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"White Industries" and State Responsibility: Lesser-Known Facts about the Case as Discussed during the 2014 ICCA Young Arbitration Practitioners Conference

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It has been some time since the *White Industries Australia Limited v Republic of India* judgment was rendered against India in 2011. However, there remain several interesting aspects of the case still not widely known by the international arbitration community. For example, it is generally considered that this case was the first Investment Treaty Claim (ITA) against India. In fact, there was another ITA claim against India previously – the *Dabhol* case – which was related to a power project in the State of Maharashtra but was settled in 1996. This post seeks to set out some of the interesting aspects of *White Industries*, and their implications, in a digestible manner.

Background

White Industries arose from a commercial arbitration under the ICC Rules which resulted in an ITA under the UNCITRAL Rules. The Indian respondent, "Coal India", was a wholly owned subsidiary of a governmental undertaking by India. The ICC award was rendered against the Indian party and was sought to be enforced by *White Industries* in the Indian courts. Due to the predictable sluggishness of the Indian courts, the award would not be enforced for an estimated 10 years, as it remained in a pipeline of backlogged cases. This prompted *White Industries* to initiate an ITA against India under the India-Australia BIT.

Holding the Judiciary Accountable

The heart of the issue in the ITA was the enforcement delay of the award by the Indian courts. The most interesting fact was that *White* used a provision that did not exist in the India-Australia BIT. By relying on the "Most Favoured Nation" ("MFN") clause in the India-Australia BIT, *White* was able to treaty shop from the India-Kuwait BIT the provision that India should provide "*Effective means of asserting claims*".

There were seven contentious issues before the tribunal. Remarkably, out of the seven questions, only two were decided in favour of *White Industries* while the other five went against it. However, the two issues decided in favour of *White Industries* were pivotal in determining the case.

The issues are briefly discussed below.

1. Was *White Industries* an investor under the BIT?
YES; held that the ICC Award was the manifestation of rights under the contract, and would permit *White Industries* to avail itself of the protection afforded to an investment.

2. Could the acts of Coal India be attributed to India?
NO

3. Had India failed to encourage and promote "Favourable Conditions" for investors? [A sub-argument was whether the Indian judiciary breached the New York Convention by purporting to set aside awards made outside India, and was there denial of justice because of extraordinary delays?]
NO

4. Was Fair and Equitable Treatment ("FET") violated? Was there a frustration of *White Industries'* legitimate expectation? Did the judiciary's actions amount to a denial of Justice and was India therefore in breach of the FET standard under the Treaty?
NO

5. Had an expropriation taken place due to the award not being enforced?
NO; held that a determination of the validity of an expropriation had not yet occurred.

6. Did India fail to allow *White* freely to transfer funds related to Investment?
NO

7. Did the conduct of the judiciary amount to a failure to provide "*Effective means of Asserting Claims*"?
YES

As illustrated above, most of *White Industries'* arguments were centered on the delay of an enforcement of the commercial arbitration award and holding the judiciary responsible. None of the arguments succeeded except for one. Hence, although essentially the same issue pervaded all the questions, it only succeeded on one occasion. The tribunal relied on *Chevron-Texaco v. Ecuador* in holding that the standard to be applied in determining whether '*effective means of asserting claims*' were provided was less demanding than the standard required to prove that there has been a '*denial of justice*'.

Bumpy Road Ahead?

What are the chances going forward of a dispute arising from a private arbitration being covered under an ITA? It must be borne in mind that the respondent in the original ICC case pursued by *White Industries* was a completely separate legal commercial entity divorced from the State – although its parent company was a State-owned company – therefore, it was not regarded as an organ of the State. Further, it was argued by the Indian government that ordinary commercial contracts of the sort which was the subject of the case, do not constitute an 'investment'. However, the tribunal did not agree to this, citing lack of material submitted by the Indian side to support this jurisprudence. An argument was raised that an ITA arises from a contract where the rights are *in rem*, as opposed to *in personam* in a commercial contract such as this. Whilst this argument is a popular theory, it did not satisfy the tribunal that the contract was not an "investment".

Transparency

An important issue that arises, in this case, is transparency. Although widely regarded as the first ITA case which India lost, we have referred to the *Dhabol* case above which predates *White Industries*, and there is a possibility that there may be further earlier cases which never surfaced into the public domain. In fact, the *White Industries* decision only became public three months after the award was delivered due to leaked information. Presently, the judgment is still not available on the Indian government's official website.

Gearing up for setbacks

Another concern is the consequence of an "*Effective means of Asserting Claims*" provision. Interpreting the provision so as to make the judiciary liable in a milieu such as this is controversial, not least because there is a high possibility that when India was in a spree of signing BITs it did not appreciate the implications a clause such as this might have.

The readers may find more information about this case in the Journal of International Arbitration.

This entry was posted on Monday, June 30th, 2014 at 8:00 am and is filed under Arbitral Award, Arbitration Institutions and Rules, BIT, Enforcement, India, Investment, Investment Arbitration, Investment protection

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