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AWARD: A CRITICAL ASSESSMENT***

*SUMEET KACHWAHA*

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LCIA  
70 Fleet Street  
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# THE *WHITE INDUSTRIES* *AUSTRALIA LIMITED – INDIA BIT* AWARD: A CRITICAL ASSESSMENT

by SUMEET KACHWAHA\*

## ABSTRACT:

*In recent times, the White Industries – India Award<sup>1</sup> (BIT Award) has created quite a stir. In short, it holds India liable for damages for judicial delays of over nine years in enforcing an ICC Award between White Industries Australia Ltd. (White) and an Indian Government company, Coal India. The delay in enforcement by the Indian courts was held to deprive the Australian investor of ‘effective means of asserting claims and enforcing rights’ – an obligation contained in the Kuwait-India BIT, which the Tribunal held the Australian investor could take advantage of, relying on the most favoured nation (MFN) clause in the bilateral investment treaty between Australia and India.*

*The BIT Award has far reaching implications. At one level, it is an indictment of the Indian judicial system (as one not affording ‘effective means of asserting claims and enforcing rights’). At another, it opens the doors to disappointed foreign litigants to seek similar relief and make court delays and other judicial shortcomings actionable per se. The Award throws up jurisprudential issues of the role, responsibility and independence of national courts and brings into focus the future of BITs and BIT arbitrations.<sup>2</sup>*

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\* Sumeet is a partner in the New Delhi based firm, Kachwaha & Partners (skachwaha@kaplegal.com). He recently concluded a three-year term as Chair of the Dispute Resolution & Arbitration Committee of the IPBA (Inter-Pacific Bar Association). Currently, he is a Vice President of APRAG (Asia Pacific Regional Arbitration Group) and a Member of the Advisory Board of the KLRCA (Kuala Lumpur Regional Centre for Arbitration). Sumeet is grateful to Ms Ankit Khushu, Associate, Kachwaha & Partners for her research and editorial assistance.

<sup>1</sup> Final award dated 30 Nov. 2011 (Award) in the matter of UNCITRAL arbitration under the Agreement between the Government of Australia and the Government of Republic of India on the promotion and protection of investment (Treaty). In this article, the Award is referred to as ‘BIT Award’ or the ‘White Award’. The arbitral tribunal is referred to as the ‘BIT Tribunal’ or the ‘White Tribunal’, and the Treaty is referred to as the ‘Australia – India BIT’.

<sup>2</sup> See opening address by the Attorney General of Singapore, Mr Sundaresh Menon, Senior Counsel; ICCA Congress 2012: ‘International Arbitration: the coming of a new age for Asia (and elsewhere).’ The Attorney General stated that cases (like White Industries) ‘illustrate that an entirely new source of State accountability has emerged’ (para. 16).

*Some issues which come up are: if an arbitral award is an 'investment' under Bilateral Investment Treaties; does an MFN clause extend to incorporation of a third-party treaty; scope of the 'effective means of asserting claims and enforcing rights' clause – and more particularly if it furnishes a cause of action to an investor if the host country's judicial system and institutions fall short of an 'objective international standard'.*

*This article presents a critical analysis of the BIT Award and my views as to why it is erroneous and ought not to become a precedent in investment arbitrations.*

#### BACKGROUND FACTS:

On 28 September 1989, White entered into a contract with Coal India (a Government of India Public Sector Undertaking) for the supply of equipment and development of a coal mine in India. The contract was governed by Indian law and contained an arbitration clause requiring disputes to be settled as per the ICC Arbitration Rules. Disputes and differences arose between the parties and the same were referred to arbitration in London resulting in an award dated 27 May 2002 in White's favour (hereinafter 'ICC Award').

On 6 September 2002, Coal India applied to the High Court of Calcutta to have the ICC Award set aside.<sup>3</sup> Unaware of this application, White moved the High Court of Delhi on 11 September 2002 to have the ICC Award enforced.<sup>4</sup> When White became aware of Coal India's application to set aside the ICC Award, it applied to the Supreme Court of India to transfer the Calcutta High Court proceedings to the High Court of Delhi and also applied for an interim stay of the Calcutta proceedings.<sup>5</sup> On 29 October 2002, the Supreme Court of India granted an ex parte order staying the Calcutta proceedings. On 2 January 2003, Coal India's application to have the ICC Award set aside came up for hearing before the Calcutta High Court but could not be heard in view of the Supreme Court's stay order. On 20 January 2003, the transfer petition was heard by the Supreme Court of India. The BIT Award records that the Supreme Court advised White that it was inclined to dismiss its transfer petition, whereupon White withdrew the same.<sup>6</sup>

It may be stated as an aside that White's transfer petition was misconceived to begin with. The law is clear that if an issue is 'directly and substantially in issue' between the parties in a previously instituted suit, then 'no Court shall proceed with the trial' of the subsequent suit.<sup>7</sup> This principle rests on the rule of *res sub judice* i.e. courts of concurrent jurisdiction should not simultaneously try two parallel suits with respect to the same matter in issue. White's enforcement application in

<sup>3</sup> This was under Section 34 of the Arbitration and Conciliation Act, 1996 (Act). Section 34 applies to arbitrations seated in India. Recourse by Coal India to this provision is explained hereafter.

<sup>4</sup> This was under Section 48 of the Arbitration Act (enforcement of foreign awards, under the New York Convention).

<sup>5</sup> The Supreme Court of India has jurisdiction if a transfer is sought from one High Court to another; Section 25 of the Code of Civil Procedure, 1908.

<sup>6</sup> Paragraph 3.2.48 of the BIT Award at p. 21.

<sup>7</sup> Section 10 of the Code of Civil Procedure, 1908.

the High Court of Delhi was filed subsequent to Coal India's set aside application in Calcutta and therefore it could not have been proceeded with in a different forum. White could have of course sought a transfer of the Delhi proceedings to Calcutta and have both applications heard together. White instead lost time in trying to have the Calcutta proceedings transferred to Delhi (a move doomed to fail from the start). White's ultimate withdrawal of its transfer petition from the Supreme Court was a tacit admission that its legal move was misconceived.

Upon withdrawal and dismissal of White's transfer application, the Calcutta setting aside of ICC Award proceedings should have re-commenced, and White should have sought a transfer of its enforcement application filed in the Delhi High Court to the Calcutta High Court (so that both could be heard together). However it did not happen like that. White instead applied to the Calcutta High Court on 10 March 2003 seeking rejection of Coal India's setting aside application (of the ICC Award), on the ground of lack of jurisdiction (i.e., a set aside proceeding is not maintainable in relation to a foreign award).

On 17 November 2003, a single Judge of the Calcutta High Court heard White's challenge on jurisdiction and by an order dated 19 November 2003 rejected the same. White appealed this to a Division Bench of the Calcutta High Court. The appeal was also dismissed on 7 May 2004. It may be mentioned that since the judgment of the Supreme Court in *NTPC v. Singer*,<sup>8</sup> (*NTPC*) a view taken in India was that Indian courts would have jurisdiction to entertain an application to set aside a foreign award if the law governing the contract and the law governing the agreement to arbitrate were the laws of India. However this law was stated under the previous Arbitration Act of 1940.<sup>9</sup> India promulgated a new Arbitration Act in 1996. The new Act is a composite piece of legislation providing *inter alia* for domestic and international arbitration and enforcement of foreign awards. It distinguishes between domestic and foreign arbitrations solely on the basis of the seat of the arbitration. If the place of arbitration is in India, it would be a domestic arbitration and governed by Part I of the Act and if the place of arbitration is outside India, it would be a foreign arbitration and governed by Part II thereof. Part I of the Act contains a provision for setting aside a domestic award,<sup>10</sup> but there is no provision for setting aside an award in Part II – the only provision being to enforce (or refuse to enforce) a foreign award.<sup>11</sup>

Hence, subsequent to the 1996 Arbitration Act some High Courts started taking a view that a foreign award could not be set aside by Indian courts. An interesting development however took place in the year 2002, when a three-judge Bench of the Supreme Court, in the case of *Bhatia International v. Bulk Trading S.A.*<sup>12</sup> held that the domestic law provisions (i.e., Part I of the Act) could be extended to foreign arbitrations as well, unless the parties have expressly or impliedly excluded

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<sup>8</sup> (1992) 3 SCC 551.

<sup>9</sup> (Act No. 10 of 1940).

<sup>10</sup> Section 34 of the Act.

<sup>11</sup> Section 48 and 49 of the Act.

<sup>12</sup> (2002) 4 SCC 105 (*Bhatia*).

application of the said Part. This judgment was in the context of Section 9 of the Act providing for interim measures of protection from courts. *Bhatia* furnished a basis for some High Courts (notably the High Court of Gujarat) to take a view (following *NTPC*) that where there is an express choice of Indian law, Indian courts could entertain applications for setting aside of foreign awards, applying the domestic law provisions for the same.<sup>13</sup> The rulings of the Single Judge of the Calcutta High Court and thereafter of the Division Bench, rejecting White's jurisdictional challenge to the set aside application were in this scenario.

On 31 July 2004, White appealed the decision of the Division Bench of the Calcutta High Court to the Supreme Court of India<sup>14</sup> and also sought interim stay of the Calcutta proceedings. The Supreme Court granted leave to appeal but refused to stay the Calcutta High Court set aside proceedings.<sup>15</sup>

In the meanwhile, White's enforcement application continued to come up before the High Court of Delhi from time to time. On 9 March 2006, following an oral hearing, the Delhi High Court directed that the enforcement proceedings be stayed *sine die* with leave to White to revive the same upon a decision of the Supreme Court of India or of the High Court of Calcutta. The decision of the High Court of Delhi rested on Section 10 of the Code of Civil Procedure, 1908 (referred to above)<sup>16</sup> and the need to avoid conflicting decisions between two High Courts and also considered that the Supreme Court while granting White leave to appeal had refused to stay the Calcutta proceedings. White did not appeal the decision of the High Court of Delhi staying its enforcement proceeding *sine die*. White also did not avail of its alternative remedy of having the Delhi (enforcement) proceeding transferred to Calcutta (so that the set aside proceedings and the enforcement proceedings could be heard together and the matter proceed). Clearly White preferred to wait out the outcome of its Supreme Court appeal while the Calcutta and Delhi proceedings came to a standstill. It would seem that there was some forum shopping on the part of White in neither applying for the Delhi proceedings to be transferred to Calcutta nor proceeding with the Calcutta set aside proceedings on merits.

On 10 January 2008, an important development took place. The Supreme Court of India handed out a decision in the case of *Venture Global Engineering v. Satyam Computer Services Ltd.*<sup>17</sup> (*Venture Global*). Here the Supreme Court settled the divergent views amongst the various High Courts of India and held (applying *Bhatia*) that Indian courts had jurisdiction to entertain an application to set aside a foreign award on the basis of the domestic law provisions of the Act. This decision was no doubt controversial.

Six days later, on 16 January 2008, White's appeal (against the order of the Division Bench of the High Court of Calcutta) came up for hearing before the

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<sup>13</sup> *Nirma Ltd. v. Lurgi Energie Und Entsorgung GmbH*; AIR 2003 Guj 145.

<sup>14</sup> Paragraph 3.2.59 of the BIT Award at p. 24.

<sup>15</sup> Paragraph 11.4.4 of the BIT Award at p. 115.

<sup>16</sup> *Supra* n. 7.

<sup>17</sup> (2008) 4 SCC 190.

Supreme Court of India. Normally the Supreme Court should have made short work of the appeal in view of its very recent decision in *Venture Global* (following a three-judge Bench decision in *Bhatia*). However the two judges who heard the matter differed. The Court passed the following order:

In the midst of hearing of these appeals, learned counsel for the appellant has referred to the three-Judges Bench decision of this Court in *Bhatia International Vs. Bulk Trading S.A. & Anr.*, (2002) 4 SCC 105. The said decision was followed in a recent decision of two Judges Bench in *Venture Global Engineering Vs. Satyam Computer Services Ltd. & Anr.* 2008 (1) Scale 214. My learned brother Hon'ble Mr. Justice Markandey Katju has reservation on the correctness of the said decisions in view of the interpretation of Clause (2) of Section 2 of the Arbitration and Conciliation Act, 1996. My view is otherwise.

Place these appeals before Hon'ble CJI for listing them before any other Bench.<sup>18</sup>

By this process, White's appeal (which normally should have been dismissed on 16 January 2008 itself) got a fresh lease of life, and this (as subsequent events would show) became a turning point in the case.

White knew or ought to have known that the process of constituting a larger Bench would take time. First the Chief Justice of India would constitute a special Bench of three judges and if they thought it fit, the matter would again be placed before the Chief Justice to constitute a five-judge Bench (Constitution Bench). This process was necessary as *Bhatia* was a decision of three judges, and in the first instance a three-judge Bench would decide if it warranted a review by a larger Bench.

On 1 November 2011, White's appeal came up for hearing before a three-judge Bench. The Court felt that the matter deserved to be referred to a Constitution Bench, and accordingly the matter was referred to and finally heard by a Constitution Bench of the Supreme Court of India on various dates beginning from 10 January 2012.<sup>19</sup> However all this became academic as in the meanwhile White ran out of patience with the Indian judicial system. On 10 December 2009 (within less than two years of the Supreme Court agreeing to reconsider *Venture Global* and refer its appeal to a larger Bench<sup>20</sup>) White wrote to India contending that 'by action of its courts . . . it had breached the provisions of . . . the BIT' and asserted claims exceeding AUD 10 million towards loss and damages.<sup>21</sup>

It needs to be stated that White chose to wait out the entire period it took for the Single Judge; the Division Bench of the Calcutta High Court and the Supreme Court of India to decide its application as to the jurisdiction of Indian courts to entertain a set aside application. Once there were two concurrent decisions of the High Court against it, common sense would have dictated that it should in the meanwhile have proceeded with the matter on merits. White did ask the Indian Supreme Court to stay the Calcutta proceedings at the time of grant of leave to appeal (in July 2004), but the Court declined to do so. Further on 10 January 2008,

<sup>18</sup> Supreme Court record of proceedings in Civil Appeal No. 7019 of 2005 dated 16 Jan. 2008.

<sup>19</sup> Supreme Court record of proceedings in Civil Appeal No. 7019 of 2005 dated 1 Nov. 2011 and 10 Jan. 2012.

<sup>20</sup> *Supra* n. 17.

<sup>21</sup> Paragraph 3.2.64 of the BIT Award at p. 25.

the Supreme Court upheld the jurisdiction of Indian courts to set aside a foreign arbitral award.<sup>22</sup> In such situation for White not to have proceeded with the case on merits was a decision of its own. White took this decision in a scenario when it knew or ought to have known that the process of referring the matter from two Judges of the Supreme Court to three and thereafter (if they so agreed) from three to five would consume time. Moreover, the usual practice in the Supreme Court in such situation is to move an application before the Chief Justice of India for constitution of a special Bench.<sup>23</sup> White moved no such application.

In such situation, to my mind, White's complaint of delay loses its legitimacy and the dispute its factual foundation.

Considering that the entire cause of action rested on delay, one would have expected the BIT Tribunal to reflect in some detail if there was any legitimate reason for the same and if steps could have been taken by White to mitigate delay. The Tribunal did advert to early hearing applications made by White in 2006 and 2007 and held that having done so White had, '*done everything that could reasonably be expected of it to have the Supreme Court deal with its appeal in a timely manner*'.<sup>24</sup> The Tribunal did not advert as to why White did nothing to set in motion the process of setting up a special three-judge Bench and thereafter a Constitution Bench to hear the appeal. The Tribunal quoted the following passage from White's counsel's closing speech:

It (White) has already been granted the right to any early appeal. That happened, comically, five and a half years ago. The matter sits in the court's weekly list, which is where expedited appeals go.<sup>25</sup>

I do not see this as a fair comment. Whatever comic relief White derived could not have been a substitute for it not doing what is normally required to be done in such situation in India. The 2006 or 2007 early hearing applications had clearly become infructuous in view of the subsequent developments of 16 January 2008 referring the matter to a larger bench.<sup>26</sup> It is also no answer as to why White did not get on with the matter on merits in Calcutta while its appeal was pending in the Supreme Court, (especially considering that a stay of the Calcutta proceedings was asked for from the Supreme Court but declined way back in 2004).

<sup>22</sup> *Supra* n. 17.

<sup>23</sup> The Supreme Court of India has a sanctioned strength of thirty-one judges (though the actual strength may be lower). The Court normally sits in divisions of two judges each. From time to time, special Benches of three judges are constituted to take up matters where a two judge Bench may have differed, or there are conflicting views of the Court on a point. Similarly, from time to time, Constitutional Benches (comprising of five judges) are constituted to hear cases of grave significance.

The constitution and timing of a three- or five-judge Bench is purely at the administrative discretion of the Chief Justice of India and also depends on the urgency demonstrated in a matter. It is usual for an appellant to move an application seeking urgent constitution of a special Bench (though such endeavours meet with mixed results).

<sup>24</sup> Paragraph 11.4.18 of the BIT Award at p. 118.

<sup>25</sup> Paragraph 11.4.18 of the BIT Award at p. 118.

<sup>26</sup> *Supra* n. 18.

The Supreme Court of India granted a rare indulgence to White by agreeing to reopen its recent decision (then barely six days old). In less than two years (on 10 December 2009) White invoked the Australia-India BIT contending that Articles 3, 4, 7 and 9 thereof stood breached.<sup>27</sup>

*IS THE ICC AWARD IN WHITE'S FAVOUR AN  
'INVESTMENT' UNDER THE BIT?*

This was the first issue before the BIT Tribunal: Essentially, White's cause of action (in the BIT arbitration) was based on non-enforcement by India of its ICC Award. Hence it was necessary for it to establish that an award in itself constitutes an investment under the BIT. If the ICC Award was not an investment, it was not entitled to any protection under the BIT and nor could any alleged breach relating thereto (by India) be an arbitrable dispute.

The BIT Tribunal did not directly decide this issue. Relying on *Saipem S.p.A. v. The People's Republic of Bangladesh*<sup>28</sup> (*Saipem*), it concluded that, '*...rights under the Award constitute part of White's original investment (i.e., being a crystallization of its rights under the Contract) and, as such, are subject to such protection as is offered to investments by the BIT.*'<sup>29</sup>

It may be pointed out that in *Saipem*, the cause of action did not rest on an award in itself.<sup>30</sup> This is clear from para 110 of *Saipem* which states:

'Finally, the Tribunal wishes to emphasize that for the purpose of determining whether there is an investment under Article 25 of the ICSID Convention, it will consider the entire operation. In the present case, the entire or overall operation includes the Contract, the construction itself, the Retention Money, the warranty and the related ICC Arbitration.'

In contrast, in *White*, the cause of action rested purely on the ICC Award. Further, *Saipem* made it clear (in the context of Article 25(1) of the ICSID Convention) that an award by itself does not constitute an investment. It held:

'The Tribunal agrees with Bangladesh that the rights arising out of the ICC Award arise only *indirectly* from the investment. Indeed, the opposite view would mean that the Award itself does constitute an investment under Article 25(1) of the ICSID Convention, which the Tribunal is not prepared to accept.'<sup>31</sup> (emphasis in original).

<sup>27</sup> Article 3 provides for a 'fair and equitable' treatment. Art. 4 contains the MFN clause, on the basis of which White wished to import the 'effective means of asserting claims and enforcing rights' found in the Kuwait-India BIT. Art. 7 provides for exportation and Art. 9 for free transfer of funds.

<sup>28</sup> *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07; Decision on Jurisdiction and Recommendation on Provisional Measures dated 21 Mar. 2007.

<sup>29</sup> Paragraph 7.6.10 of the BIT Award at p. 82.

<sup>30</sup> In *Saipem*, the Tribunal was concerned with an alleged State expropriation. The facts briefly being that an ICC tribunal was enjoined by local courts from proceeding with an arbitration. The injunction was ignored by the tribunal and various adverse orders from local courts were not appealed against by Saipem. In such a situation, the Supreme Court of Bangladesh refused to set aside the final arbitration award holding that the same is non-existent in the eyes of law and is not capable of being enforced.

<sup>31</sup> Paragraph 113 of *Saipem* at p. 31.

Having held that the award does not constitute an investment and that the rights arising out of the award arise only ‘indirectly’ from the investment, the *Saipem* Tribunal went on to consider if a ‘credit for sums of money’ within the meaning of Article 1(1)(c) of the Italian-Bangladesh BIT (with which it was concerned) can be found in the award between the parties. In this context, the *Saipem* Tribunal held that in its ‘ordinary meaning’ the words ‘credit for sums of money’ would:

. . . also cover rights under an award ordering a party to pay an amount of money: the prevailing party undoubtedly has a credit for a sum of money in the amount of the award.

This said, the rights embodied in the ICC Award were not created by the Award, but arise out of the Contract. The ICC Award crystallized the parties’ rights and obligations under the original contract. It can thus be left open whether the Award itself qualifies as an investment, since the contract rights, which are crystallised by the Award constitute an investment within Article 1(1)(c) of the BIT.<sup>32</sup>

It would thus be seen that *Saipem* clearly distances itself from holding that an Award is itself an investment (both under ICSID as well as under the BIT it was concerned with). It only interprets the expression ‘credit for a sum of money’ as it appears in the Italian - Bangladesh BIT and concludes that the sums mentioned in the award as payable would constitute a credit. Thus the award was seen only for this limited purpose under its BIT.

In the White arbitration, the cause of action rested purely on the ICC Award and not on anything contained therein. The contents of the Award mattered little – what mattered was non-enforcement of the same. White did not and (could not) have had any other grievance.

Hence the issue if an award is by itself an investment could not have been side-stepped relying on *Saipem*, which as submitted above was not *pari materia*.

Perhaps, the only direct precedent on the point is *GEA Group Aktiengesellschaft v. Ukraine*<sup>33</sup> (*GEA*). This categorically held that an award – ‘in and of itself cannot constitute an ‘investment’. Properly analysed, it is a legal instrument, which provides for disposition of rights and obligations . . .’<sup>34</sup> The *GEA* Award notices *Saipem* but finds that the statements made therein are ‘difficult to reconcile’. It states:

It may be noted that in the Decision on Jurisdiction in *Saipem S.p.A v. The People’s Republic of Bangladesh* (a case heavily relied upon by the Claimant), the Tribunal made statements that are difficult to reconcile, i.e., that the ICC arbitration is part of the investment (under the heading: ‘Has Saipem made an investment under Article 25 of the ICSID Convention?’); that the ICC award is not part of the investment (under the heading ‘Does the dispute arise directly out of the Investment?’); and that it is unnecessary to decide whether the ICC award is part of the investment (under the heading ‘Jurisdictional objections under the BIT’).<sup>35</sup>

<sup>32</sup> Paragraphs 126 and 127 of *Saipem* at p. 35.

<sup>33</sup> ICSID Case No. ARB/08/16 dated 31 Mar. 2011.

<sup>34</sup> Paragraph 161 of *GEA* Award at p. 47.

<sup>35</sup> Paragraphs 163 of *GEA* Award at pp. 47–48.

*GEA* was not followed by the White Tribunal (nor its criticism of *Saipem* taken note of). The White Tribunal held *GEA* to be ‘an incorrect departure from the developing jurisprudence’ and also *obiter dicta* (in light of the *GEA* Tribunal’s finding that neither the Settlement Agreement nor the Repayment Agreement therein were ‘investments’). To my mind, this is incorrect: First *GEA* is not a departure from the ‘developing jurisprudence’. *Saipem* pretty much came to the same conclusion (as seen above). The ‘developing jurisprudence’ relied upon was, with respect, of no relevance to the issue at hand. Further, the operative portion of *GEA* is not an obiter.

The facts in the *GEA* arbitration were briefly as follows: In 1995, a contract was concluded between a German company (*GEA*) and a Ukraine state-owned oil refinery providing *inter alia* for supply of naphtha fuel to the latter. The parties fell into dispute which culminated in a Settlement Agreement followed by a Repayment Agreement. Both agreements provided for resolution of disputes as per the ICC Rules. In 2002, *GEA* obtained an ICC Award against the Ukraine Company which it then sought to enforce in Ukraine. The Ukrainian court refused to enforce on the ground that the Repayment Agreement was not signed by an authorized person. The *GEA* then brought ICSID proceedings under the German-Ukraine BIT claiming that Ukraine had breached its treaty obligation. One issue framed by the Tribunal was ‘whether *GEA* had made an investment in Ukraine’. In relation to this, a sub issue was whether the ICC Award on its own constitutes an investment.<sup>36</sup> In this context, the *GEA* Tribunal concluded that the award does not constitute an investment. It held:

the ICC Award – in and of itself – cannot constitute an ‘investment’. Properly analysed, it is a legal instrument, which provides for the disposition of rights and obligations arising out of the Settlement Agreement and Repayment Agreement neither of which was itself an ‘investment’.

. . . . Even if – arguendo – the Settlement Agreement and Repayment Agreement could somehow be characterised as ‘investments’, or the ICC Award could be characterised as directly arising out of the Conversion Contract or the Products, the Tribunal considers that the fact that the Award rules upon rights and obligations arising out of an investment does not equate the Award with the investment itself. In the Tribunal’s view, the two remain analytically distinct, and the Award itself involves no contribution to, or relevant economic activity within, Ukraine such as to fall – itself – within the scope of Article 1 (1) of the BIT or (if needed) Article 25 of the ICSID Convention.<sup>37</sup>

It was incorrect for the White Tribunal to treat the first para of *GEA* as an *obiter dicta* (which it clearly was not). Even the second para is a considered view by the *GEA* Tribunal (*judicial dicta*). It is not a passing remark, nor does it pertain to a collateral matter which did not arise. As the strict principles of *stare decisis* are inapplicable to international arbitral tribunals, the second para of *GEA* should also have been duly considered.

Accordingly, in my view, the threshold jurisdictional issue of the ICC Award being an ‘investment’ was not satisfactorily addressed by the White Award.

<sup>36</sup> Paragraph 158 of *GEA* Award at p. 46.

<sup>37</sup> Paragraphs 161 and 162 of *GEA* Award at p. 47.

*ALLEGED BREACH OF ARTICLE 3(2) - 'FAIR AND  
EQUITABLE' TREATMENT AND 'DENIAL OF JUSTICE':*

Having overcome the jurisdictional hurdle, the first issue the White Tribunal considered was whether there was a breach of the 'fair and equitable' treatment standard or 'denial of justice' standard. White *inter alia* contended that the conduct of India's courts amounted to breach of the 'fair and equitable standards' incorporated in Article 3(2) of the BIT. White argued that it had a legitimate expectation that it would be allowed to enforce any award in India 'in a fair and reasonably timely manner'. The BIT Tribunal dismissed these contentions, stating that White knew or ought to have known at the time of entering into the contract with Coal India that the court structure in India was overburdened. Further at the time the contract was initiated, Indian courts were regularly entertaining set aside applications in respect of foreign awards, and lastly the investor must take a host State (including its court system) as it finds it. In the absence of any assurance from India that any award is enforced in a particular manner or time frame, it is not possible for White to have had any legitimate expectation as to the timely enforcement of its Award.<sup>38</sup>

White further argued that the Indian court's delay in enforcing the ICC Award and allowing the enforcement proceedings and set aside proceedings to continue for more than nine years was a 'denial of justice' to it. The BIT Tribunal held that an assessment of denial of justice is a highly fact sensitive exercise depending *inter alia* on the complexity of the proceedings, the need for swiftness, the behaviour of the litigants involved and the behaviour of the courts themselves. Considering these, the White Tribunal's overall conclusion was that the delay by the Indian Supreme Court in hearing and determining the jurisdiction appeal 'is certainly unsatisfactory in terms of efficient administration of justice', but it had not reached the stage of constituting a 'denial of justice'. It held the delay to be regrettable but there to be no bad faith.<sup>39</sup>

*INCORPORATION OF THE KUWAIT-INDIA BIT AND  
APPLICATION OF THE 'EFFECTIVE MEANS OF ASSERTING  
CLAIMS AND ENFORCING RIGHTS' PROVISION  
CONTAINED THEREIN:*

Having held that there was no breach of the 'fair and equitable treatment' standard or of the 'denial of justice' standard, and having also held that there could be no legitimate expectation by White that it would be allowed to enforce any award in India 'in a fair and reasonably timely manner', the short route which the White Tribunal took to hold India liable for damages (for delay) may be summarized as follows: The Tribunal referred to Article 4(2) of the Australia-India BIT and the

<sup>38</sup> Paragraphs 10.3.12 to 10.3.15 of the BIT Award at pp. 95–96.

<sup>39</sup> Paragraphs 10.4.22 and 10.4.23 of the BIT Award at pp. 104–105.

Most Favourable Nation (MFN) provision contained therein. Relying on this, it incorporated Article 4(5) of the Kuwait-India BIT.<sup>40</sup> The said Article 4(5) *inter alia* provides for ‘effective means of asserting claims and enforcing rights’. The next task was to interpret this provision. For this the White Tribunal resorted to the *Chevron-Texaco v. Ecuador* Arbitral Award<sup>41</sup> (*Chevron*) which interpreted the US-Ecuador BIT and *inter alia* held that an indefinite or undue delay by the host State’s courts in dealing with an investor’s claim ‘may amount to a breach of the effective means standard’.<sup>42</sup> Relying on *Chevron*, the White Tribunal held that the Indian court’s undue delay ‘constitutes a breach of India’s voluntarily assumed obligation of providing White with ‘effective means’ of asserting claims and enforcing rights’<sup>43</sup> and therefore India had breached its obligation pursuant to the Kuwait-India BIT.

With respect, I feel that the Tribunal has erred, and I set forth my views under three heads below:

*First submission:*

*Incorporation of the Kuwait - India BIT on the basis of the MFN clause in the Australia - India BIT was erroneous:*

The MFN clause in the Australia-India BIT is contained in Article 4 thereof. It bears a heading ‘Treatment of investments’ and *inter alia* states:

A Contracting Party shall at all times treat investments in its own territory on a basis no less favourable than that accorded to investments of investors of any third country.

A plain reading shows that the promise here is only in relation to ‘treatment’ of ‘investments’. Assuming that investments include ‘awards’ (though they do not) the clause can mean no more than that India would accord the same treatment to an Australian investor’s award as it renders to a Kuwaiti investor’s award. It cannot lead to a conclusion that the Kuwait - India treaty stood incorporated into the Australia - India BIT.

Simon Lester and Bryan Mercurio in their standard work describe the MFN principle as follows:<sup>44</sup>

... the principle is actually a (somewhat) straightforward non-discrimination requirement. The MFN principle means that a country must treat other countries at least as well as it treats the ‘most favoured’ country... Thus, a key aspect of the principle is a prohibition on discriminating...

<sup>40</sup> Agreement between the State of Kuwait and the Republic of India for the Encouragement and Reciprocal Protection of Investment dated 27 Nov. 2001.

<sup>41</sup> *Chevron Corporation (USA) & Texaco Petroleum Company (USA) v. The Republic of Ecuador*, Partial Award on Merits dated 30 Mar. 2010.

<sup>42</sup> Paragraph 11.3.2 (d) of the BIT Award at p. 109.

<sup>43</sup> Paragraph 11.4.19 of the BIT Award at pp. 118–119.

<sup>44</sup> *World Trade Law Text: Materials and Commentary*, Universal L. Publ. Co. at p. 322.

The authors further note that in US domestic law, the term has now been officially replaced by ‘normal trade relations’ in order to clarify the policy behind it.<sup>45</sup>

The MFN clauses thus assure equality of treatment and work as a guarantee against discrimination. They are concerned with ‘treatment’ (of investments) and cannot become a device for investors to pick and chose any treaty clause (from the accumulation of bilateral treaties the host country may have). In other words, relying on an MFN clause an investor cannot cherry pick; accept or reject and create for itself a treaty (and rights thereunder) which it did not have to begin with. If this sort of route were permissible, each investor would fashion for itself a tailor-made treaty, rendering the entire rationale of treaty negotiations between sovereign nations a redundant exercise.

That the MFN clause must refer to ‘treatment’ as against ‘treaty shopping’ is also borne out from the following passages from *Zackary Douglas*:<sup>46</sup>

The MFN Clause does not, in truth, operate automatically to ‘incorporate’ provisions of a third treaty so that all that remains for a tribunal to do is to interpret the amended text of the basic treaty. It is not an exercise in the construction of a static legal text that has been modified by an invisible hand prior to or upon the commencement of arbitration proceedings. The MFN clause operates to secure more favourable *treatment* for the claiming party; it does not operate to rewrite the terms of a treaty in respect of which the claimant is not even a signatory. Let us not forget that the more favourable treatment can be granted to an investor of a third state by means of a domestic legislative enactment or by any other act of state (judicial decision, administrative circular and so on). It would be wrong to suppose that the documents recording this treatment are ‘incorporated’ into the basic treaty by the operation of the MFN clause. It is the ‘treatment’ represented by these documents that can be invoked by the investor claiming *through* the MFN clause in the basic treaty (emphasis in original).

The fact that the White Tribunal simply incorporated the Kuwait-India treaty is clear from the heading in para 11.2 of the Award. (Does Article 4(2) of the BIT *incorporate* Article 4(5) of the Kuwait-India BIT?) and the Tribunal’s operative decision – ‘The Republic of India has breached its obligation . . . pursuant to Articles 4 (2) of the BIT ‘*incorporating*’ 4 (5) of the Kuwait-India BIT.’<sup>47</sup> (emphasis supplied).

It was of course never White’s case that some special privilege or treatment vis-à-vis enforcement of arbitral awards was afforded to a Kuwaiti investor which was not afforded to it.

Accordingly in my view, reliance and incorporation of the Kuwait-India BIT (adopting the MFN route) was incorrect.

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<sup>45</sup> *Ibid.*, n. 50, p. 322.

<sup>46</sup> *The MFN clause in Investment Arbitration: Treaty Interpretation off the Rails*, 2 J. Intl. Dispute Settle. 97–114 (2011).

<sup>47</sup> Paragraph 16.1.1 of the BIT Award at pp. 139–140.

*Second submission:*

*Faulty interpretation of the Kuwait-India BIT:*

The BIT Tribunal set out Article 4(5) of the Kuwait-India BIT, but unfortunately it did not set it out in full. <sup>48</sup> Article 4(5) contains an unbroken single sentence which in its entirety reads as follows:

Each Contracting State shall in accordance with its applicable laws and regulations provide effective means of asserting claims and enforcing rights with respect to investments *and ensure to investors of the other Contracting State, the right of access to its courts of justice, administrative tribunals and agencies, and all other bodies exercising adjudicatory authority, and the right to employ persons of their choice, for the purpose of the assertion of claims and the enforcement of rights with respect to their investments.*

The italicized portion was not set out or referred to by the White Tribunal in its Award.

Two points of significance (from a plain reading of the above): First, that whatever obligation each Contracting State can be said to have assumed under the aforesaid Article 4(5) shall be ‘*in accordance with its applicable laws and regulations*’. These opening words qualify and define the content of the obligation which follows. These words had to be given *some* meaning. The BIT Tribunal gave them none.

Indeed, the Australia-India BIT also states in its preamble:

... that investments of investors of one Contracting Party in the territory of the other Contracting Party would be made within the framework of laws of that other Contracting Party.

Hence nothing could have been expected or demanded by White which fell outside India’s laws or regulations. The ‘effective means’ promised had to be found within the four corners of Indian law. The White Tribunal paid little heed to this qualification and created an obligation *dehors* Indian laws and regulations. This subverted the nature and content of the treaty provision being imported.

Second, the balance part of Article 4(5) of the Kuwait-India BIT (omitted to be set out by the Tribunal) brings out that the entire emphasis of the provision is on judicial access. This was no accidental language to be accorded no meaning or role in the interpretation of the clause. The balance portion of Article 4(5) indeed is linked to the genesis of the ‘effective means’ clause. The *Chevron* Award explains this in some detail. It traces the ‘origin and purpose’ of this clause to US treaty practise:

at a time when disagreement existed among publicists about the content of the right of access to the courts of the host state, thus making treaty protection desirable . . . . Article II (7)<sup>49</sup> was thus

<sup>48</sup> Paragraph 11.1.4 of the BIT Award at p. 105.

<sup>49</sup> Article II(7) contained the ‘effective means’ clause to be found in the US-Ecuador BIT.

created as an independent treaty standard to address a lack of clarity in the customary international law regarding denial of justice.<sup>50</sup>

The *Chevron* Award goes on to refer to *Kenneth J. Vandeveld* who states that this provision was later deleted from the US Model BIT when US drafters deemed it to be no longer necessary as ‘customary international law provided adequate protection’.<sup>51</sup> The *Chevron* Award footnotes the following passage from *Vandeveld* - ‘Although customary international law guarantees an alien the right of access to the courts of the host state, disagreement among publicists about the content of the right [of access to the courts of the host state] prompted the United States to seek treaty protection.’<sup>52</sup>

Hence the roots of the ‘effective means’ clause lie in a ‘disagreement’ which at one time existed on rights of aliens to access the courts of the host State and this is what the Kuwait-India BIT makes explicit in the balance portion of the Article 4(5). As the White Tribunal did not even set forth the balance of the clause, it obviously did not have this aspect within the realm of its contemplation.

Hence the interpretation given by the White Tribunal to Article 4(5) (ignoring its express language) was inherently flawed.

*Third submission:*

*Reliance on the Chevron-Texaco v. Ecuador*<sup>53</sup> award as a precedent was inappropriate:

The White Tribunal’s reliance on the *Chevron* award to interpret the ‘effective means’ clause was in my view inappropriate. This was primarily for three reasons: first, the treaty clause in consideration therein was materially different from its counterpart in the Kuwait-India BIT; second, the *Chevron* Tribunal departed from precedents in interpreting the ‘effective means’ clause and third, the facts in *Chevron* rendered it a *sui generis* decision.

The *Chevron* Tribunal was concerned with a bilateral investment treaty between the USA and the Republic of Ecuador. Article II(7) thereof reads as follows:

Each party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.

The most obvious difference between this and the Kuwait-India BIT is that the opening words ‘in accordance with its applicable laws and regulations . . .’ are missing. Thus, the *Chevron* Tribunal could arrive at a conclusion that ‘effective means’ have to be measured against an ‘objective international standard’.<sup>54</sup> This could not have been the conclusion in the teeth of the qualification attached to the obligation in the Kuwait-India treaty. Further, the balance of Article 4(5) of the Kuwait-India treaty (pertaining to access to courts) is absent in the US-Ecuador treaty. These

<sup>50</sup> Paragraph 243 of the *Chevron* Award at p. 122.

<sup>51</sup> Paragraph 243 of the *Chevron* Award at p. 122.

<sup>52</sup> *US International Investment Agreements* 411 (Oxford 2009).

<sup>53</sup> *Supra* n. 38.

<sup>54</sup> Paragraph 263 of the *Chevron* Award at p. 129.

factors render it a materially different provision, and the White Tribunal should not have unquestioningly followed *Chevron*.

The second reason why *Chevron* was not an appropriate precedent for the case at hand was that it departed from at least two precedents (which it noticed). The first was *Duke Energy Electroquil Partners v. Republic of Ecuador*<sup>55</sup> (*Duke*). Interestingly, *Duke* was concerned with an interpretation of the same treaty and the same provision as *Chevron* (i.e., Article II (7) of the US-Ecuador BIT). Interpreting the said Article II(7), the *Duke* Tribunal held:

Such provision guarantees the access to the courts and the existence of institutional mechanisms for the protection of investments. *As such, it seeks to implement and form part of the more general guarantee against denial of justice.*<sup>56</sup> (emphasis supplied)

Hence recalling the history of the clause, *Duke* interpreted the ‘effective means’ provision as one guaranteeing access to the courts (precisely what the Kuwait-India treaty takes pains to emphasize). Further it interprets the obligation as a part of the general guarantee against denial of justice (on which the White Tribunal had already held against White).

The second precedent before *Chevron* was *Amto v. Ukraine (Amto)*.<sup>57</sup> *Amto* was concerned with Article 10(12) of the Energy Charter Treaty (ECT), which is significantly differently worded. It requires the Contracting State to ‘ensure’ that its domestic laws provide ‘effective means for the assertion of claims’ etc. It reads as follows:

Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to Investments, investment agreements, and investment authorizations.

Interpreting this provision, the *Amto* Tribunal held:

The fundamental criteria of an ‘effective means’ for the assertion of claims and the enforcement of rights within the meaning of Article 10(12) is law and the rule of law. There must be legislation for the recognition and enforcement of property and contractual rights. This legislation must be made in accordance with the constitution, and be publicly available. An effective means of the assertion of claims and the enforcement of rights also requires secondary rules of procedure so that the principles and objectives of the legislation can be translated by the investor into effective action in the domestic tribunals.<sup>58</sup>

The *Amto* Tribunal accepted the claimant’s contention that the ‘effective means’ clause in the ECT requires a State not only to ensure that legislation and rules are promulgated but also that the quality of the legislation meets the minimum

<sup>55</sup> ICSID Case No. ARB/04/19; Award dated 18 Aug. 2008.

<sup>56</sup> Paragraph 391 of *Duke* at p. 105.

<sup>57</sup> *Limited Liability Company Amto v. Ukraine*; Arbitration No. 080/2005 of the Arbitration Institute of the Stockholm Chamber of Commerce; Award dated 26 Mar. 2008.

<sup>58</sup> Paragraph 87 of *Amto* at p. 52.

international standards. Hence the ‘effective means’ clause is not only a rule of law standard but also a qualitative standard.<sup>59</sup>

*Amto* then stated:

The difficulty is to identify the criteria by which to assess the effectiveness of the legislation and rules called into question under Article 10(12) ECT. Bearing in mind the context and the object and purpose of the ECT, the Tribunal considers that ‘effective’ is a systematic, comparative, progressive and practical standard. It is systematic in that the State must provide an effective framework or system for the enforcement of rights, *but does not offer guarantees in the individual cases*. Individual failures might be evidence of systematic inadequacies, but are not themselves a breach of Article 10(12). (emphasis supplied).

Hence, interpreting an obligation under Article 10(12) of the ECT (requiring the Contracting State to ‘ensure’ that its domestic laws provide effective means for the assertion of claims etc.), the *Amto* Tribunal held that it refers to the ‘quality’ of the legislation, and that it meets the minimum international standards but it does not offer guarantees in individual cases. Hence, even in the context of the ECT which requires the Contracting States to ‘ensure’ that its domestic laws provide ‘effective means’, the *Amto* Tribunal held that there is no guarantee in individual cases.

The third case before the *Chevron* Tribunal was *Petrobart*.<sup>60</sup> This was also concerned with Article 10(12) of the ECT, but it did not lay down any principle of general application. On facts *Petrobart* held that an *ex parte* communication by the Vice Prime Minister of the country to its local court violated Article 10(12) of the ECT.

*Chevron* considered but departed from these precedents. It began by noting that BIT provisions such as this (the ‘effective means’ clause) are ‘relatively rare’.<sup>61</sup> They appear only in the USA BITs, the Energy Charter Treaty, ‘and a handful of other BITs’.<sup>62</sup> The *Chevron* Tribunal agreed in principle with *Duke* ‘to some extent’ that the ‘effective means’ provision seeks to implement and form part of a more general guarantee against denial of justice. It however held that Article II(7) has to be interpreted as it stands and so considered it is not a mere restatement of the law on denial of justice. If that were the intent (it held) it ‘could have been easily expressed through the inclusions of explicit language to that effect ...’.<sup>63</sup> The *Chevron* Tribunal distinguished *Amto* on the basis that it was not considering potential ‘injustices arising in a particular case’ and was only concerned with complaint against legislative framework.<sup>64</sup> Hence *Chevron* distinguished and departed from both *Duke* as well as *Amto* based on the language of the treaty provision and on facts.

<sup>59</sup> Paragraph 87 of *Amto* at p. 52.

<sup>60</sup> *Petrobart Ltd. v. Kyrgyz Republic*; Arbitral Award dated 29 Mar. 2005 of the Arbitration Institute of the Stockholm Chamber of Commerce.

<sup>61</sup> Paragraph 241 of the *Chevron* Award at p. 121.

<sup>62</sup> Paragraph 241 of the *Chevron* Award at p. 121.

<sup>63</sup> Paragraph 242 of the *Chevron* Award at p. 121.

<sup>64</sup> Paragraph 246 of the *Chevron* Award at p. 123.

Chevron, thus did not reflect the majority view on the subject. The White Tribunal should have gone along with the majority view (i.e., *Duke* and *Amtol*), specially when these cases were not departed from by *Chevron* on principle.

Lastly, reference to *Chevron* as a precedent was also inappropriate as that case rested on *sui generis* facts. Paragraphs 142 to 148 thereof set out extensively the facts the *Chevron* Tribunal was concerned with therein and the same may be summarized as follows:

- In November 2004, the Ecuador Congress dismissed the entire Supreme Court and impeached six judges of the Constitutional Court.
- In April 2005, Ecuador's President dismissed all newly appointed judges of the Supreme Court. Later the President was himself ousted and fled the country. Thereupon a UN Special Rapporteur was despatched to Ecuador to assess the situation and make recommendations. The Organization of American State's Mission in Ecuador likewise sent representatives to the country. Soon thereafter, the Ecuador Congress nullified the dismissal of the Supreme Court judges but did not reappoint the former judges.
- In April 2005, the Ecuador Congress approved amendments which introduced a new mechanism to appoint judges to the Supreme Court. Members of the 'international community' monitored and supported the new selection process, and new Supreme Court judges were appointed in November 2005. However, the organization of the American State's Mission and the UN Special Rapporteur continued to remain critical of these efforts and highlighted 'the urgent need to further reform the whole of the judiciary'.
- The *Chevron* Arbitration commenced on 21 December 2006 under the US-Ecuador BIT.
- In January 2007, the newly elected President called for a referendum to establish a Constituent Assembly to create a new constitution. The *Chevron* Award records that later the Congress removed the President of the Electoral Court in an effort to block the referendum and the military, and the police tried to prevent the Congress from assembling in order to overturn the President's measures.
- In September 2007, the Constituent Assembly dismissed the Congress and proclaimed that it had absolute authority. In particular, it claimed the power to remove and sanction members of the judiciary that 'violate its decision'. This was followed by reduction of judges' salaries by more than 50%, and a number of judges resigned as a consequence.
- In February 2008, the President of the Supreme Court of Ecuador stated: '*the rule of law is only a partial reality in Ecuador . . . we cannot deny it: the judicial and constitutional reality in our country is a partial reality; we are not fully living in a state of law*'.<sup>65</sup>

<sup>65</sup> As translated by the *Chevron* Tribunal; para. 148 at p. 77.

The Claimant's contention in *Chevron* was that the violation of Article II(7) was in view of the *'incompetent, manifestly unjust, and biased decisions and erosion of judicial independence in Ecuador since 2004 ...'*<sup>66</sup> The Claimant also cited a recent BIT award, in *EnCana Corporation v. Republic of Ecuador*<sup>67</sup> where the Tribunal therein held:

It is difficult to see how any oil company litigant with a case pending at that time could have received impartial justice.

It was in the aforesaid situation that the Chevron Tribunal had to consider if in relation to the seven pending cases of *Chevron* and *Texaco* in Ecuador there were *'effective means of asserting claims or enforcing rights'*. After an extensive review of each of these seven litigations (filed on various dates between 1991 to 1993 and then pending) the *Chevron* Tribunal held:

Accordingly, it is the nature of the delay, and the *apparent unwillingness of the Ecuadorian courts to allow the cases to proceed* that makes the delay in seven cases undue and amounts to breach of the BIT by the Respondent for failure to provide 'effective means' in the sense of Article II (7).<sup>68</sup> (emphasis supplied).

Hence on facts there was a clear determination that there was an 'unwillingness' on part of the Ecuadorian courts 'to allow the cases to proceed' and that made delay in the seven cases, undue and a breach of the 'effective means clause' therein.

Nothing remotely close to this was contended by White.

To sum up, the *Chevron* Tribunal was considering a markedly different treaty in an exceptional factual setting. Reliance on this as a precedent by the White Tribunal was misplaced.

***THE BIT TRIBUNAL HOLDING INDIA LIABLE FOR  
BREACH OF THE 'EFFECTIVE MEANS' CLAUSE IN  
ARTICLE 4(5) OF THE KUWAIT-INDIA BIT***

The White Tribunal extensively referred to and relied upon the findings in *Chevron* and upon a review of facts concluded that while the enforcement proceedings brought about by White in the High Court of Delhi did not suffer from unjustifiable delays, the set aside proceedings initiated by Coal India in Calcutta were on a different footing:

the Indian judicial system's inability to deal with White's jurisdictional claim in over nine years, and the Supreme Court's inability to hear White's jurisdictional appeal for over five years amounts to undue delay and constitutes a breach of India's voluntarily assumed obligation of

<sup>66</sup> Paragraph 206 of the *Chevron* Award at p. 106.

<sup>67</sup> LCIA Case No. UN 3481, UNCITRAL Award dated 3 Feb. 2006, para. 198 at p. 56.

<sup>68</sup> Paragraph 262 of the *Chevron* Award at p. 128.

providing White with ‘effective means’ of asserting claims and enforcing rights. Accordingly, India is in breach of Article 4(2) of the BIT.<sup>69</sup>

As regards compensation, the White Tribunal held that the ICC Award in White’s favour was enforceable in India, and that Coal India’s objections to enforcement of the Award must fail under the New York Convention.<sup>70</sup> The Tribunal held White to be entitled to be restored to the position it would have enjoyed had the breach of the BIT not occurred. It held that had India provided White with effective means it would have received the amounts due to it under the ICC Award including interest and not have incurred the costs in pursuing litigation through the Indian courts, nor would it have incurred the costs in attempting to settle the dispute with India, nor would it have incurred the costs in bringing the BIT arbitration. On this basis, White was awarded compensation (essentially representing the amounts payable to it under the ICC Award along with costs and interest).

#### *SUMMING UP:*

Essentially, the White Tribunal used the MFN route to incorporate a treaty which India did not have with Australia. Then the incorporated treaty provision (Article 4(5) of the Kuwait-India BIT) was interpreted with reference to *Chevron* ignoring the difference in language in the treaty provisions and the prior precedents on the point. The exceptional facts in *Chevron* were also not reflected upon. The resultant award was thus, with respect, erroneous on more than one count.

A few concluding thoughts: Of late, India has been in the arbitration news mostly for the wrong reasons. It is beyond the scope of this article to go into this wider issue. Briefly, I may say that India is not a jurisdiction which suffers from xenophobia or an arbitration bias.<sup>71</sup> Prof. Albert Jan van den Berg’s famous study concluded that globally only about 10% of the New York Convention Awards were not enforced (which he called ‘the unfortunate few’).<sup>72</sup> Statistics show that the ‘unfortunate few’ are fewer in India (around 8%). Sadly, India does have a problem of judicial delays. To the extent, the White Award may help move the Indian State to address this problem, it would have served a laudable purpose – but other than that, I do not see it as a fit precedent.

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<sup>69</sup> Article 4(2) being the MFN clause; para. 11.4.19, 11.4.20 of the BIT Award at p. 119.

<sup>70</sup> The Award records (in para. 14.2.2 at p. 123) that parties agreed that the BIT Tribunal was in a position to determine whether the Award was enforceable in India without any further evidence or submissions.

<sup>71</sup> ‘I must stress that there is no foreigner bias in India’s legal system, nor amongst its judges. The foreign party loses or wins as often as the local. In fact, statistics show that in the last fifty-five years, amongst the important arbitration cases that ultimately reached the Supreme Court of India, foreign parties have succeeded over Indian parties in a preponderating majority of cases.’ Fali S. Nariman, *India and International Arbitration*, 41 *Geo. Wash. Int. L. Rev* 367–379 (2009).

<sup>72</sup> Albert Jan van den Berg, *Why are some awards not enforceable?* ICCA Congress series no. 12 (Beijing 2004) at p. 291.

