LEGAL AND CONSTITUTIONAL JUSTIFICATION OF WHITE INDUSTRIES

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I. INTRODUCTION

It is often said that *"justice delayed is justice denied"*. The Arbitral tribunal in *White Industries Australia Limited ("White")* v. *Republic of India ("India")*[1] fell short of this conclusion when it held that justice delayed is not quite justice denied but certainly amounted to failing to provide "effective means" of asserting claims. This is of course in the context of White failing to have its jurisdiction claims *asserted* in the Apex Court of India, although it is a fundamental principle of international law that domestic legislation cannot override obligations of a sovereign State under international law.[2] This was upheld by various cases such as the *Lockerbie*[3] and *La Grand*[4] matters in the ICJ. At the same time, domestic law and constitutional arrangements such as the requirement of ratification are not utterly irrelevant[5] since Governments cannot bind States through treaties in excess of their powers or in violation of the procedure under domestic law.[6] It is also clear that once White approached the Supreme Court of India, the Government of India could have done nothing to expedite or resolve the dispute under the Constitution of India. But it is equally true that if a country wants to be economically competitive in a globalised world, it must keep an efficient mechanism to resolve the disputes arising out of the same.

Domestic standards cannot be the sole criteria for defending State efforts in honouring an international obligation. From the judgment, it is important to note that India has been penalized not because the government failed to act in a certain manner. It has been penalized because the State as a whole, the executive and the judiciary have failed to put an institutional structure which is expeditious in nature, to support the BIT entered into with Australia. Thus, at the heart of this lies the age-old debate of international law versus municipal law, on which much juristic ink has been spilled. Some view the award as attacking

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[1] White Industries v. India, *available at:* http://italaw.com/documents/WhiteIndustriesv.IndiaAward.pdf.

[2] *ICJ Rep*. 1988, at 12,34 *reprinted in* 82 ILR 225.

[3] *ICJ Rep*. 1992, at 3,32.

[4] *ICJ Rep*. 2001, at 90-1.

[5] *See*, KRYSTYNA MAREK, DROIT INTERNATIONAL ET DROITINTERNE (1961).

[6] MALCOM N. SHAW, INTERNATIONAL LAW, 124-26 (5th ed. Cambridge University Press, 2003); *See also*, C.W. JENKS, THE PROSPECTS OF INTERNATIONAL ADJUDICATION (1964); H. LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 43 (1958).

judicial sovereignty, because an external authority evaluated Indian court orders, indicting the Indian judicial system as "slow" and "seriously overstretched",[7] while it should be considered as a rude awakening by developing countries entering into BIT's with other nations to lure capital and flow of resources from it, as we can see that India has started the process of renegotiation of such treaties.[8]

II. FACTS

The origin of this decision can be traced back to 28th September 1989, wherein Coal India entered into a contract with White Industries to develop an open cast mine in Piparwar. It was signed by the subsidiary of Coal India, Central Coal fields limited, under the Indian-Australian Bilateral Assistance Programme. It had been negotiated between the two companies, who had agreed on exclusion of the Indian Arbitration Act 1940, and provided for an arbitration tribunal to be set up following the rules of UNICTRAL having a seat in Paris.[9] The government had almost no part in this decision_ making process, where White Industries was to provide Coal India with a soft loan for the same.

Disputes arose between Coal India and White Industries with respect to the terms of the contract which provided that Coal India will receive a bonus when the mining was on schedule with the target being met and pay a penalty when the target fell short. Further disputes arose about the quality of coal being produced, which according to Coal India did not meet the specifications as stated in the contract. Thus, disputes arose about the amount of bonus and nature of bonus to be paid to White Industries as per the contractual obligations between the two companies. Under such circumstances, Coal India encashed the bank guarantee as given by White Industries to the tune of 2.77 Million AUD$, aggrieved by which White Industries filed a request to initiate arbitration proceedings.

The ICC tribunal, formed on 28th June 1999, gave a decision on 27th May 2002, wholly in favour of White Industries.[10] White Industries initiated proceedings in the Delhi High Court to enforce the Award of the tribunal in 2002, but Coal Industries filed an anti-suit injunction in the Calcutta High Court

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[7] P.K. Suresh Kumar, *Globalisation and the Judicial Sovereignty of India*, 47(49) EPW 47,(2012).

[8] Vivek Vashi & Kanika Sharma, *Increasing litigation under Bilateral Investment Treaties – should the Government be worried?,* INDIAN L. J. (date of article in format: Oct. 28, 2012 within brackets) *available at:* http://indialawjournal.com/volume5/issue_2/article_1.html.

[9] White Industries v. India, *supra* note 1, at 1, at para. 3.2.18.

[10] *Id.*, at ¶.3.2.33.

to prevent the enforcement of the same. The Calcutta High Court assumed jurisdiction even though a clear arbitration clause had been spelt out, taking into consideration the newly formed Arbitration and Conciliation Act of 1996. White Industries appealed against this decision, which was rejected and finally had to approach the Supreme Court in July 2004. The matter remained stayed and lingered in the Supreme Court till 2009, and the Delhi High Court awaited the decision of the Supreme Court.

Agitated and aggrieved, White Industries wrote to the government in 2009, asking them to intervene and solve the matter as per Article 13(2) of the BIT[11] by coming to an amicable solution. But, the Indian government did not respond within the specified period of six months as per the BIT clause, following which White initiated an Investment Arbitration against the Union of India, which was decided in its favour. The tribunal applied the benchmark of "effective means" to hold India in want of the provisions of the BIT and provide White Industries with the compensation of the arbitral award plus interest and other expenses.

III. LEGAL JUSTIFICATION

A. International Law

"There is little use in going to law with the devil while the court is held in hell." stated by Humphrey O' Sullivan, refers to the argument preferred by all parties going to investment arbitration under a BIT as they state that domestic courts are not objective.[12] They go against State actions and believe that domestic courts would be biased. State actions and practice forms an important part of international law as has been mentioned in the famous *Scotia Case*,[13] and we cannot attribute State action on predictability in case of no State enforcement. In *White industries* too, the government did not break Article 3(1) of the BIT which stipulates creation of favourable conditions and Fair and Equitable Treatment[14] by not creating favourable conditions for redressal, but these conditions were out of its control due to the doctrine of separation of powers as stated in the Indian constitution. Even the tribunal acknowledged that *White Industries* knew of the Indian judiciary being "slow" and "seriously overstretched" and thus no legitimate expectation can be attributed as stated in *TECMED S.A* v. *United Mexican States*.[15] Thus, there was definitely no breach, under the denial of justice standard, as per the

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[11] *Available at:* http://unctad.org/sections/dite/iia/docs/bits/australia_india.pdf.

[12] *See*, HUMPHREY O'SULLIVAN, THE DIARY OF AN IRISH COUNTRYMAN 1831 (Dufour Editions, 1997).

[13] *The Scotia*, 81 U.S. 14 Wall. 170 (1871).

[14] *See supra* note 11

[15] Tecnicas Medioambientales Tecmed v. Mexico, 43 I.L.M. 133 (2004).

standards held in *Chevron* v. *Ecuador*.[16] Then how is India accused of not being able to provide the effective means not stated under the BIT, something beyond the power and control of the government?

The legitimacy of the same is derived from treaties signed by a nation under international law. *Pacta sunt servanda*[17] provides that all nations would be bound by the obligations as signed by them with another nation. No nation can in such a manner outrun such an obligation which is like a contract. The obligation created here arose when a sovereign government, India, contracted a treaty, i.e. BIT, creating obligations towards any investor from the contracting country with respect to protection of investment and fair and equitable treatment. But additional obligations arose because of 'treaty shopping' via the "most favoured nation" principle, leading to a binding obligation on the host State, wherein White industries borrowed the principle from other treaties to which India was a party.

Furthermore, when such a claim is to be treated as legitimate, the question which arises is about its breach. Following the dualist theory in international law,[18] one cannot take the defence of domestic laws to escape international obligations. International obligations have to be of paramount importance (*Arbitmte Case*),[19] which can be further supported by looking at article 27 of the Vienna convention on law of treaties,[20] to which India might not be a signatory, but has become a customary rule under international law.[21] Therefore, as seen in the *Alabama Claims Tribunal*,[22] one nation cannot take a defence of domestic impediments or law to absolve itself of international obligations. Like in *Lockerbie*,[23] the executive could not have gone beyond its powers once the

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[16] Chevron v. Ecuador, UNCITRAL, PCA Case No. 2009-23.

[17] VCLT Art.26 (1969).

[18] JANNE NIJMAN & ANDRE NOLLKAEMPER, NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW 57 (1st ed., Oxford Univ. Press, 2007) (Dualism appears to be that the international law and municipal law are viewed as separate legal systems, which may be defined as self-contained, because within each system the only existing rules are those part of the system. Rules which are not created within the system may nevertheless be relevant for the system if they are referred to by a rule included in the system).

[19] *ICJ Rep*. 1988, at 12,34 *reprinted in* 82 ILR 225, 252.

[20] *Available at:* http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (Internal law and observance of treaties: A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to Article 46).

[21] *See*, Kearney & Dalton, *The Treaty on Treaties*, (1970) 64 AM. J. INT'L L. 517; *See also*, Sir Humphrey Waldock, OR 1968 COW158, para.73; *See also*, Sir Humphrey Waldock, OR 1968 COW 53, para.31.

[22] J. B. MOORE, INTERNATIONAL ARBITRATIONS 495 (1898)

[23] *ICJ Rep,* 1992, pp. 3, 32.

case was initiated in the judiciary due to the strict separation of powers and the structure of the Indian constitution providing absolutist rights to the judiciary in disposing of maters when approached. And imposing upon the same would have been seen as a violation of the same and would be invalid as per law.

Therefore, the State, without fault under international law, can be held to a legitimate claim, leading to reparation by the State. *Rainbow Warrior arbitration,*[24] clearly shows that international law does not distinguish between contractual breach and the breach by any other method. It recognises that there should have been existence of State Responsibility, which can be interpreted by both the treaties being read together. Secondly, applying the objective or strict responsibility test under international law as held in the *Sapiem Tribunal*,[25] an act or omission which took place with or without the fault of the government itself can lead to a legitimate claim, and thirdly, damage should have resulted which can be claimed to take place due to the delay in the enforcement under the *White industries case*. But it must be seen that India did not breach the "fair and equitable treatment" clause nor did it expropriate any property of White Industries yet a *lex specialis* was breached between the parties. The clause being breached was the effective means clause as imported into the Indo-Australian BIT via Treaty Shopping. This points to the fact that India as a State was responsible for working of all its organs and not just of the government of India.

B. Constitutional Challenges

With increased globalization of economic regimes, ideas of State sovereignty have undergone dramatic changes. In reality, with the phenomenal growth in communications and consciousness, and the constant reminder of global rivalries, not even the most powerful of States can be entirely sovereign. Reality circumscribes the concept of sovereignty in operation. In such a context, the award, in consonance with India's international obligations under the India-Australia BIT, can hardly be said to be an attack on State sovereignty. In the alternative, the BIT as a whole may be called unconstitutional for allowing the violation of the principle of separation of powers. But as long as the International Arbitration Tribunal, in granting its award, was simply acting in accordance with the BIT, the award itself cannot be challenged.

This leads to the inevitable question: in a situation of conflict, do international obligations prevail over domestic law, or vice-versa? States cannot invoke internal law provisions to justify their failure to perform international

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[24] New Zealand v. France, 82 ILR 17 499. (*Saipem* v. *Bangladesh*, ICSID Case No. ARB/05/7.)

[25] Saipem S A v. Peoples Republic of Bangladesh, ICSID Case No. ARB/05/7, Jurisdiction, p.100 (Mar. 21, 2007).

obligations.[26] But international law conflicts with domestic law, theorists usually turn to one of the three possible theories: monist, dualist and the Fitzmaurice doctrine. While the first views municipal and international law as one unified whole, the second sees them as separate entities. Monist countries adhere to international law when it is in conflict with domestic obligations, while in dualist countries, municipal law prevails in such situations. The Fitzmaurice doctrine on the other hand, denies them any common field of operation, so that neither system is superior or inferior to the other.

India is dualist; its Parliament must actively legislate to incorporate international obligations into municipal law.[27] But its written Constitution complicates matters. India has ratified UNCITRAL's 1958 "New York" Convention, and our Arbitration and Conciliation Act is based on UNCITRAL's 1976 Arbitration Rules and 1985 Model Law.[28] Thus, we have passed national legislation conforming to our international obligations in the arena of international commercial arbitration. The dualist requirements have so been fulfilled, but it cannot be said with certainty, that during situations of conflict, domestic law will always prevail in the Indian legal system, in strict adherence to the dualism theory.

Therefore, even though the Indian constitution provides for strict separation of powers, it also grants the executive the power to enter into international obligations. Although, they cannot be held to be superior to internal obligations, each organ of the State has to bear the responsibility as such international obligations tend to treat the State as a whole rather than as separate organs. The basic structure and principle of separation of powers has to be reconciled when such matters have international obligations. Thereby, even if the executive could not have been able to take any steps once the matter had reached the judiciary, the judiciary should have seen its responsibility and worked towards them, prioritizing such commitments which treat the State as a whole.

IV. ISSUES RAISED BEFORE THE TRIBUNAL

The Tribunal, in its quick award, discussed issues as to how such money can be considered an investment and how the Indian government been in breach of the treaty. For our specific area of interest, we will focus on how the Indian government has breached the BIT and not been able to reconcile obligations with respect to the Indian constitution. Therefore, there are two implications of the Tribunal ruling pertaining to how India can potentially violate its BIT obligations, with respect to the "effective means" standard. Inordinate

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[26] VCLT Art.27 (1969).
[27] The Constitution of India, art.51, 253 ; Verghese v. Bank of Cochin, AIR 1980 SC 470; Gramophone Company of India v. Pandey, AIR 1984 SC 667.
[28] Arbitration and Conciliation Act, Preamble (1996).

delays in the Indian courts can be one way of violating a BIT. The second way of a tribunal holding India in its breach of a BIT can be through "treaty shopping" i.e. using a broad MFN provision to import investor guarantees from others BITs.

India argued that Article 4(2) of the India-Australia BIT did not incorporate Article 4(5) of the India–Kuwait BIT[29], for two main reasons; first, to do so would *fundamentally subvert the carefully negotiated balance* of the BIT; second, it would be contrary to the emphasis that India and Australia placed on the application of national laws to investments. The tribunal disagreed with India's contentions and upheld White's contention, the ratio being that a MFN agreement was supposed to achieve precisely what White sought.

It was held that Article 4(5) of the India-Kuwait treaty could be imported since Article 4(5) was not contrary to the present BIT. Article 31 of Vienna convention on treaties necessitates a good faith interpretation of treaties.[30] The Tribunal, in the present case, that the claimant is relying on a "more favorable provision" present in another treaty which was held to be permissible in *CME* v. *Czech Republic*.[31] However, the pre-requisite to this is the existence of a provision to the same or lesser effect.

The *Maffezini*[32] decision and the case of *Siemens AG* v. *The Argentine Republic*[33] allowed for an import of a "third party" treaty since the other was broader. However, this distinguishing factor as was seen in the case of *Plama Consortium* v. *Bulgaria*[34] wherein, the tribunal held that "the intention to incorporate dispute settlement provision must be clearly and unambiguously expressed" (Para. 225). The self-adaptation of an MFN provision has the effect of the investor being able to pick and choose from various BITs entered into with various permutations of dispute settlement which would result in a chaotic

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[29] *Supra* note 1, at 1, at para. 11.2.2 – 11.2.4 (India Asserts that Article 4(5) of the India-Kuwait-BIT ought not to be incorporated into the BIT as to do so would (in the words of Mclachlan, Shore and Weiniger) 'have the effect of fundamentally subverting the carefully negotiated balance of the BIT in question').

[30] VCLT art.31 (1969) (A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.).

[31] CME Czech Republic v. Czech Republic (March 14, 2003) *available at:* http://italaw.com/documents/CME- 2001PartialAward.pdf.

[32] Maffezini v. Spain, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, (Jan. 25, 2000).

[33] Siemens AG v. Argentina, ICSID Case No. ARB/02/8, Decision on Jurisdiction, (Aug. 3 2004).

[34] Plama Consortium v. Bulgaria, ICSID Case No. ARB/03/24, , Decision on Jurisdiction, (Feb. 8 2005).

situation.

Therefore, it is permissible to import provisions of other treaties, though only when less favorable provisions to the same or lesser effect is present in the disputed treaty. The India- Australia BIT does not contain such a dispute settlement provision which is the pre-requisite for the import of a different and a more favorable dispute settlement provision, that is, the India- Kuwait treaty. None of these cases were considered by the tribunal, though granted they were before the ICSID, however, the principle in question was similar to the present case. Thus, in the absence of such a provision, the import of Article 4(5) of the India-Kuwait treaty is not justified completely and the obligation of India did not extend to providing dispute resolution under India-Australia BIT. But the Tribunal allowed White Industries to 'treaty shop' and White Industries imported Article 4(5) from the India- Kuwait treaty by the principle of MFN as provided to all WTO member States.

The 'effective standard' was subsequently developed from *Chevron-Texaco* v. *Ecuador*[35] The 'effective means standard' found in Article II(7) of the United States–Ecuador BIT[36] in *Chevron* was similar to that of the India–Australia BIT. The tribunal, after discussing the extensively the meaning and application of the 'effective means standard', found it apt to be considered in the current case. It then applied the test in two avenues- enforcement proceedings and setting-aside proceedings. Regarding the delay as a whole in the enforcement proceedings, though the tribunal agreed it was 'less than ideal', it held White had not successfully shown that India had failed to provide effective means for it to enforce its rights under the award. Regarding the setting-aside proceedings, the tribunal held that although it did not constitute denial of justice, it amounted to India breaching the BIT by failing to provide White with 'effective means' of asserting claims and enforcing rights.

Although one agrees with the Tribunal's final decision in the matter of "effective means", one disagrees with the components of the test as enumerated by the Tribunal. Clause (f) of the *Cheveron case* providing the "effective means" test states '*the issue of whether or not "effective means" have been provided by the host State is to be measured against an objective, international standard*'. Such a take on what constitutes "effective means" is deeply problematic and simply highlights why many scholars are skeptical about international commercial arbitration being a

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[35] Chevron Corporation and Texaco Petroleum Company v. Ecuador, UNCITRAL, PCA Case No. 2009-23 *available at:* http://www.italaw.com/sites/default/files/case-documents/ita0154.pdf.

[36] *Available at:* http://www.state.gov/documents/organization/43558.pdf (Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations)

fair method of adjudication. Certain observations were recorded in an empirical study by the International Institute for Sustainable Development when it studied various judgements, and found as stated by Gus Van Harten:-

> *"Two significant tendencies were observed. First, there was a strong tendency towards expansive resolutions of contested issues of law that enhanced the compensatory promise of the system for claimants and, in turn, the risk of liability for respondent States. The second was an accentuated tendency toward expansive resolutions where the claimant was from a Western capital-exporting State."*[37]

Furthermore, a BIT usually involves a treaty between a capital intensive country and a developing country. In the latter, institutional mechanisms are at a nascent stage. If *"effective means"* includes "*an objective, international standard",* the conundrum lies in finding the international standard. How can an international standard be found objectively when most BITs effectively deal with two countries at the polar opposite position of economic development? It is implicit that adopting such a standard will most probably put one country (the developing one) at a disadvantageous position.

Thus, the *White Industries Tribunal* held that the delay by the judicial system of 9 years, amounted to breach of the *'effective means'* standard and for such reasons, the Indian government was liable.

In India's case, the Tribunal's decision has been seen by many as opening up floodgates of litigation alleging breach of multiplicity of BITs. But such a scenario seems far-fetched for various reasons. First, failure to provide "effective means of asserting claims" has to be proven by either of the two ways- MFN or the BIT itself. Secondly, an "investment" has to be shown to exist under the BIT and there is no formal doctrine even after the present case. Lastly, there can be no enforcement of such a standard on the grounds of legitimate expectations as the Indian courts are plagued with constant and continuous delays.

V. CONCLUSION

Therefore, the Republic of India can be held responsible for the acts of its organs including its Judiciary. However, there is a requirement of wrongful act for the applicability of this standard. Thus, there is a necessary requirement of existence of conduct of State which induced the delay to hold the Republic of India responsible and allow the claim for damages, but although it may have

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[37] Gus Van Harten, *Pro-investor or pro-State bias in investment-treaty arbitration? Forthcoming study gives cause for concern, available at:* http://www.iisd.org/itn/2012/04/13/pro-investor-or-pro-State-bias-in-investment-treaty-arbitration- forthcoming-study-gives-cause-for-concern/

been absent explicitly under the constitution and executive actions in the present case, the State as a whole has to be considered for act and obligations of an international treaty.

In conclusion, one holds that the arbitral award is not in contravention of any internal law or the treaties in play. But one is deeply unsettled as far as the components of the "effective means" are concerned, particularly the one discussed above. Given the geo-political and economic power matrix, "international" is often seen as synonymous with "western". This will put the poor countries in a BIT at a disadvantageous position in international commercial arbitrations.

Given that India has been held to breach a BIT, the clarion calls for faster adjudicatory mechanism to be finally acted upon. The call for a faster adjudication mechanism certainly came from an unusual source- an UNCITRAL tribunal. But, the irony here is that White industries has to battle the snail paced Indian judiciary to enforce the second award, the same ground on which it was awarded as it is under UNCITRAL rules, but this decision can lead to future claims, caused due to the overburdened judiciary as one being prepared by the Russian conglomerate Sistema JSFC.