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Arbitral Tribunal award on White Industries Australia Ltd V the Republic of India

The Arbitral Tribunal comprising of J. William Rowley (Chairman), Charles N. Brown and Christopher Lau constituted under the UNCITRAL Arbitration Rules in November, 2011 pronounced the first ever Investment Treaty arbitral award involving Republic of India. This investment treaty arbitral award has paved the way for investment arbitration in India. This present article is in continuation of the previously published article on Investment Arbitration in India and aims to briefly describe the first investment treaty arbitral award that made India liable for breach of its obligation under Bilateral Investment treaty.

It is first important to understand what investment Arbitration is before understanding the award passed in the White Industries case.

Investment Treaty Arbitration is arbitration proceedings initiated by investors against the host states where they have made investments to enforce their claims for the breach of obligations under the Bilateral Investment Treaties (BIT) between their home states (of investors) and the host states. The contracting Parties resolve under the BIT to provide safeguard to each other investors and investments so as to encourage economic activity and business. In the present case, white industries initiated arbitration proceedings against India on account of Indian courts causing inordinate delay in the enforcement of arbitral award passed in arbitration proceedings arising out of contract with Indian company and thus breaching in its obligation under Australian and Indian BIT in providing effective means to the enforcing claims.

Facts Leading to the Initiation of Investment Arbitration

White industries Australian Ltd. was a company incorporated in Australia which entered into contract with Indian Government owned company Coal India Ltd for the supply of equipment and development of Piparwar Coal mines. White industries also furnished a Bank guarantee in favour of coal India for the purpose of providing coal India with guarantee that it would be entitled to immediate payment in case it is believed that white industries have defaulted on its obligation. White industries under the contract were also entitled to some bonuses. Some disputes arose between the two parties on the issue of bonuses, penalty payment and quality of coal wherein coal India refused to pay the bonuses to white industries and cashed in the bank guarantee that resulted in initiation of arbitration proceedings under the contract under ICC Court of Arbitration Rules followed by the passing of arbitral award in favour of white industries.

Two applications, one application for setting aside this arbitral award (first award) passed by ICC Court of arbitration were filed by coal India in Calcutta High Court and White industries filed an application for enforcement of this first award in Delhi High Court. Meanwhile white industries applied for dismissal of the coal India application for setting aside award which was dismissed by the Calcutta High court leading to white industries filing appeal against the order in Supreme Court of India which remained pending in the apex court for almost 5 years. The enforcement proceedings for the first award was stayed pending a decision in setting-aside proceedings and due to this delay in enforcement of first arbitral award, white industries invoked the arbitration clause of the Bilateral Investment Treaty between it home state Australia and India asserting breach of obligations by India under the treaty. Under this BIT, Australian and Indian investors can initiate arbitration proceedings directly against the government of the opposite contracting party in case of breach of any obligation under the treaty and infringement of rights of investors.

Questions before the Arbitral Tribunal

An arbitral tribunal under UNCITRAL Arbitration Rules was constituted to hear the claim made by White industries Ltd, which alleged that Republic of India had breached its obligation towards White Industries under the Bilateral Investment Treaty (BIT) on Promotion and Protection of Investment that had been entered between Government of Australia and Government of India as result of which it suffered loss and damage. Republic of India on the other hand denied the alleged breaches under BIT and alleged that the tribunal do not have jurisdiction to hear the claim of the claimant (White Industries) as white industries was not investor within the meaning provided under BIT and the assets on which the claimant placed reliance were not an "investment" under the BIT.

The broad questions before the Arbitral tribunal were:

- Was white industry an investor in India and has it made investment in India pursuant to the BIT.
- Does the tribunal have the jurisdiction over the acts and omissions of coal India?
- Has India failed to encourage and promote favourable conditions for investor in breach of article 3 (1) of BIT.
- Does India conduct amounted to breach of fair and equitable standard and thus breach of BIT.
- Does India 's conduct amounted to failure to provide effective means of asserting claims" and thus constituted breach of Article 4 (2) of the BIT.
- Has India expropriated white's investment contrary to Article 7 of the BIT.
- Has India breached Article 9 of the BIT by failing to allow white industries freely transfer funds related to investment.
- Is white industry entitled to compensation for any breach of BIT.

Conclusions drawn by Arbitral Tribunal

The Tribunal concluded that White Industries were "investor" under BIT between Australian and Indian Governments and concluded further that the rights arising out of contract between White industries and Coal India amounted to investments within the definition of BIT. The tribunal said that definition of investment provided by the contracting parties in the BIT lead to inference that the contracting parties intended BIT to capture investments in broadest sense and therefore concluded that "right to money" and " to any performance having financial value" constituted investment.

The Tribunal also said that white industries investment satisfied the "Saline" test that defines investment. The tribunal said that white industry commitment towards the project was substantial that was far beyond the provisions of supply of equipment and technical services. The tribunal said that white financed its own performance, provided substantial funds to Coal India, had maintained staff in its office in India and provided training to staff of coal India leading to satisfaction of Saline test and thereby confirming the fact that white industries contractual rights constitute investments.

The Tribunal also relying upon the jurisprudence developing in respect of treatment of awards arising from disputes concerning investments by investors concluded that rights of white industries under the ICC award constituted a part of original investment as these were crystallisation of the rights under the contract and can be said to be continuation or transformation of the original investment.

The tribunal also concluded that rights under the Bank Guarantee did not constituted investment under BIT. The Tribunal said that bank guarantee drawn in favour of Coal India by white industries was for the purpose of providing Coal India with the guarantee that it would be entitled to immediate payment in case it is believed that white industries had defaulted on its obligation. The tribunal said that bank guarantee did not provided substantial rights in favour of white industries. The tribunal said that at most white had the right under bank guarantee was to ensure that payment would not be taken there under except in the contractually stipulated circumstances which allowed Coal India to draw on to the bank guarantee.

The tribunal also concluded that acts of Coal India were not attributable to Government of India as there was no suggestion as to any official or employee of Coal India requiring or was to obtain approval from Indian government to activate the bank guarantee. The tribunal also said that the government of India was not directly/indirectly involved in the negotiation of contract and hence the acts of coal India were not attributable to Government of India.

The Tribunal also rejected the claim of white industries that India had not provided fair and equitable treatment to white industries and frustrated white industries legitimate expectation of Indian courts setting aside the award setting aside application of coal India (in accordance to New York convention) and timely enforcement of the ICC award in a reasonably timely manner. The tribunal said that an investor must generally take the host state as it finds it and in case of absence of any express assurance from India that the award would be enforced in a particular manner and in particular time frame, it was not possible for the white industries to have had the said expectation as to timely enforcement of award. The tribunal concluded that white industries could not have legitimately have expected that India would apply New York Convention when it ought to know and have known that developing country India courts are overburdened and the working of Indian courts.

The tribunal further concluded that delay in the court proceedings in respect of enforcement of ICC award or first award cannot be said to be denial of justice on account of white industries knowledge of court structure in India and further said that proceedings in Calcutta and Delhi High

Court were moved at not an unreasonable pace in context of denial of justice of assessment test. The tribunal said that the test of denial of justice is stringent one and it includes within it fold many matters like complex nature of proceeding, behaviour of litigants etc and thereby concluded that overall delay in the proceedings along with the delay of Supreme Court in hearing the appeal and determining jurisdictional appeal is certainly unsatisfactory in terms of efficient administration of justice but had not reached the stage of denial of justice.

The tribunal also rejected the claim of white industries relating expropriation and concluded that investment of white industries (rights crystallised in award) would not have been substantially affected as the Indian courts were yet to dispose of either set aside application of Coal India or application of white industries for enforcement of award. The tribunal said that first award was not set aside and this is no expropriation. The Tribunal also concluded that since bank guarantee did not amounted to investment and hence it cannot be said that India has breached its obligation under Article 7 (1) of BIT.

Main conclusion of the Arbitral Tribunal that made tribunal hold that the Republic of India was liable for the breach of obligation under BIT.

The Tribunal accepted white industries claim that India had breached its obligation to provide effective means for asserting claims and enforcing rights with respect to investments. The tribunal concluded that delay faced by white industries in enforcing the first award was not denial of justice but amounted to breach of obligation of India in providing means to enforce claims. The Tribunal said that delay faced by white industries for 10 years without reaching a conclusion was a denial of providing effective means to asserting claims. White industries relied upon the BIT between Kuwait and India that included the said provision whereby India obligated to provide effective means of asserting claims and enforcing rights to Kuwait investors. White relied upon the "most favoured nation" clause in the BIT between Australia and India to seek redressal for delay by courts by relying upon similar provisions in other treaties. Investors under BIT can rely on similar provisions of other treaties for enforcement of claims in case the provisions of other treaties provides greater protection than the BIT to which they are subject on the basis of "most favoured nation" clause where under BIT grants the beneficiary state all the advantages that any other nation also receives with respect to the matter to which the "most favoured nation" clause applies. This allows the beneficiary investor not be treated less than any other investor of other state. Beneficiary investor is the investor under BIT having this clause.

The tribunal further said white industries had done very possible thing that could be reasonably expected from it to have Supreme Court deal with the matter in a timely manner and there was no effective course open to white industries to expedite the appeal further and therefore concluded that Indian judicial system inability in dealing with white industries jurisdictional claim in over 9 years and the Supreme Court inability to hear white industries jurisdictional appeal for over 5 years constituted breach of India voluntarily assumed obligation of providing white industries with "effective means of asserting claims and enforcing rights".

Final Decision of the Arbitral Tribunal

The Arbitral Tribunal finally concluded that Government of India was in breach of its investment treaty obligation for not providing White industries Australian Ltd, the investor with effective means of asserting claims and enforcing rights as promised under treaty. The tribunal concluded that the Indian judicial system failed to deal with white industries jurisdictional claim and appeal for 10 years and this delay by Indian courts was not addressed by the Indian government leading to the breach of its obligation under the treaty that was meant for protection and preservation of investments made by contracting party investors in India.