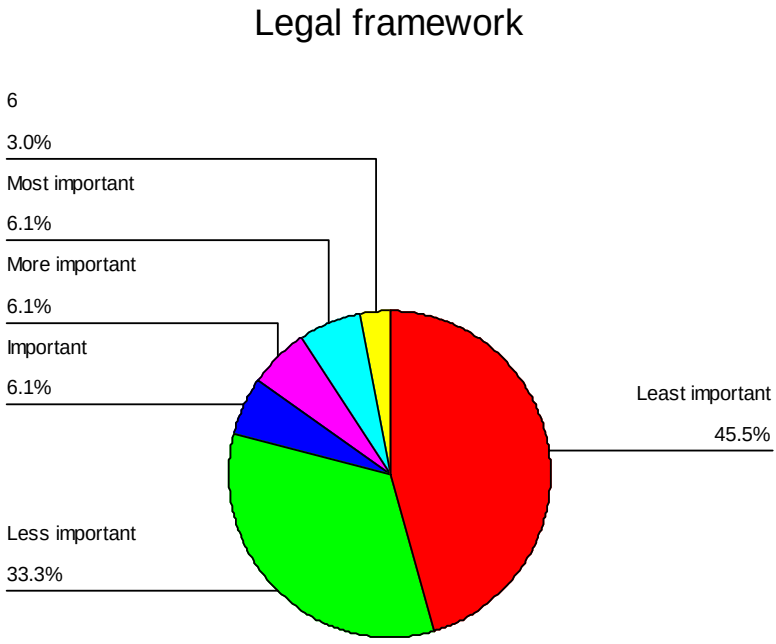


Figure A.4.6: Legal framework



The pie diagram shows that almost 78% of the total respondents consider legal framework as at most less important factors influencing FDI flow into Bangladesh.

Table: A.4.1: The factors influencing FDI flow into Bangladesh.

Attributes	Mean	Standard deviation	95% Confidence interval	Importance level
Low cost labor	4.45	0.71	4.20-4.71	Most important
Availability of raw material	4.21	0.86	3.91-4.52	Most important
Political stability	2.48	1.30	2.24-3.22	Important
Government policies	2.73	1.38	2.02-2.95	Important
Availability of land	2.79	1.27	2.34-3.24	Important
Legal framework	2.03	1.36	1.55-2.51	Less importa

Source: Field Survey, 2008

Thus table 5.3.1 indicates the respondent's opinion about the factors influencing FDI into Bangladesh based on the various factors such as 1. Low cost labor, 2.Availability of raw materials 3.Political stability. 4. Government's open door policies towards FDI.

5. Location /Availability of land. 6. Legal framework.

Among the six factors low cost labor and Availability of raw material are considered most important factor with rank mean score 4.45 & 4.21 and standard deviation 0.71 & 0.86. The factor political stability (mean 2.48 & sd 1.30), Government open door policies (mean 2.73 & sd 1.38), Availability of land (mean 2.78 & sd 1.27) are considered important factors. While legal framework (mean 2.03 & sd 1.36) is considered as less important factor influencing FDI flow into Bangladesh.

Table A.4.2: Correlation coefficients

		Low cost labor	Availability of raw material	Political Stability	Govt. open door policies towards FDI	Availability of land	Legal frame work
Low cost labor	Pearson Correlation	1.000	**.555**	-.077	-.253	-.063	-.177
	Sig. (2-tailed)	.	**.001**	.671	.156	.728	.326
Availability of raw material	Pearson Correlation	**.555**	1.000	-.319	.105	.158	-.006
	Sig. (2-tailed)	**.001**	.	.070	.566	.381	.975
Political Stability	Pearson Correlation	-.077	-.319	1.000	.041	.026	-.115
	Sig. (2-tailed)	.671	.070	.	.820	.884	.525
Govt. open door policies towards FDI	Pearson Correlation	-.253	.104	.041	1.000	.199	.155
	Sig. (2-tailed)	.156	.566	.820	.	.268	.388
Availability of land	Pearson Correlation	-.063	.158	.026	.199	1.000	.240
	Sig. (2-tailed)	.728	.381	.884	.268	.	.179
Legal framework	Pearson Correlation	-.177	-.006	-.115	.155	.240	1.000
	Sig. (2-tailed)	.326	.975	.525	.388	.179	.

Source: Field Survey, 2008

** Correlation is significant at the 0.01 level (2-tailed).

This table shows that low cost labor and availability are linearly related. The respondents who considered low cost labor as most important factor also considered availability of raw materials as most important factor.

A.5 Analysis of obstacles to FDI in Bangladesh

Almost 30% of the respondents considered regulatory framework of Bangladesh is an at least a factors that obstacles to FDI in Bangladesh.

Figure A.5.1: Regularity framework

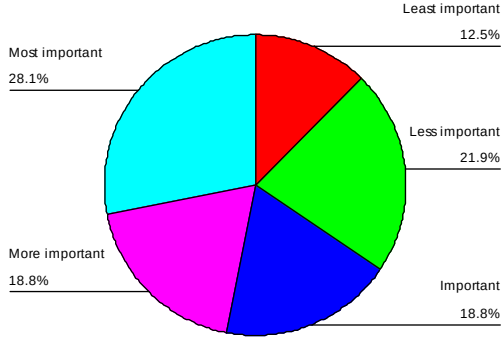
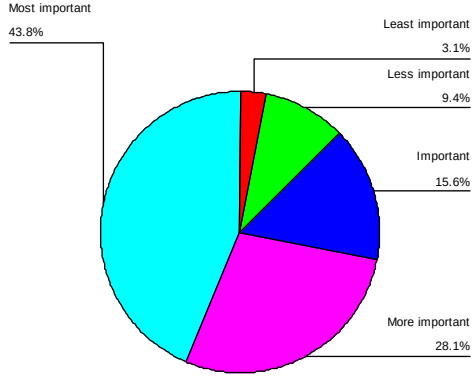
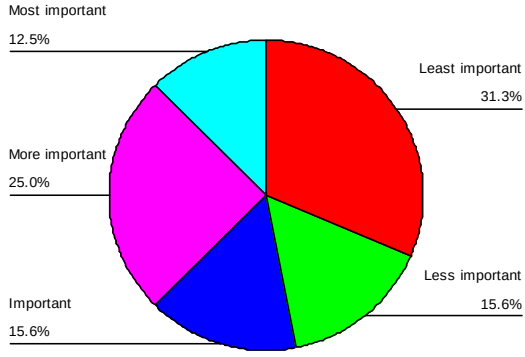


Figure A.5.2: Failure to promote country image



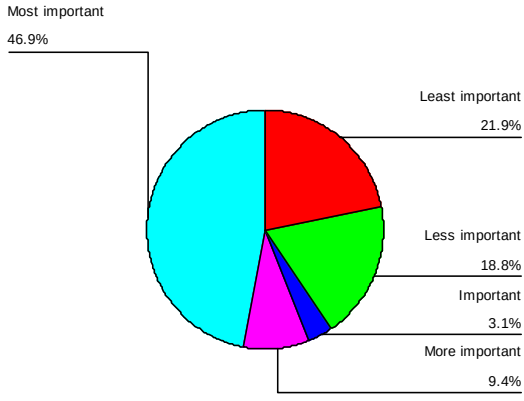
Above chart shows that almost 45% of the respondents considered failure to promote country image is the most important obstacles to Bangladesh.

Figure A.5.3: Lack of cooperation and communication from government



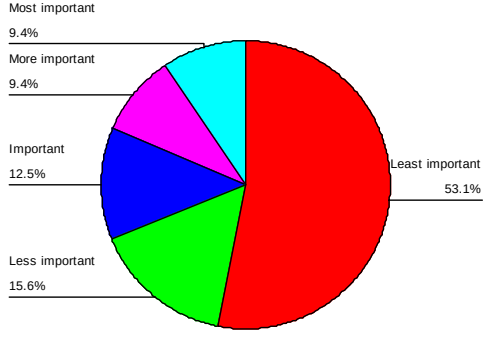
Almost 47% of the respondents considered Lack of cooperation and communication from government is less to least important factor obstacles to FDI.

Figure A.5.4: Lack of willingness of GOB to resolve investment disputes



Almost 55% of the respondents consider Lack of willingness of GOB to resolve investment disputes as more to most important obstacle factor. Among which almost 47% of the respondents considered it as a most important obstacle.

Figure a.5.5: Low confidence in judiciary



Almost 68% of the respondents considered low confidence in judiciary are least to less important obstacles to FDI flow in Bangladesh.

Table A.5.1: The factors influencing FDI flow into Bangladesh.

Attributes	Mean	Standard deviation	95% Confidence interval	Importance level
Regularity framework	3.28	1.42	2.77-3.79	High important
Failure to promote country image	4.00	1.14	3.59-4.41	Most important
Lack of cooperation	2.72	1.46	2.19-3.25	Important
Lack of willingness	3.41	1.72	2.79-4.03	High Important
Low confidence in judiciary	2.06	1.39	1.56-2.56	Less Important

Source: Field Survey, 2008

Thus table 5.5.1 indicates the respondent's opinion about the obstacles to FDI into Bangladesh based on the various factors such as 1) Regularity framework. 2) Failure to promote country image as an investment friendly country. 3) Lack of cooperation and communication from GOB. 4) Lack of willingness on the part of GOB to resolve investment disputes. 5) Low confidence in judiciary.

Among the five factors failure to promote country image is considered most important factor with rank mean score 4.00 and standard deviation 1.14. The factor regularity framework (mean 3.28 & sd 1.42),

Government lack of willingness to resolve investment dispute (mean 3.41& sd 1.72) are considered high important factors. Lack of cooperation and communication from GOB is an important obstacle factor with mean 2.72 & sd 1.46. While legal framework (mean 2.06 & sd 1.39) is considered as less important obstacle factor FDI flow into Bangladesh.

Table A.5.2: Correlation analysis

		Low confidence in judiciary	Lack of cooperation from the Gov.	Failure to promote Country image as an investment friendly country	Regularity frame work	Lack of willingness on the part of the Gov.	
Low confidence in judiciary	Correlation Coefficient	1.000	-.425	.019	.295	-.209	
	Sig. (2-tailed)	.	.015	.919	.101	.252	
Lack of cooperation from the Gov.	Correlation Coefficient	-.425	1.000	-.209	**-.541**	**.675**	
	Sig. (2-tailed)	.015	.	.250	**.001**	**.000**	
Failure to promote Country image as an investment friendly country	Correlation Coefficient	.019	-.209	1.000	.101	-.300	
	Sig. (2-tailed)	.919	.250	.	.582	.095	
Regularity frame work	Correlation Coefficient	.295	**-.541**	.101	1.000	-.323	
	Sig. (2-tailed)	.101	**.001**	.582	.	.071	
Lack of willingness on the part of the Gov.	Correlation Coefficient	-.209	**.675**	-.300	-.323	1.000	
	Sig. (2-tailed)	.252	**.000**	.095	.071	.	

Source: Field Survey ,2008

* Correlation is significant at the .05 level (2-tailed).

The above table shows that there is negative correlation between regularity framework and Failure to promote country image i.e the respondents who considered regulatory framework as most important obstacle may consider failure to promote country image as an investment friendly country as an less important obstacle.

About this series …

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