



## International Arbitration

### ***White Industries v. India: Investment Arbitration as Last Resort to Overcome Hurdles in Enforcing Arbitral Awards***

By Sandra Friedrich

On November 30, 2011, a three-member *ad hoc* arbitral tribunal<sup>1</sup> rendered the first published investment treaty award against India in *White Industries Australia Limited v. India*. In a unanimous decision, the tribunal held that India's inordinate delay in enforcing an arbitral award violated the "effective means" standard incorporated by the most-favored-nation (MFN) provision of the 1999 India-Australia bilateral investment treaty (India-Australia BIT), and awarded White Industries Australia Limited (White Industries) A\$4.08 million, the amount due under the original award, plus interest.

#### **The Piparwar Mining Project and Related ICC Award**

In 1989, White Industries, an Australian mining company, entered into a long-term contract with Coal India Limited (Coal India), a State-owned Indian company, for the supply of equipment to and the development of a coal mine near Piparwar in India's northeastern state of Bihar (the Mining Contract). Disputes relating to bonus and penalty payments as well as to the quality of the extracted coal arose between Coal India and White Industries, prompting the latter to commence arbitral proceedings under the ICC Arbitration Rules in 1999.<sup>2</sup> In a majority decision, the ICC tribunal awarded A\$4.08 million to White Industries in May 2002 (the ICC Award).

In September 2002, Coal India applied to the Calcutta High Court to set aside the ICC Award under the 1996 Indian Arbitration and Conciliation Act (the set-aside proceedings). Nearly simultaneously, White Industries applied to the New Delhi High Court to enforce the ICC Award in India (the enforcement proceedings). Both proceedings experienced significant delays. The enforcement proceedings were eventually stayed pending a decision in the set-aside proceedings. After nearly 10 years in the Indian courts, these proceedings were still pending before the Indian Supreme Court, and as of April 2012 no hearing date had been set to resolve them.

#### **The UNCITRAL Arbitration Under the India-Australia BIT**

After years of fruitless attempts to enforce the ICC Award in the Indian courts, White Industries commenced arbitration proceedings against India in 2010 under the India-Australia BIT (the BIT Arbitration), claiming that the inordinate delay resulted in a breach of the provisions on fair and equitable treatment (FET), expropriation, the "effective means" standard incorporated by the MFN clause and free transfer of funds under the treaty.

#### **Initial Jurisdictional Hurdle:<sup>3</sup> The Mining Contract as an Investment, and the ICC Award as Its "Continuation"**

**Mining Contract as an Investment under the BIT.** India argued in the BIT Arbitration that the Mining Contract at issue was "an ordinary commercial contract for the supply of goods and services," and therefore did not constitute an investment under the India-Australia BIT.<sup>4</sup> However, the tribunal held that White Industries' contractual rights fell squarely within the definition of investment in the India-Australia BIT, which included "right[s] to money or to any performance having a financial value."<sup>5</sup>

The tribunal clarified that the dispute was “not subject to the ICSID Convention,” and stated that the so-called *Salini* test, which “imposes a higher standard” for defining investment under the ICSID Convention was “simply not applicable.”<sup>6</sup> Nonetheless, the tribunal noted that White Industries’ commitment under the Mining Contract “extended far beyond the provision of equipment and technical services” because White Industries provided its own working capital, equipment and technical know-how, hired and trained local workers, and bore the financial risk of rising costs and penalties for inadequate performance under the eight-year contract.<sup>7</sup> Thus, even though the dispute did not arise under the ICSID Convention, the tribunal considered that the investment would satisfy the *Salini* criteria.<sup>8</sup>

**ICC Award as “Continuation” of the Original Investment under the BIT.** Relying on *GEA Group Aktiengesellschaft v. Ukraine*,<sup>9</sup> India argued in the BIT Arbitration that White Industries’ rights under the ICC Award itself were not protected as an investment under the India-Australia BIT.<sup>10</sup> The *White Industries* tribunal considered this statement *obiter dicta*, and in any case rejected the position of the *GEA v. Ukraine* tribunal as “incorrect departure from the developing jurisprudence.”<sup>11</sup> While the *White Industries* tribunal did not characterize the award *itself* as an investment, it extended BIT protections to the continuing interests the investor held in the original investment. Thus, the India-Australia BIT protected White Industries’ rights under the ICC Award as “a continuation or transformation of the original investment.”<sup>12</sup>

### **On the Merits: Lengthy Delays in Enforcing the ICC Award Violated “Effective Means” Standard, but not Fair and Equitable Treatment or Expropriation Standard of the India-Australia BIT**

**Lengthy Delays in Enforcing ICC Award Breached “Effective Means” Standard Imported Through the MFN Clause.** The tribunal considered that, through the MFN clause in the India-Australia BIT, White Industries could invoke India’s obligation to provide investors with “effective means of asserting claims and enforcing rights” contained in the 2001 Kuwait-India BIT.<sup>13</sup> The tribunal considered that the “effective means” standard was a forward-looking, “distinct and potentially less demanding test, in comparison to denial of justice.”<sup>14</sup> The tribunal also noted that the “effective means” standard was “measured against an objective, international standard,” which focuses on “whether the system of laws and institutions work effectively at the time the promisee seeks to enforce its rights/make its claim.”<sup>15</sup> Thus, White Industries’ knowledge of delays in the Indian court system—while thwarting its denial of justice claim discussed in more detail below—did not undermine its “effective means” claim. As to the set-aside proceedings, the tribunal “had no difficulty in concluding the Indian judicial system’s inability to deal with White’s jurisdictional claim in over nine years . . . amounts to undue delay and constitutes a breach of India’s voluntarily assumed obligation of providing White with ‘effective means’ of asserting claims and enforcing rights.”<sup>16</sup> However, the tribunal ruled the delay in the enforcement proceedings did not constitute a breach of the “effective means” standard because White Industries had not taken all means available to it, such as an appeal of the stay order, to prevent such delay.<sup>17</sup> While the tribunal gave consideration to India’s “developing” economy when assessing White Industries’ denial of justice claim,<sup>18</sup> the tribunal noted that “the relevance of the State’s population or the current operation of its court system(s) (in assessing the undueness of a delay) is limited” when evaluating the “effective means” claim.<sup>19</sup>

### **India Provided Fair and Equitable Treatment Based on White Industries’ Legitimate Expectations.<sup>20</sup>**

White Industries claimed that India breached the FET standard by frustrating its legitimate expectations that Indian courts would reject Coal India’s set-aside application under the New York Convention and enforce the ICC Award in a reasonably timely manner.<sup>21</sup> However, the tribunal held that such legitimate expectations would only have arisen out of a specific, “unambiguous affirmation to the effect by India,” which was not the case.<sup>22</sup> The tribunal noted that in any case White Industries “could not legitimately have expected India would ‘apply the [New York] Convention properly and in accordance with international standards’” and should have known that “the domestic court structure in India was overburdened.”<sup>23</sup> The tribunal also emphasized that “an investor must . . . take a host State (including its court system) as it finds it.”<sup>24</sup> As for India, the tribunal noted that it was known to be “a developing country with a population of over 1.2 billion people with a seriously overstretched judiciary.”<sup>25</sup> Based on White Industries’ knowledge of the conditions of the Indian court system, the tribunal rejected its claim that the excessive delays amounted to a denial of justice, thus confirming that the relevant test is a stringent one.<sup>26</sup>

**No Expropriation While Case Pending in Indian Courts.** Finally, the tribunal swiftly rejected White Industries' expropriation claim, as "neither the value of White's investment . . . nor its rights under the Contract . . . have been substantially affected by the fact that the Indian Courts have yet to dispose" of the set-aside and enforcement applications. In brief, since the ICC Award "has not been 'taken,'" there could be no expropriation.<sup>27</sup>

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As the first published investment-treaty ruling against India, the *White Industries* case will likely increase awareness of the potential of India's BITs to be used by prospective claimants against India.<sup>28</sup> The tribunal's ruling in *White Industries* indicates that an investor may, in certain circumstances, seek recovery through investment arbitration, where a State (usually through its judiciary) has interfered with the enforcement of an arbitral award.<sup>29</sup> While investors may have to take the host State's court system "as is" under the FET standard, they are entitled to expect that the host State will provide "effective means" for the enforcement of rights in its courts, where the State has undertaken to do so.

Ultimately, the investor's likelihood of success will largely depend on the wording of the relevant BIT and must be determined on a case-by-case basis. The BIT should include either an "effective means" provision, which is relatively rare, or an MFN clause, as in *White Industries*, through which an "effective means" provision may be imported from another BIT. Moreover, the investor's chances of success will depend on the tribunal's willingness to accept that a prior arbitral award may constitute an investment (or continuation thereof) under the relevant BIT.<sup>30</sup>

#### Endnotes

- <sup>1</sup> The tribunal was constituted under the UNCITRAL Arbitration Rules and composed of J. William Rowley QC (chairman), the Hon. Charles N. Brower and Christopher Lau SC. The seat of the UNCITRAL arbitration was Singapore, but the hearings were held in London for convenience.
- <sup>2</sup> The tribunal was constituted under the ICC Arbitration Rules and composed of Max Abrahamson (chairman), Trevor Morling QC and Justice Jevan Reddy. The seat of the ICC arbitration was Paris, but the hearings were held in London for convenience.
- <sup>3</sup> The tribunal also held that that Coal India's conduct—its call on the bank guarantees and challenge of the ICC Award in the Indian courts—could not be attributed to India because Coal India was neither a State organ nor did it exercise governmental authority nor was it controlled by India as required under the International Law Commission's Articles on Responsibility of States for Intentionally Wrongful Acts. *White Industries Australia Limited v. India*, UNCITRAL (India-Australia BIT), Award, Nov. 30, 2011, ¶¶ 8.1.1 *et seq.* Therefore, White Industries' claims that India Coal's call on the bank guarantees breached the India-Australia BIT, which guaranteed fair and equitable treatment and free transfer of funds, and protected investors from expropriation, failed. *Id.* ¶¶ 10.2, 10.3.8, 10.4.2, 12.2.1, 13.1.1-13.2.4.
- <sup>4</sup> *Id.* 5.1.5.
- <sup>5</sup> *Id.* 7.3.8 *et seq.*
- <sup>6</sup> *Id.* 7.4.9.
- <sup>7</sup> *Id.* 7.4.10 *et seq.*
- <sup>8</sup> *Id.* 7.4.19. White Industries also provided Coal India with performance bank guarantees, which entitled the latter to immediate payments should White Industries default on its obligations under the Mining Contract. The tribunal found that these bank guarantees, standing alone, did not constitute an investment under the India-Australia BIT because they did not provide White Industries with "substantive rights" and thus could not be considered White Industries' "asset." *Id.* ¶ 5.1.15.
- <sup>9</sup> *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, March 31, 2011, ¶ 161 (stating that an award "in and of itself cannot constitute an 'investment'"). Latham & Watkins represented respondent Ukraine in this proceeding.
- <sup>10</sup> *White Industries*, 7.6.6.
- <sup>11</sup> *Id.* ¶ 7.6.8.
- <sup>12</sup> *Id.* ¶ 7.6.8.
- <sup>13</sup> *Id.* ¶¶ 11.2.1 *et seq.*
- <sup>14</sup> *Id.* ¶¶ 11.3.2(a), 11.3.3.
- <sup>15</sup> *Id.* ¶¶ 11.3.2(f), 11.14.16, n. 78.
- <sup>16</sup> *Id.* ¶¶ 11.4.16-11.4.20.
- <sup>17</sup> *Id.* ¶¶ 11.4.4-11.4.15.
- <sup>18</sup> *Id.* ¶ 10.4.18.
- <sup>19</sup> *Id.* ¶ 11.14.16 n. 78.

<sup>20</sup> The tribunal also rejected White Industries' claims that India breached its obligation under the India-Australia BIT to "encourage and promote favourable conditions for investors" because the provision "lack[ed] sufficient content to be treated as a stand-alone, positive commitment giving rise to substantive rights." *Id.* ¶ 9.2.12; *but see Italy v. Cuba*, Ad hoc (Italy-Cuba BIT), Final Award, Jan. 15, 2008 (holding that a similar provision in the Italy-Cuba BIT created an enforceable obligation).

<sup>21</sup> *White Industries*, ¶ 10.3.1.

<sup>22</sup> *Id.* ¶¶ 10.3.2 *et seq.*

<sup>23</sup> *Id.* ¶¶ 10.3.13, 10.3.14.

<sup>24</sup> *Id.* ¶ 10.3.15.

<sup>25</sup> *Id.* ¶ 10.4.18.

<sup>26</sup> *Id.* ¶ 10.4.8.

<sup>27</sup> *Id.* ¶ 12.3.6.

<sup>28</sup> It should be noted that the Indian Department of Industrial Promotion and Policy (DIPP) recently announced that it would exclude investor-State arbitration clauses from the country's future trade agreements. See Asit R. Mishra, "India May Exclude Clause on Lawsuits from Trade Pacts", Live Mint/*The Wall Street Journal* (Jan. 29, 2012), available at <http://www.livemint.com/articles/2012/01/29231517/India-may-exclude-clause-on-la.html> (last visited June 7, 2012). The DIPP explained that "[t]his is now the view worldwide that the State should not get drawn into private disputes . . . That's why we are cautioning to be more careful." *Id.*

<sup>29</sup> See also *Saipem S.p.A. v. Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction, March 21, 2007, ¶¶ 129 *et seq.*; *Saipem S.p.A. v. Bangladesh*, ICSID Case No. ARB/05/07, Award, June 30, 2009, ¶¶ 110, 122 (holding that "the right to arbitrate and the rights determined by the Award are capable in theory of being expropriated"); *Frontier Petroleum Services v. Czech Republic*, UNCITRAL (Canada-Czech Republic BIT), PCA, Final Award, Nov. 12, 2010, ¶¶ 231, 525 (holding that "by refusing to recognize and enforce" an arbitral award, respondent may "have affected the management, use, enjoyment, or disposal by Claimant of what remained of its original investment" in violation of the BIT); see also *ATA Construction, Industrial and Trading Company v. Jordan*, ICSID Case No. ARB/08/2, Award, May 18, 2010, ¶ 125 (holding that "[t]he extinguishment of the Claimant's right to arbitration by the Jordanian courts . . . violated both the letter and the spirit of the Turkey-Jordan BIT"); *but see GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, March 31, 2011, ¶¶ 231-238, 311-319, 324 (stating in *obiter dicta* that the non-enforcement of an arbitral award by Ukrainian courts did not amount to expropriation or denial of justice).

<sup>30</sup> See, e.g., *Saipem S.p.A. v. Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction, March 21, 2007, ¶ 127 (holding that an ICC arbitral award "crystallized the parties' rights and obligations under the original contract," which in turn constituted an investment under the BIT); *Romak S.A. v. Uzbekistan*, PCA Case No. AA280, Award, Nov. 26, 2009, ¶ 211 (holding that a GAFTA arbitral award was "inextricably linked" to the underlying contract and constituted an "embodiment" of claimant's contractual rights); *ATA Construction, Industrial and Trading Company v. Jordan*, ICSID Case No. ARB/08/2, Award, May 18, 2010, ¶¶ 115-17 (holding that "the right to arbitrate [was] a distinct 'investment' within the meaning of the BIT"); see generally *Mondev Int'l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, Oct. 11, 2001, ¶ 81 ("[T]he intent of NAFTA is evidently to provide protection of investments throughout their life-span . . ."); *but see GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, March 31, 2011, ¶ 161 (holding that an award "in and of itself cannot constitute an 'investment'" under the BIT or the ICSID Convention).

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