Introduction

Investment arbitration appears to have opened a new avenue for foreign investors to seek redressal for treatment accorded to them by the Government of India. Such arbitration, available under Bilateral Investment Treaties signed by India with various countries, gives individual investors access to protection under international law, for various acts of omission and commission on part of the Government of India.

The impact of such proceedings first came to light in November 2011, when an ad-hoc arbitral tribunal delivered the first ever published award against the Republic of India, in an international investment arbitration. The proceedings were initiated by White Industries Australia Limited, under the provisions of the Bilateral Investment Treaty (“BIT”) between India and Australia. Within a year, six other foreign investors had sent notices to the Government of India, invoking arbitration under various BITs, with regard to their investments in India[1].

In this article, we analyse various fundamental concepts in international investment arbitration, as illustrated by the decision in White Industries v Republic of India[2] (“White Industries”).

The dispute in White Industries

In 1989, White Industries Australia Limited (“White”), an Australian company, entered into a contract with Coal India Limited (“Coal India”), a public sector undertaking, for supply of equipment and development of a coal mine at Piparwar, for a sum of about AUD 206.6 million (“Contract”). Disputes arose between the parties, and Coal India encashed the bank guarantee submitted by White under the Contract. In response, White invoked arbitration proceedings against Coal India.

The arbitration between White and Coal India took place before an International Chamber of Commerce (“ICC”) Tribunal of three arbitrators
seated in Paris. A majority of the arbitrators rendered an award on 27 May 2002, awarding White an amount of AUD 4.08 million (“First Award”).

Coal India approached the Calcutta High Court in September 2002, for setting aside of the award under Section 34 of the Arbitration and Conciliation Act, 1996 (“Act”). Almost simultaneously, White approached the Delhi High Court for enforcement of the award. White then moved the Supreme Court of India in October 2002, with an application for transfer of the Calcutta proceedings to Delhi but later withdrew the application in January 2003. In the meantime, White applied to the Calcutta High Court to have Coal India’s application for setting aside of the award dismissed. In November 2003, the Calcutta High Court, rejected White’s application for dismissal. White appealed against this decision before a Division Bench of the Calcutta High Court and the appeal was dismissed in May 2004. In July 2004, White again approached the Supreme Court of India in appeal against the decision of the division bench of the Calcutta High Court (“Set Aside Appeal”). Meanwhile, the proceedings before the Delhi High Court were stayed.

The Set Aside Appeal remained pending before the Supreme Court of India from July 2004 to December 2009, when White first wrote to the Government of India, invoking the provisions of the India-Australia BIT. On the failure of negotiations, the parties agreed to the constitution of an ad-hoc arbitral tribunal, under the terms of the BIT. The Tribunal consisted of one former judge and two international lawyers and the UNCITRAL Rules of Arbitration applied to the proceedings. The arbitration was seated in London.

In the award rendered on 30 November 2011, the Tribunal found that India had breached its obligation to provide “effective means of asserting claims and enforcing rights” owed to White, and directed India to pay to White, the amount payable by Coal India to White under the First Award, as well as the expenses of the arbitration, alongwith interest (“International Award”).

The text of the International Award traverses many terms and concepts developed by international investment law. In the following sections, we detail some such major concepts that were considered in the International Award.

**Bilateral Investment Treaties**
Bilateral Investment Protection Agreements ("BIPAs") or BITs are international treaties entered into between two sovereign states, under which the states reciprocally agree to accord certain standards of treatment to investors and investments made by nationals of the opposite party. The obligations that states undertake under BITs are governed by public international law, and are largely independent of the domestic legal systems. Practically, this means that if India violates a commitment in a BIT, in its treatment of a foreign investor, it may be held liable for violations of public international law, independent of the provisions of the domestic law of India.

India has 72 BITs / BIPAs in force with various countries, including the United Kingdom, Germany, Israel, Sri Lanka, Australia, Indonesia and Sudan. The Indian Model Text of Bilateral Investment Promotion and Protection Agreement ("Model BIPA") forms the base text for negotiation of India’s BITs / BIPAs[3]. The mix of capital exporting and capital importing counterparties suggests that the existence of a BIT ought to be a factor to be considered by foreign investors entering India, as well as by Indian companies investing abroad.

**Dispute Resolution under BITs**

BITs provide for a range of dispute resolution procedures, usually commencing from time-bound negotiations and use of diplomatic measures. On the failure of this step, several BITs provide for dispute resolution in terms of the International Convention for Settlement of Investment Disputes ("ICSID Convention"). The ICSID Convention limits the host state's invocation of the defence of sovereign immunity, and also provides for direct enforcement of awards rendered under its aegis.[4] Arbitrations under the ICSID Convention are administered by the International Centre for Settlement of Investment Disputes ("ICSID") based in Washington, DC. The ICSID also has a set of Additional Facility Rules for administration of disputes that involve non-contracting states.

India is not a party to the ICSID Convention. However, ICSID proceedings would be relevant in an Indian context in two situations – first, for an outbound Indian investor, in cases where the host country is party to the ICSID Convention; and second, in case India agrees to submit to arbitration under the Additional Facility Rules.
In spite of this, ICSID remains a focal point in the development of international investment arbitration, due to the number of published decisions available from disputes submitted before it. While decisions in ICSID arbitrations themselves have no precedential value, arbitrators, even in ad hoc tribunals often tend to follow the reasoning of prior decisions, leading to a certain consistency in the interpretation of the common terms in BITs. The most likely dispute resolution procedure for a BIT dispute, is an ad-hoc tribunal under the UNCITRAL Rules for arbitration. Since the proceedings are under an international treaty, the law applied is generally public international law, along with precedents developed in international investment law.

In the following sections, certain common clauses under which BIT claims are structured and defended are discussed in some detail.

**“Investment”**

The definition of “investment” is fundamental to the protection that a foreign party can claim under a BIT. The Model BIPA contains a wide, inclusive definition of the term, and covers intangibles such as the right to money, and the right to performance having financial value, as well as activities associated with investments[5]. The practical import of this is that most ventures of financial value made by a foreign party in India are likely to be protected under BITs.

In *White Industries*, White submitted that the definition of “investment” in the India-Australia BIT covered all its contractual rights under the Contract, its rights in relation to the Bank Guarantee, as well as its rights under the First Award. India argued that Contract was an ordinary commercial contract for the supply of goods and services, and as such would not qualify as an “investment”. It further submitted that only agreements that created rights in rem would qualify as an investment, and not commercial contracts that created rights in personam.

The Tribunal found that the *in rem / in personam* distinction was not borne out by the text of the India-Australia BIT. On merits, it found that White’s rights under the Contract did constitute an “investment”, and the First Award was a crystallisation of White’s rights under the Contract, thus also becoming a part of the “investment”. However, the Tribunal also noted that the Bank Guarantee “did not grant any substantive rights in favour of White”[6] and hence did not qualify as an “investment”.

Expropriation

Expropriation occurs when a government nationalizes or takes measures that have a similar effect, with regard to the rights or property of an individual. The prevention of expropriation is one of the foundational principles of international investment law, in accordance with which, the India-Australia BIT prohibited the host State from expropriating investments, other than for a public purpose, in a non-discriminatory, lawful manner and against payment of compensation[7].

In White Industries, White alleged that Indian Courts, by entertaining a set aside application in contravention of India’s international obligations, and by delaying its resolution over a period of over 6 years, effectively expropriated White’s rights under the Contract. India argued that as an investor, White should have been aware of the enforcement procedure for arbitral awards in India, and as such, White’s litigation strategy, designed with a view to prevent Indian Courts from reviewing the award, was itself a cause for the delay.

The Tribunal found that neither the value of White’s investment, nor its rights under the Contract, had been affected by the delay in enforcement or set aside proceedings. The Tribunal thus held that the delay in the proceedings did not amount to expropriation.

Fair & Equitable Treatment

The “fair and equitable” treatment standard, in international investment law, has grown to encompass a number of guarantees from the host country, including the requirement to fulfil the investor’s “legitimate expectations”, accord it due process and prevent “denial of justice”[8].

White made claims against India with regard to the first and third of these requirements. It alleged that India violated White’s legitimate expectations with regard to enforcement of the First Award, in accordance with the provisions of the New York Convention. It further alleged that India deviated from White’s legitimate expectations by failing to supervise Coal India with regard to its encashment of White’s bank guarantee. Furthermore, White alleged, that the Indian Courts’ “improper” exercise of jurisdiction to set aside the award, as well as the inordinate delay in the proceedings, amounted to a denial of justice.
The Tribunal dismissed both the claims. With regard to “legitimate expectations”, it found that White ought to have been aware of the nature of India’s legal system, both generally, as well as with regard to enforcement of arbitral awards. Hence, none of White’s expectations were violated either by India’s approach to foreign awards or by the delay caused.

With regard to denial of justice, the Tribunal noted that White would have to prove “egregious conduct, that shocks or at least surprises, a sense of judicial propriety”. In the absence of bad faith on India’s part the Tribunal found that White’s claim must fail.

“Most Favoured Nation” Clause

The key to the decision in the *White Industries* case was the “Most Favoured Nation” (“MFN”) clause in the India-Australia BIT. By means of an MFN clause, the host country agrees to treat investments from the counter party on a basis that is no less favourable than that accorded to investments from a third country. The problem with an unqualified MFN provision is that it practically allows importation of terms of BITs with third countries, into every other BIT, rendering country-specific negotiations redundant.

The India-Australia BIT, however, contained an unqualified MFN Clause[9]. By use of this clause, White argued that Article 4(5) of the India-Kuwait BIT, which obligated the host State to provide “effective means of asserting claims and enforcing rights” to investors, would be applicable in the India-Australia BIT. Further, White argued that this clause was nearly identical to Article II(7) of the US-Ecuador BIT, and in an arbitral decision under that BIT[10], the Tribunal had found that the standard was violated when the host state took an inordinate amount of time in allowing the investor to assert its rights.

India vigorously opposed this claim by arguing that that importing clauses from other BITs would violate the delicately negotiated balance of every BIT, each of which was set in specific circumstances. Furthermore, India submitted that the *Chevron-Texaco v Ecuador* decision was distinguishable on facts, and the alleged delay in the proceedings relating to the First Award in the present circumstances were not due to any deliberate acts on part of India, but were a natural consequence of White’s litigation strategy.
In spite of this, the Tribunal found in favour of White on this crucial point. It held that since India had failed to explain the special circumstances in the India-Kuwait BIT, and there was no specific carve out for Article 4(5) therein, the provision could be applied in the India-Australia BIT. Thereafter, the Tribunal carried out an extensive analysis of the “effective means” standard in international law, as well as the procedural history of White’s disputes before the Indian Courts. It found that the delay in the enforcement proceedings, before the Delhi High Court, was not a breach of the standard, but the delay in the set aside proceedings, of over 9 years, was not excusable. In particular, it found fault with “the Indian judicial system’s inability to deal with White’s jurisdictional claim... and the Supreme Court’s inability to hear White’s jurisdictional appeal for over five years” and held that the same was a breach of India’s international obligations.

**Enforcement**

While the judgment on India’s judicial system has received some attention from commentators, the main practical issue is the tangible result for White. The result of the entire proceedings for White is an international arbitral award rendered in London which is enforceable against the Republic of India. Since the International Award has not been challenged in the UK as of date, the main advantage that it brings to White is the ability to enforce the International award against India’s assets in foreign jurisdictions that are amenable to easy enforcement of arbitration awards, for example, in the UK, Singapore or Hong Kong. India is likely to have deeper pockets, as well as more foreign assets than Coal India, making White’s task easier. However, White will have to contend with vexed questions of sovereign immunity, before it can exercise such claims.

With regard to enforcement in India, White’s task does not appear to have become any easier. The International Award will be treated as a “foreign award”, and enforcement would be under Part II of the Act. However, since the BIT, which is the arbitration agreement between the parties, was entered into before the *BALCO* decision[12], the provisions of Part I of the Act would still apply and India could move to have the award set aside under Section 34 of the Act. In both enforcement and set aside proceedings, the stringent “public policy” tests[13] under the Act would apply, and given the nature of the remarks made on the judicial process in India, it appears doubtful that the International Award would actually be enforced.
In sum, while White has gained tactical advantage in terms of its remedies outside India, it might just have got itself into another series of proceedings within the country.

**Conclusion**

At an academic level, the decision in *White Industries* has been the subject of much comment for its observations on the Indian judicial system, as well as in respect of India’s compliance with the New York Convention. It is in fact arguable whether the decision would have gone any differently, had the law as elucidated in the *BALCO* decision applied at the time of White’s set aside proceedings. Several authors have noted that the Indian government ought to rethink its policy with regard to entering into BITs, and the government itself, has expressed an intention to alter its policy with regard to arbitration clauses in BITs.

At a more practical level, the decision in *White Industries* has made foreign investors to India, as well as outbound Indian investors, aware of the possibility of international investment arbitration as a mechanism to redress grievances against host governments. The process enables investors to bypass complex and prolonged litigation in the host states, and obtain reliefs against the host states that are likely to be enforceable in various countries.

In light of the foregoing, it appears that international investment arbitration is likely to gain increasing prominence. Akin to tax structuring, investors would profit substantially by “dispute structuring” their investments to gain the benefit of BITs between their home and host states.

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[4] Article 54 of the ICSID Convention: “Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State”

[5] Article 1(b) of the Model BIPA

[6] Paragraph 7.5.7 of the International Award

[7] Article 7 (1) of the BIT

[8] Waste Management, Inc. v United Mexican States, ICSID Case No. ARB(AF)/00/3

[9] Article 4 (2) of the BIT

[10] Chevron – Texaco v Ecuador, Partial Award on the Merits, March 30, 2010 (see Paragraph 4.4.5 of the International Award)


[12] Bharat Aluminium Company and Ors. etc. v Kaiser Aluminium Technical Service, Inc. and Ors. etc., (2012) 9 SCC 552