

**IN THE MATTER OF AN UNCITRAL ARBITRATION IN SINGAPORE
UNDER THE AGREEMENT BETWEEN
THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT
OF THE REPUBLIC OF INDIA ON THE PROMOTION AND PROTECTION
OF INVESTMENTS**

BETWEEN

WHITE INDUSTRIES AUSTRALIA LIMITED

(Claimant)

and

THE REPUBLIC OF INDIA

(Respondent)

FINAL AWARD

The Tribunal:

**The Hon. Charles N. Brower
Christopher Lau SC
J. William Rowley QC (Chairman)**

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1. INTRODUCTION

1.1 Overview

1.1.1 This arbitration concerns a dispute over whether, and if so, the extent to which the Republic of India (“**Respondent**” or “**India**” or “**the Republic**”) has breached its obligations to White Industries Australia Limited (“**Claimant**” or “**White**”) arising under The Agreement Between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments, made in New Delhi on 6 February 1999 (“**BIT**”). Claimant alleges that Respondent has breached its obligations under Articles 3, 4, 7 and 9 of the BIT, as a result of which it has suffered loss and damage in the amount of A\$8,769,469.07. Respondent denies each of the alleged breaches of the BIT and says, in addition, that the Tribunal does not have jurisdiction to hear this claim as Claimant is not an “investor” in India, and none of the “assets” on which it relies as constituting “investments” into India qualify as such under Article I of the BIT.

1.2 The Arbitration Agreement

1.2.1 Article 12 of the BIT provides a dispute resolution mechanism to investors from one Contracting Party against the other Contracting Party in which their investment is made (the “**Host State**”). When the Host State is thought to have breached its obligations to protect investments made within the Host State’s area by nationals of the other Contracting Party, Article 12 provides:

“Settlement of disputes between an investor and a Contracting Party

1. Any dispute between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former under this Agreement shall, as far as possible, be settled amicably through negotiations between the Parties to the dispute.

2. Any such dispute which has not been amicably settled may, if both Parties agree, be submitted:

(a) for resolution, in accordance with the law of the Contracting Party which has admitted the investment to that Contracting Party's competent judicial or administrative bodies; or

(b) to international conciliation under the Conciliation Rules of the United Nations Commission on International Trade Law.

3. Should the Parties fail to agree on a dispute settlement procedure provided under paragraph 2 of this article or where a dispute is referred to conciliation but conciliation proceedings are terminated other than by signing of a settlement agreement, the dispute may be referred to Arbitration. The Arbitration procedure shall be as follows:

(a) if the Contracting Party of the investor and the other Contracting Party are both Parties to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, 1965, and both Parties to the dispute consent in writing to submit the dispute to the International Centre for Settlement of Investment Disputes such a dispute shall be referred to the Centre;

(b) if both Parties to the dispute so agree, under the Additional Facility for the Administration of Conciliation, Arbitration and Fact Finding Proceedings; or

(c) to an ad hoc arbitral tribunal by either Party to the dispute in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law, 1976, subject to the following provisions;

(i) The arbitral tribunal shall consist of three arbitrators. Each Party shall select an arbitrator. These two arbitrators shall appoint by mutual agreement a third arbitrator, the Chairperson, who shall be a national of a third State. All arbitrators shall be appointed within two months from the date when one of the Parties to the dispute informs the other of its intention to submit the dispute to arbitration;

(ii) If the necessary appointments are not made within the period specified in sub-paragraph (c)(i), either Party may, in the absence of any other agreement, request the President of the International Court of Justice to make the necessary appointments;

(iii) The arbitral award shall be made in accordance with the provisions of this Agreement;

(iv) The tribunal shall reach its decision by a majority of votes;

(v) The decision of the arbitral tribunal shall be final and binding and the parties shall abide by and comply with the terms of its award;

(vi) The arbitral tribunal shall state the basis of its decision and give reasons upon the request of either Party;

(vii) *Each Party concerned shall bear the cost of its own arbitrator and its representation in the arbitral proceedings. The cost of the Chairperson in discharging his or her arbitral function and the remaining costs of the tribunal shall be borne equally by the Parties concerned. The tribunal may, however, in its decision direct that a higher proportion of costs shall be borne by one of the two Parties, and this award shall be binding on both Parties.*

4. *Once an action referred to in paragraphs 2 and 3 of this Article has been taken, neither Contracting Party shall pursue the dispute through diplomatic channels unless:*

(a) *the relevant judicial or administrative body, the Secretary General of the Centre, the arbitral authority or tribunal or the conciliation commission, as the case may be, has decided that it has no jurisdiction in relation to the dispute in question; or*

(b) *the other Contracting Party has failed to abide by or comply with any judgement, award, order or other determination made by the body in question.”*

1.3 The Parties

Claimant

1.3.1 Claimant is a company constituted in accordance with the laws of the Commonwealth of Australia with its domicile in Sydney, Australia.

Respondent

1.3.2 Respondent is the Republic of India.

1.4 The Parties' Representatives

1.4.1 Claimant was represented in these proceedings by:

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1.4.2 Respondent was represented in these proceedings by:

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Ms Mamta Tiwari
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1.5 The Arbitral Tribunal

1.5.1 By Terms of Appointment dated 8 March 2011, the Parties confirmed the appointment of the Tribunal pursuant to Article 12.3(c)(i), of the BIT, comprising the Hon. Charles N. Brower as co-arbitrator (on the nomination of Claimant), Mr Christopher Lau SC as co-arbitrator (on the nomination of Respondent) and Mr J. William Rowley QC as presiding arbitrator (on the joint nomination of the co-arbitrators).

1.5.2 Mr Brower's contact details are:

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2. BACKGROUND DETAILS

2.1 Initial Pleadings

2.1.1 These arbitration proceedings were initiated on 27 July 2010, by Claimant's filing of a Notice of Arbitration on that date.

2.1.2 On 9 November 2010, the parties were notified by the co-arbitrators of their selection and appointment of Mr Rowley as the presiding arbitrator of the Tribunal

2.1.3 On 23 November 2010, Claimant served an Amended Notice of Arbitration which, it advised, would stand as Claimant's Statement of Claim in this arbitration.

2.2 Agreed Timetable and Procedures, Terms of Appointment and Subsequent Pleadings

2.2.1 On 15 November 2010, the Chairman wrote to the parties enclosing for their consideration draft Terms of Appointment for the Tribunal. The parties were also

invited to consult together with a view to seeing if they were able to propose to the Tribunal an agreed timetable and set of procedures for the conduct of the arbitration.

- 2.2.2 By late November 2010, the Tribunal's Terms of Appointment had been agreed in principle and were circulated for execution by the parties and members of the Tribunal.
- 2.2.3 During the same timeframe the parties had proposed an agreed timetable and set of procedures for the arbitration with which the members of the Tribunal agreed. Accordingly, on 1 December 2010, the Tribunal issued Procedural Order No. 1.
- 2.2.4 Following further discussions between the Parties in January 2011 the Terms of Appointment were finalised and re-circulated for execution.
- 2.2.5 On 14 February 2011, Respondent filed its Statement of Defence.
- 2.2.6 On 18 February 2011, Respondent requested the production of certain documents from Claimant.
- 2.2.7 On 21 February 2011, Claimant agreed to produce the documents requested by Respondent and confirmed that it did not request any documents from Respondent.
- 2.2.8 On 7 June 2011, each of the parties filed its Memorial together with supporting documentation, statements and authorities.
- 2.2.9 Claimant filed witness statements from:
- | | |
|----------------------------|---------------------------|
| Mr Harnett Singh Chandhoke | Mr Allan Roy |
| Mr David Thomas Knappick | Mr William Duncan Travers |
- 2.2.10 Respondent filed with its Memorial a witness statement from Mr Tapas Kumar

Chakraborty. An expert report was separately filed from Justice B. N. Srikrishna.

2.2.11 On 19 June 2011, the parties advised the Tribunal that they were in discussions about the possibility of moving the hearing from Singapore to London, a more convenient place for a number of potential witnesses.

2.2.12 On 4 July 2011, the parties confirmed, with the Tribunal's prior approval, that they had agreed to move the hearing to London.

2.2.13 On 14 August 2011, Claimant filed its Reply Memorial with the Tribunal without further witness statements or expert reports.

2.2.14 On 18 August 2011, Respondent filed its Reply Memorial with the Tribunal, and on the same date, the parties exchanged their Reply Memorials.

2.2.15 Respondent filed with its Reply Memorial an additional expert report from Justice Srikrishna, an additional witness statement from Mr Chakraborty and witness statements from Mr Sharad Ghodke and Mr Rajinder Singh Malhotra.

2.2.16 On 25 August 2011, the parties held a pre-hearing teleconference with the Chairman to agree to and settle the details for the conduct of the hearing.

2.3 Oral Hearing

2.3.1 An oral hearing was held on 19-21 September 2011 at the IDRC, 70 Fleet Street, London, EC4Y 1EU, United Kingdom. The hearing was recorded and transcribed. The transcripts were corrected, to the extent required, by the parties following the hearing.

2.3.2 At the hearing, the parties, by agreement, advised the Tribunal that they would not require to cross-examine each others' witnesses.

- 2.3.3 In the light of the parties' prior agreement, the available time at the hearing was divided roughly equally.
- 2.3.4 On 14 October 2011, each of the parties filed a bill of costs together with its submissions as to the allocation of the costs in the proceedings.
- 2.3.5 On 21 October 2011, India commented on White's bill of costs and proposed allocation of costs. Although entitled to do so, White did not comment on India's bill of costs.
- 2.3.6 On 4 November 2011, pursuant to Article 29 of the UNCITRAL Rules, the Tribunal notified the parties that it had that day declared the proceedings closed as regards the filing by the parties of further evidence or submissions.
- 2.3.7 Following the hearing, the members of the Tribunal deliberated by various means of communication including a meeting in London, United Kingdom on 22 September 2011. In reaching its conclusions in this Award, the Tribunal has taken into account all pleadings, documents and oral submissions filed in this case.
- 2.3.8 Throughout the course of these proceedings, the Tribunal has been greatly assisted by the submissions of counsel, who, in turn, were helped by many others whose names do not appear in the transcriptions of the hearings. It is, therefore, appropriate at the beginning of this Award to record our appreciation of the excellent efforts which counsel for the disputing parties have brought to bear during these proceedings, together with their respective experts, assistants and other advisers.

3. THE FACTS

3.1 The Tribunal's Approach to the Facts

- 3.1.1 A review of disputing parties' submissions, witness statements and the oral testimony

given at the hearing indicates that, with few exceptions, the factual matrix out of which this dispute arises is either agreed or not seriously disputed. Put another way, most of the differences between the parties have to do with the implications arising from, or the interpretation to be given, the events which unfolded and the parties' competing visions as to the extent of the Republic's obligations to White under the BIT, its applicability on the facts, and India's responsibility for the acts and omissions of Coal India.

3.1.2 We set out in detail below a summary of the facts most relevant to the dispute - either as agreed, not disputed or determined by the Tribunal.

3.2 Background

3.2.1 During the 1970's and 1980's, India decided that it needed to develop its coal resources. One of the areas of focus was Piparwar and, through its state-owned and controlled company, Coal India, India began exploration work there in the late 70's.

3.2.2 At that time, Coal India was a Public Sector Undertaking incorporated under Sections 6/7 of the Indian Companies Act, 1956, which was engaged in coal mining and responsible for the coal mining sector in India. As a Public Sector Undertaking, Coal India discharged purely commercial functions. To this end, Coal India had been conferred with various powers, including, within limits, the power to approve its own projects. However, with respect to projects proposed to be undertaken whose capital requirements exceeded those which its board of directors was entitled to approve, approval was required from the Government of India ("GOI").¹ The approval procedure in such cases involved the preparation of a project feasibility report for

¹ In 2008-2009, Coal India was awarded "Navratna" status which enabled it, thereafter, to take decisions on new projects and the use of funds without formal approval from the GOI.

consideration first by Coal India's board and thereafter the GOI.

- 3.2.3 Between 1978 and 1982, Coal India's subsidiary, Central Mine Planning and Design Institute Limited ("CMPDI") undertook extensive drilling in the region where the Piparwar mine would subsequently be located and produced a report for the development of an open cast mine.
- 3.2.4 Subsequently, meetings were held between high level officials of the Australian and Indian governments to determine whether the governments could co-operate in any ventures, particularly in the mining industry. The Australian government indicated that it might be prepared to assist India with the financing for particular developments.
- 3.2.5 Shortly afterwards, a delegation from India's Ministry of Coal and Coal India visited Australia to inspect Australian mining technology. Various Australian companies, including White, were involved in the "marketing" to the Indian representatives.
- 3.2.6 After the representatives returned to India, it appears that CMPDI was requested by the Ministry of Coal to prepare a feasibility report in relation to the development of the mine at Piparwar.
- 3.2.7 CMPDI commenced preparation of that report in around 1988, and requested White to assist in its preparation. White assisted CMPDI in the preparation of that report as well as another detailed feasibility study. Claimant's ultimate interest was to negotiate a contract with Coal India to supply equipment (principally an in-pit mobile crushing and conveying system and related technology for the project).
- 3.2.8 Project feasibility reports were presented by CMPDI to the Indian Public Investment Board in April 1989 and, in September that same year, the GOI approved the

development of the mine and the consequent expenditures (estimated by GOI at the time to be Rs 542.43 crores - or approximately A\$506 million). As noted above, GOI approval for the project was required because its capital requirements were greater than the limits Coal India's board was empowered to approve at that time.

3.2.9 Throughout this period, representatives of Claimant travelled to India on several occasions and met with various Indian government officials. Claimant was told at these meetings that Respondent was a safe place in which to invest and that India's laws were derived from English law, so Claimant would understand the legal system and would be treated fairly.

3.2.10 At this time, Coal India did not have the ability to fund the importation of the equipment and technology which White, amongst others, were hoping to supply. However, as part of Australia's efforts to strengthen its bilateral trade relationship with India, the Australian Trade Commission ("ATC" or "AUSTRADE") became involved. The role of AUSTRADE was as a potential facilitator of a funding package to enable Coal India to purchase goods and services from Australia with funding from Australia's Export Finance and Insurance Corporation ("EFIC").

3.2.11 A typical funding package consists of a Development Import Finance Facility ("DIFF") grant, which is provided by AUSTRADE, as well as Export Credit Financing which is provided by the EFIC. The availability of such funding packages means that an Australian company (in the present case, White) has the potential to offer its buyer a loan funded by AUSTRADE and the EFIC, which can obviously help to make it possible for a buyer (in this case, Coal India) to enter into a contract.

3.2.12 During 1987 to 1989, Coal India and White engaged in contractual negotiations with a view to entering into an agreement over the Piparwar Project. There were parallel

discussions between Coal India, White and AUSTRADE-EFIC concerning how White's technology would be imported by Coal India, the loan facility to be provided by AUSTRADE, the mechanism through which White would secure its payments, and the obligations of Coal India under the Loan Agreement with EFIC, as well as the contractual terms between White and Coal India.

3.2.13 On 28 September 1989, against the background of the preceding discussions, White entered into a contract with Coal India (on behalf of its subsidiary, Central Coalfields Limited) for the supply of equipment to, and development of a coal mine at Piparwar, India ("**Contract**"). In return, White was to be paid approximately A\$206.6 million.

3.2.14 Whilst White met with officials from the GOI in the course of discussions with respect to its participation, in principle, in the Piparwar Project, GOI officials did not participate in the negotiations of the Contract. Rather the Contract was negotiated directly between Coal India and White personnel.

3.2.15 The "whereas" clause of the Contract provides:

*"Pursuant to Indo-Australian meeting on Coal held in November 1986 a proposal summary and financial offer was made by Australian Trade Commission ("**AUSTRADE / EFIC**") in conjunction with WIL (selected by AUSTRADE/EFIC for the development of the project as Annexure I to this agreement during November 1987 for the supply of foreign equipment, and the management of the local development of the:*

- Piparwar Coal Mines;*
- Piparwar Coal Handling Facilities: and*
- Piparwar Coal Preparation Plant,*

*for Central Coal Fields Limited ("**CCL**"), a subsidiary of CIL, India ("the project").*

3.2.16 The objective of the contract was set out in Article 2.1 as follows:

“the objective of this Agreement is to develop an Open Cast Coal Mine at Piparwar, CCL, under Australia/India Bilateral Assistance, with a rated capacity of at least 6.50 MTPA of ROM coal and 3.5 Mcum PA of over-burden and at least 5.525 MTPA of Beneficiated Coal and a productivity of 31 tonnes per shift of ROM coal within 66 months from the date this Agreement comes into force and capital estimates for equipment, services and manpower to be rendered by WIL.”

3.2.17 Article 3.0 of the Contract headed “PROVISION OF SERVICES” provides as follows:

“the provision of services under this Agreement will consist of two independent parts -

PART I: SUPPLY OF EQUIPMENT

WIL will supply Equipment and Equipment related spares/exchange assemblies in accordance with the terms of Part I of this Agreement.

PART II: TECHNICAL SERVICES

WIL will provide technical services in accordance with the terms of PART II of this Agreement.”

3.2.18 The Contract is governed by Indian law. It contains an arbitration clause requiring the parties to arbitrate all disputes under the ICC Arbitration Rules. The Contract excludes the operation of the Indian Arbitration Act 1940.

3.2.19 The Contract provides for a production target of 2.76 million tonnes of washed and processed coal to be produced by the Coal Preparation Plant during an initial six month demonstration period.

3.2.20 The Contract provides that White was to be entitled to a bonus where production was in excess of the target figure and, conversely, White was also liable to a penalty where production was below the target figure.

3.2.21 In addition, White was to be entitled to a Coal Handling Plant bonus (or subject to a

Coal Handling Plant penalty) in certain circumstances.

3.2.22 At the same time as it entered into the Contract, Coal India also entered into a Credit Agreement with AUSTRALIA-EFIC (“**Credit Agreement**”) which provided Coal India with “soft loan financing for the Piparwar Integrated Mine - Cum - Coal Beneficiation Project”. The Credit Agreement notes that Coal India, as borrower, requested “EFIC to finance the Contract for the import of foreign goods and services ...” and that EFIC agreed “to make available the Credit Facility from which EFIC ... may make loans to the Borrower to assist the Borrower to finance the Contract for the supply of Eligible Goods and Eligible Services”.

3.2.23 Under the Credit Agreement, Coal India, as the Borrower, irrevocably authorised EFIC “to make payment of proceeds of each Disbursement in Australian currency at the Exchange Rate to or at the direction of the Exporter or into the Exporter’s Account [White]” and it agreed that “each payment so made shall constitute a loan to the Borrower. The currency of account and payment of which is German currency”.

3.2.24 Disputes subsequently arose between Coal India and White as to whether White was entitled to the bonuses and/or Coal India was entitled to penalty payments. A number of other related technical disputes also arose, primarily concerning the quality of the washed and processed coal and the sampling process by which quality would be measured.

3.2.25 Coal India considered that a penalty was due under the Contract because it felt that the quality of washed coal produced by the Coal Preparation Plant did not meet the contractual standard. In these circumstances, Coal India rejected White’s demand for payment of a bonus on the Coal Handling Plant and Coal Preparation Plant and cashed the Bank Guarantee (the “**Bank Guarantee**”) to the extent of A\$2,772,640.

- 3.2.26 Prior to encashing the Bank Guarantee Coal India requested White to extend it, but the extension requested was not granted.
- 3.2.27 The GOI had nothing to do with and did not play a part in Coal India's decision to draw down the Bank Guarantee.
- 3.2.28 Coal India called upon a Bank Guarantee provided by Claimant in the amount of A\$2.77 million. This was cashed by Coal India and the money retained.
- 3.2.29 White filed a Request for Arbitration with the ICC dated 28 June 1999. A tribunal (sometimes "**ICC tribunal**") consisting of Mr Max Abrahamson, Mr Trevor Morling QC and Justice Jevan Reddy was appointed.
- 3.2.30 The Contract did not stipulate the seat of the arbitration. In accordance with the ICC Arbitration Rules, the ICC Court fixed Paris as the place of arbitration. The parties agreed that, for convenience, the hearings of the arbitration would be in London.
- 3.2.31 The arbitration was held in London between 15 and 25 May 2000. Following supplementary questions from the tribunal and complaints by Justice Reddy, the parties were given a further opportunity to make submissions on the issues in dispute and further hearings were held on 9 and 10 January 2002.
- 3.2.32 During the course of the arbitration, Coal India applied to the ICC to have the Tribunal reconstituted on the basis of apprehension of bias. The ICC refused the request.
- 3.2.33 A majority of the arbitrators (Messrs Abrahamson and Morling) rendered an award on

27 May 2002 (the “Award”)² in which they held, *inter alia*:

- (a) the Coal Preparation Plant produced 172,749 tonnes less than the production target and, as such, Coal India was entitled to a penalty of A\$969,060;
- (b) the performance of the Coal Preparation Plant and the Coal Handling Plant were not such as to constitute a total failure of consideration;
- (c) White was entitled to a Coal Handling Plant bonus of A\$2.28 million;
- (d) White was entitled to recover the A\$2.77 million Bank Guarantee;
- (e) in total, White was entitled to an award of A\$4.08 million.

3.2.34 Justice Reddy provided a dissenting opinion in which he found in favour of Coal India. Mr Abrahamson provided a further note attached to the Award in which he responded to the comments of Justice Reddy.

3.2.35 On 6 September 2002, Coal India applied to the High Court at Calcutta to have the Award set aside on the basis of 30 claimed grounds of review (under the relevant sections of the Indian Arbitration and Conciliation Act 1996).³ White was not made aware of this application until early October 2002. The Calcutta High Court granted Coal India leave to apply and ordered the matter returnable on 14 November 2002.

3.2.36 On 11 September 2002, White applied to the High Court at New Delhi to have the Award enforced. On 13 September 2002, the Registry of the Delhi High Court

² A copy of the Award is Exhibit 4 to the Notice of Arbitration.

³ In consequence of its application to have the Award set aside, Coal India has not paid White the amounts ordered to be paid in the Award. The decision to seek to set aside the Award was that of Coal India in which the GOI played no part.

cleared the application for hearing, and on 16 September 2002, the matter was listed for 17 September 2002.

3.2.37 On 17 September 2002, White's application was heard in the Delhi High Court. The Delhi High Court ordered that Coal India be given notice of the petition, and at the request of White for a short return date, the matter was made returnable for 27 November 2002.

3.2.38 On 23 September 2002, White served Coal India with notice of the application in the High Court at New Delhi and filed an affidavit of service in the Delhi High Court.

3.2.39 On 4 October 2002, White received notice from Coal India advising of its application to the High Court at Calcutta to have the Award set aside.

3.2.40 On 24 October 2002, White filed an application in the Supreme Court of India to transfer Coal India's application from the Calcutta High Court to the Delhi High Court. In addition, White applied for an order that the Calcutta High Court proceedings be stayed.

3.2.41 White subsequently filed an application before the Registrar of the Supreme Court of India to have the transfer petition listed for mentioning before the Chief Justice in order to request a hearing before 14 November 2002 (being the next hearing date for the Calcutta High Court proceeding).

3.2.42 The Supreme Court of India heard the transfer petition and application for an *ex-parte* stay on 29 October 2002. The Court made an order that it had taken the matter on board and, in the meantime, ordered that the proceedings in the Calcutta High Court be stayed. The Court further ordered that Coal India file its reply to the transfer petition within four weeks.

- 3.2.43 On 27 November 2002, White's application for the enforcement of the Award was heard in the Delhi High Court. Coal India entered an appearance and requested that the Court stay the proceedings. The Delhi High Court did not stay the proceedings and directed Coal India to file a short reply within three weeks, before 19 December 2002. The Court further ordered White to file a rejoinder to the reply before the next date of hearing. The Court ordered that the matter be listed for hearing on 14 February 2003.
- 3.2.44 On or around 9 December 2002, Coal India filed an affidavit in reply to the transfer petition in the Supreme Court of India.
- 3.2.45 On 16 December 2002, the transfer petition was heard in the Supreme Court, however, the hearing was adjourned by the Court for two weeks.
- 3.2.46 On 2 January 2003, Coal India's application to have the Award set aside was heard in the Calcutta High Court. The Calcutta High Court was advised that the Supreme Court of India had ordered that the Calcutta proceedings be stayed. The Calcutta High Court adjourned the proceedings with directions that Coal India's application resume after the Supreme Court had disposed of the transfer petition.
- 3.2.47 On 6 January 2003, the transfer petition was heard in the Supreme Court of India. White requested permission to file a rejoinder affidavit in those proceedings. The Court agreed and White filed a rejoinder affidavit during the proceedings. The Supreme Court then adjourned the matter and ordered that it be listed for hearing after one week.
- 3.2.48 On 20 January 2003, the transfer petition was heard in the Supreme Court of India. At that time, the court advised that it was inclined to dismiss the petition, whereupon

White withdrew the transfer petition.

- 3.2.49 On 14 February 2003, White's petition to enforce the Award was heard in the Delhi High Court. Coal India requested the court to stay the proceedings and further requested that it be given additional time in which to file its reply. The Delhi High Court granted Coal India one final opportunity to comply and ordered Coal India to file a reply within three weeks, by 8 March 2003. The court ordered White to file a rejoinder two weeks after Coal India had filed its reply. On the insistence of White for a short return date, the court posted the matter for arguments on 28 May 2003. Coal India further advised the Delhi High Court that it would be filing an application to stay the Delhi High Court proceedings until the proceedings in the Calcutta High Court were decided. Coal India did not file a reply within the stipulated timeframe.
- 3.2.50 On or around 10 March 2003, White applied to the Calcutta High Court to have Coal India's application rejected.
- 3.2.51 On 22 March 2003, White applied to the Delhi High Court to have Coal India's right to file objections and a reply dismissed on the basis that Coal India had failed to file its reply within the stipulated timeframe.
- 3.2.52 On 24 March 2003, the Calcutta High Court heard White's application to have Coal India's application to set aside the Award rejected. The court directed Coal India to file a reply to White's application by 16 April 2003. The court further ordered White to file a rejoinder by 2 May 2003. The court listed the matter for hearing and arguments on 5 May 2003.
- 3.2.53 On 31 March 2003, White's application to dismiss Coal India's right to file a reply was listed for hearing in the Delhi High Court for 3 April 2003. At the hearing on 3

April 2003, Coal India requested a further two weeks to file a reply, which the court granted as a final opportunity. The court further ordered that White file a rejoinder two weeks thereafter and posted the matter for arguments on 20 May 2003.

3.2.54 On 21 April 2003, Coal India filed its reply in the Delhi High Court and on 22 April 2003, applied for an urgent stay of the Delhi High Court proceedings pending disposal of the proceedings in the Calcutta High Court. The Delhi High Court heard Coal India's reply on 20 May 2003. During the hearing, Coal India requested the court to hear arguments on its application to stay the Delhi proceedings. White contested the application for a stay and filed a reply. In view of the pending proceedings in the Calcutta High Court, the Delhi High Court posted the matter for arguments on 8 August 2003. White filed an affidavit in opposition to Coal India's reply to White's enforcement application on 5 August 2003.

3.2.55 On 21 April 2003, Coal India filed in the Calcutta High Court an affidavit in opposition to White's application to prevent the Award being set aside. The Calcutta High Court ordered the matter returnable on or around 20 May 2003. White filed a rejoinder to Coal India's affidavit on or around 20 May 2003.

3.2.56 On or around 17 November 2003, the Calcutta High Court heard White's application to dismiss Coal India's petition to set aside the Award. A single judge of the Calcutta High Court rejected White's application on 19 November 2003.

3.2.57 On 15 December 2003, White appealed the decision of the single judge of the Calcutta High Court before the Division Bench of the Civil Appellate Division of the High Court at Calcutta. The appeal was heard on 22 December 2003. White filed written submissions during these proceedings. This appeal was dismissed by the Calcutta High Court on 7 May 2004.

- 3.2.58 On 28 January 2004, the Delhi High Court directed Coal India to file any objections as to the enforceability of the Award within three weeks, before 18 February 2004. Coal India did not file its objections by 18 February 2004 and, on 11 May 2004, sought further time in which to do so. The Delhi High Court granted Coal India a final extension of three weeks, until 1 June 2004. Coal India did not meet this further deadline and on 7 July 2004, White filed an urgent application to dismiss Coal India's right to file any objections.
- 3.2.59 On 31 July 2004, White appealed the decision of the Appellate Division of the Calcutta High Court to the Supreme Court of India. The Supreme Court heard the application on 29 September 2004 and ordered that the appeal be heard together with another matter, Civil Appeal No 339 of 2003.
- 3.2.60 On 9 March 2006, the Delhi High Court ordered a stay of the Delhi proceedings. On 1 April 2006, Coal India applied to the Delhi High Court to correct the error in the case number and title noted on the certified copy of the Order of 9 March 2006.
- 3.2.61 On 8 January 2007, the Supreme Court called White's appeal for an early hearing. However, the office report stated that Civil Appeal No 339 of 2003 was not ready. White advised the court that Civil Appeal No. 339 had settled. The Supreme Court ordered the office to check and report back and listed the matter for hearing after two weeks.
- 3.2.62 On 3 April 2007, the Supreme Court of India ordered that the appeal be listed for 24 April 2007 with Civil Appeal No 7019 of 2005. The Appeal was heard by two judges of the Supreme Court on 16 January 2008, who referred the matter to another bench of three judges, presided by the Chief Justice of India.

- 3.2.63 Despite several attempts made by the Indian legal counsel of White to mention the matter orally, the matter has not yet been heard by the Supreme Court.
- 3.2.64 On 10 December 2009, White wrote to India contending that by the action of its courts, and by the actions of Coal India, it had breached the provisions of Articles 3, 4, 7 and 9 of the BIT. White asserted claims exceeding A\$10 million for loss and damages. It offered to meet with India to negotiate an amicable resolution of the matter within the six-month negotiation period provided for in Article 13.2 of the BIT to negotiate the disputes between the parties. A further letter seeking negotiations between the parties was sent on 30 March 2010. No response to either of these letters was received from India.
- 3.2.65 On 2 June 2010, White was informed by Indian counsel that its Supreme Court appeal was at that stage, item number 93 on the list. At the time of the arbitral hearing in London, no date had been set for the appeal and no reasonable estimate of when the appeal might be heard was available.

4. WHITE'S CASE

4.1 White Industries is an Investor in India

- 4.1.1 In summary, White says that it is an "investor" and has made an "investment" pursuant to the BIT.
- 4.1.2 It submits that the correct approach to be adopted by the Tribunal in assessing whether an "investment" has been made is to consider the plain and ordinary meaning of the words used in the BIT and to determine whether the matters relied on by White as constituting an "investment" satisfy the definition employed in the BIT. If this approach is adopted, the only conclusion that can follow is that White has made a relevant "investment" for the purposes of the BIT.

4.1.3 In the alternative, White argues that even if the test for an “investment” that was developed by the *Salini* tribunal⁴ is adopted (as India appears to contend ought to apply), it has, nevertheless, made an “investment”.

Investor defined by BIT

4.1.4 Article 1 of the BIT provides that an “investor” may be a company. A “company” is defined in that article as including any corporation that is “incorporated, constituted, set up or duly organised” under the laws of a Contracting Party (*i.e.*, Australia or India). White says that it satisfies this definition.

4.1.5 White notes that India has not disputed that it is a company incorporated in Australia. India’s argument that White is not an “investor” for the purposes of the BIT is based solely on the assertion that it has not made an “investment” under the BIT.

Investment defined by BIT

4.1.6 In these circumstances, White submits that India’s jurisdictional defence will be disposed of if the Tribunal concludes that White has made an investment. As to this, White says that its investment pursuant to the BIT comprises:

- (a) all of its contractual rights under the Contract;
- (b) all of its rights in relation to the Bank Guarantee; and
- (c) all of its rights under the Award.

4.1.7 White notes that “investment” has been defined in the BIT in the broadest terms.

⁴ *Salini Costruttori S.p.A and Italstrade S.p.A v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001 (“*Salini*”).

Article 1 of the BIT defines “investment” as follows:

“investment” means every kind of asset, including intellectual property rights, invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and investment policies of that Contracting Party, and in particular, though not exclusively, includes:

- (i) moveable and immovable property as well as other rights such as mortgages, liens, or pledges;*
- (ii) shares, stocks, bonds and debentures and any other form or participation in a company;*
- (iii) right to money or to any performance having a financial value, contractual or otherwise;*
- (iv) business concessions and any other rights required to conduct economic activity and having economic value conferred by law or under a contract, including rights to search for, extract and utilise oil and other minerals;*
- (v) activities associated with investments, such as the organisation and operation of business facilities, the acquisition, exercise and disposition of property rights including intellectual property rights”*
(emphasis added as by White)

4.1.8 White contends that the plain meaning of the words used in this definition (in particular, paragraphs (iii) and (iv)) encompass its rights under the Contract (including the Bank Guarantee). The Contract is said plainly to have conferred on White the right to “money” (for the purposes of paragraph (iii)), as well as providing it with the right to “conduct economic activity” (for the purposes of paragraph (iv)). White submits that the mere fact that its obligations under the Contract are summarised in a section titled “Provision of Services” is not determinative of whether the performance of its obligations under the Contract constitute an “investment” for the purposes of the BIT.

4.1.9 In any event, White asserts that its commitment under the Contract extended far beyond the provision of equipment and technical services (to, for example, the

provision of guarantees). It notes that tribunals have regularly found that the supply of services and equipment can constitute an “investment” under a BIT.

4.1.10 White says that India’s reliance on the *Salini* test, as summarised by Douglas in *The International Law of Investment Claims* (Cambridge, 2009) is not applicable in this case. This is because that test was developed in order to determine whether an “investment” had been made for the purposes of the ICSID Convention. The present case, however, is not subject to the ICSID Convention and all the cases cited by India are ICSID Decisions.

4.1.11 Moreover, the so-called *Salini* test arose out of the double jurisdictional requirement which is said by some tribunals to arise in ICSID cases under the ICSID convention. The *Salini* tribunal referred to this double jurisdictional requirement as follows:

*“[The Tribunal’s] jurisdiction depends upon the existence of an investment within the meaning of the bilateral treaty as well as that of the Convention, in accordance with the case law. The *ratione materiae* test applied by some ICSID tribunals was summarised in *Joy Mining Machinery Limited v the Arab Republic of Egypt* (ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, where the tribunal held that:*

“... the project in question should have a certain duration, a regularity of profit and return, an element of risk, a substantial commitment and that it should constitute a significant contribution to the host State’s development.””

4.1.12 White contends that this test is specific to arbitrations under the ICSID Convention. This is said to have been confirmed by the *Mytilineos* tribunal which concluded:

*“However, this latter *ratione materiae* test for the existence of an investment in the sense of Art 25 of the ICSID Convention is one specific to the Convention and does not apply in the context of *ad hoc* arbitration provided for in BITs as an alternative to ICSID.*

In the present ad hoc arbitration under the UNCITRAL Rules one would therefore have to conclude that the only requirements that have to be fulfilled in order to confer ratione materiae on this Tribunal are those under the BIT.”⁵

White’s Investment Meets Salini Test

4.1.13 In the alternative, in the event that the Tribunal considers that the *Salini* test ought to be applied in this case, White argues that it has nonetheless made a relevant “investment” measured by this standard.

4.1.14 As regards “duration”, White points out that the coal mine was to be developed over five and half years from the Contract coming into force. The Contract was itself was of six years duration; the calculation period which determined White’s bonus or penalty amounted to six years; and Coal India had the potential right to retain some or all of the Bank Guarantees for many years.

4.1.15 With respect to the “risk”, element, the *Salini* Tribunal concluded that:

“A construction that stretches out over many years, for which the total cost cannot be established with certainty in advance, creates an obvious risk for the Contract.”⁶

4.1.16 Other matters which are said to demonstrate the risk undertaken by White include the fact that:

- (a) it was only entitled to be paid a fixed fee, regardless of the expense it incurred over the term of the Contract;

⁵ *Mytilneos Holdings SA v State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL Arbitration, Partial Award on Jurisdiction, 8 September 2006, at para 117-8.

⁶ *Salini* at para 56.

- (b) it was vulnerable to the risk of the draw-down of a large amount on the Bank Guarantees if it failed to satisfy its obligations under the Contract (and to the risk of an unlawful retention of the bank guarantees by Coal India);
- (c) it was liable to pay Coal India a substantial penalty; and
- (d) it had a substantial bonus at risk.

4.1.17 A regards the requirement that the investment make a contribution to the Host State's development, White says that this fact is no longer accepted in investment treaty arbitration. Nevertheless, it notes that the Piparwar project was initiated by the GOI in 1986 as part of a policy decision to increase domestic coal production from 160 million to 400 million tonnes per year. The study carried out by White in 1987 to improve the productive capability of the Piparwar project was used by Coal India in support of its application to India's Public Investment Board for approval to proceed with the project.

4.1.18 White notes that the project was only developed and finalised with the approval of the GOI. In the light of the GOI's commitment to the project, any submission by the Republic that it did not intend that the project would make a contribution to its development cannot properly be accepted.

4.1.19 White contends that the substantial nature of its commitment and of its contribution to the India economy is also demonstrated by the fact that it financed the performance of the project and provided substantial funds to Coal India by way of its numerous bank guarantees.

4.1.20 White also points out that it maintained a technical staff of approximately 34 employees at the Piparwar mine site, an office in Calcutta with a full-time

administrative staff of four, an office in Ranchi with a full-time administrative staff of three and an office in Piparwar with full-time administrative staff of five. It also provided valuable know-how in the implementation of the project by:

- (a) a technology transfer to Coal India for the development of the project;
- (b) planning and designing of the mine;
- (c) training approximately 150 Coal India employees in India and Australia;
- (d) designing and developing the Coal India preparation and handling plants;
- (e) supervising the works; and
- (f) making recommendations on equipment and additional work required.

4.1.21 Two particularly significant items of technology transfer are said to have been White's "Mobile In-Pit Crushing and Conveying" technology and its coal washery.

4.1.22 In all of these circumstances, White submits that it made an investment in India for the purpose of the *Salini* test.

Provision of Bank Guarantees Constitute an Investment

4.1.23 White argues that its provision of the Bank Guarantees, standing alone, constitute an investment under the BIT. White committed its own funds in issuing tens of millions of Australian dollars in guarantees to Coal India pursuant to the Contract. These Bank Guarantees are plainly captured by the broad scope of the BIT, specifically Article 1 (c)(iii), being a right to money. White notes that the Bank Guarantees also satisfy each of the *Salini* factors.

The Award Constitutes an Investment

4.1.24 White also says that its rights under the Contract (including in the guarantees) are now represented in the Award. Article (c)(iii) of the BIT expressly includes as a

“investment” a “right to money or any performance having a financial value, contractual or otherwise.” On the plain meaning of these words, this includes the Award.

4.1.25 White does not allege that its rights under the Award represent an investment in itself, but rather that the Award is a part of the original investment, as found by the tribunal in *Saipem*:

*“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”*⁷

4.1.26 And while the *Saipem* tribunal left open the question of whether the award was an investment for the purpose of the relevant BIT, White asserts the question was answered definitively by the *Chevron* tribunal which found that “a claim to money” as provided in the US-Ecuador BIT captured an arbitral award.⁸

4.1.27 White argues that the *Chevron* decision, and others to similar effect, represent the only logical approach to a consideration of arbitral awards under BITs. If the rights under the Contract and the Bank Guarantees are found to be an “investment” for the purposes of the BIT, the only conclusion that can logically follow is that the Award, which is in respect of those very same rights, is part of or is a continuation of that investment.

4.1.28 If India’s submissions were correct (that an award cannot constitute part of an investment), then a host State would be able to expropriate an investor’s award

⁷ *Saipem S.p.A. v The Peoples Republic of Bangladesh* (ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, at Para 127

⁸ *Chevron and Texaco Petroleum Company v the Republic of Ecuador*, UNCITRAL PCA Case No. 34877, Interim Award, 1 December 2008 at Paras 179-186.

against the State (by having its courts set the award aside) in respect of an investment which would otherwise be protected by a BIT, without the investor having recourse under a BIT for those actions. That, it is said, cannot be right.

4.2 Tribunal's Jurisdiction over Acts and Omissions of Coal India

4.2.1 White contends that India's assertion that the Tribunal does not have jurisdiction over the acts and omissions of Coal India is misconceived. This is because:

- (a) Coal India is a government instrumentality;
- (b) India was in a position to (and did in fact), control and direct Coal India's actions; and
- (c) India has always had the opportunity to remedy Coal India's ongoing breach of the Contract and the Award.

4.2.2 White relies on Article 8 of the Articles on Responsibility of States for Internationally Wrongful Acts issued by the International Law Commission in 2001 ("**ILC Articles**") which provides:

"Conduct directed or controlled by a State.

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

4.2.3 White contends that Coal India was and is "subject to the control of the State" by way of India's appointment of board members and its share ownership. White points to Coal India's Articles of Association which vest in the President of India the power to appoint the Chairman, determine the terms and conditions of his/her appointment, appoint the Vice Chairman, Managing Director, whole-time Functional Directors and other directors in consultation with the Chairman, and to appoint the Directors

representing the government without any consultation with the Chairman. Further, the Chairman, Managing Director and other whole-time Functional Directors are appointed for a period of five years or until further instructions from the Government of India, whichever occurs earlier. Moreover, two of Coal India's Directors hold office by virtue of being officials of the Government of India's Ministry of Coal. Such Directors cease to hold office once they no longer serve as Ministers of the Ministry of Coal.

4.2.4 White says that these circumstances show that India was at all times able to control and direct Coal India. Moreover, the factual history shows that India did, in fact, regularly exercise its control over Coal India to direct its day-to-day operations.

4.2.5 White contends that India's close involvement in bringing about the Contract between Coal India and White, and India's direct involvement in the Contract by reason of India's Public Investment Board's approval for Coal India to proceed with the project is indicative of such a close relationship between India and Coal India as to show that Coal India was acting "on the instructions of, or under the direction of" India, in accordance with Article 8 of the ILC Articles.

4.2.6 Relying on the decisions in *Wintershall A.P., et al v Government of Qatar* (Partial Award on Liability, 5 February 1988, (1989) 28 ILM 795), *Noble Ventures, Inc v Romania* (ICSID Case No. ARB/01/011, Award, 12 October 2005), and *EnCana Corporation v Republic of Ecuador* (LCIA Case UN3481, Award, 3 February 2006), White says that it cannot sensibly be contended that the acts of Coal India, should not be attributable to India.

4.2.7 As regards India's submission that the Tribunal has no jurisdiction *rationai temporae* over the acts and omissions of Coal India because the acts and omissions complained

of occurred prior to 28 June 1999, before the BIT entered into force on 4 May 2000, White says that this is incorrect for two reasons.

4.2.8 First, the Tribunal clearly has jurisdiction *rationai temporae* over Coal India's improper retention of the Bank Guarantee as the retention is of a continuous character, in accordance with Article 14 (2) of the ILC Articles. Article 14 provides:

“Extension in time of the breach of an international obligation

1. the breach of an international obligation by an act by a State not having a continuous character occurs at the moment when the act performed, even if its effects continue.

2. the breach of an international obligation by an act of a State having a continuous character extends over the entire period during which the act continues and remains not in conformity with the international obligation.”

4.2.9 White notes that the improper retention of the Bank Guarantee persisted from well before 4 May 2000 (when the BIT came into force), and continues to the present day. Having regard to the fact that the improper taking is or constitutes a “continuous act”, India's purported reliance on the non-retroactivity principle is without merit.

4.2.10 Second, and of greater relevance, White argues that the issue here is not one of retroactivity. This is because there is nothing in the BIT which requires a dispute to have arisen after the entry into force of the BIT.

4.2.11 Under Article 2(1), the BIT applies as long as there are “investments” existing at the time of entry into force. The BIT's temporal restrictions refer to “investments” and not disputes. Thus, the BIT covers any dispute as long as it is a dispute arising out of or relating to an “investment” existing at the time of its entry into force.⁹

⁹ Claimant here relies on the *Chevron* Tribunal's reasoning in its jurisdiction award at Paras 265-267 and 283-284.

4.2.12 With respect to India's submissions that White's claims are contractual and, thus, inadmissible, White says that India had and continues to have the opportunity, means and legal obligation to remedy Coal India's retention of the Bank Guarantee. Thus, India's failure to correct Coal India's retention of the Bank Guarantee amounts to an exercise of sovereign authority. India had an obligation to ensure that Coal India only called upon the Bank Guarantee when it was proper to do so and its failure to exercise its supervisory function over Coal India properly is the relevant exercise of sovereign authority for these purposes.¹⁰

4.3 Breach of Article 3(2) of the BIT

4.3.1 Article 3(2) of the BIT provides:

"Investments or investors of each contracting Party shall at all times be accorded fair and equitable treatment."

4.3.2 White contends that India failed to afford fair and equitable treatment to its investment as required by Article 3 (2) of the BIT, in that (a) White has been subject to a denial of justice; (b) India has frustrated White's legitimate expectations; and (d) Coal India has improperly taken and retained White's Bank Guarantee.

Denial of Justice

4.3.3 White says that it has long been recognised that a denial of justice may give rise to a breach of the fair and equitable treatment requirement in international law (see, for example, *Lowen Group Inc v United States of America*, 7 ICSID Rep 421).

4.3.4 White contends, in summary, that the matters which give rise to a denial of justice in

¹⁰ The fact that India exercised control over the management and strategic direction of Coal India, in particular by the composition and lack of independence of the Board of Directors also means that India should be held legally responsible for the improper retention of the Bank Guarantee.

this case are:

- (a) The Indian courts' improper exercise of jurisdiction in asserting they have the power to set aside the Award;
- (b) The Indian courts' shocking delay in dealing with the enforcement of the Award (*i.e.*, a failure to provide justice to White by allowing the enforcement process - and the disputed setting aside proceedings - to continue for over nine years without any realistic end in sight); and
- (c) Coal India's improper call upon the Bank Guarantee and its improper retention of funds.

4.3.5 White points to the fact that it has been waiting over nine years to establish whether the Indian Courts, as a matter of Indian law, have properly exercised jurisdiction over the setting aside of proceedings.

4.3.6 It argues that the relevant standard for denial of justice must be informed by the obligations voluntarily accepted as binding by India under the Convention of the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("**New York Convention**" or "**Convention**"). By reason of Article III and V of the New York Convention, and in the light of its object and purpose, there is a strong presumption in favour of enforcement of arbitral awards. Under the New York Convention, an arbitral award must be recognised as binding and enforced by a Contracting State, subject only to limited exceptions. In signing the New York Convention, India has accepted that this is the standard of conduct to be applied by its courts for the enforcement of awards.

4.3.7 White says that the New York Convention establishes the requirement that an award

must be enforced subject to certain limited exceptions. In turn, the relevant inquiries that may be conducted by the courts of Contracting States that have been asked to enforce such awards are confined. Thus, at international law, the courts of India are not entitled to treat such enforcement in the same manner as they would a hearing of a matter that has been brought at first instance for the India courts. In effect, by failing to hear the matter within a reasonable period, India has failed to decide for or against the enforcement of the Award held by White during the period of over nine years, in a matter in which the India courts are necessarily allowed only limited jurisdiction. It follows that India has failed to conform to the required standard of justice under international law and its conduct constitutes a denial of justice.

- 4.3.8 White also says that it is a breach of India's obligation under the New York Convention and international law for its domestic courts (which are not the seat of the arbitration), to purport to have jurisdiction to set aside an award.
- 4.3.9 In practical terms, White contends that it has had its enforcement application held in abeyance for over nine years pending the resolution of the jurisdictional dispute. There is no evidence to suggest that the matters will be dealt with expeditiously in the near future. Thus, by preventing White from enforcing its Award in the courts of India in a fair and reasonably timely manner, India has denied White fair and equitable treatment.
- 4.3.10 As regards India's argument that "a State can only be held liable for a denial of justice when it has not remedied that denial domestically", White says that where the essence of a claim for denial of justice includes the delay of the State's courts, there is no requirement in international law for a claimant to exhaust local remedies.
- 4.3.11 White quotes Chittharajan Amerasinghe as the authority for this proposition:

“undue delay in the administration of justice has been held to be a good reason for not exhausting local remedies. This exception may be closely related to the general exception based on obvious futility but it is better considered separately, as delay may not always signify that there is a clear indication that the alien or claimant may not succeed after a lapse of time. However, undue delay in administration of justice is regarded as a denial of justice in itself and it is certainly one which does not require any further exhaustion of local remedies.”¹¹

- 4.3.12 With respect to India’s contention that “the delay of which White Industries now complains is largely attributable to White Industries’ own litigation strategy”, White says that its application to enforce the Award was not a reaction to Coal India’s application to set aside. Rather, White was unaware of Coal India’s application at the time it filed its own application to enforce.
- 4.3.13 White also argues that it was right to challenge the jurisdiction of the Calcutta High Court to set aside a foreign award because, as an international matter, the Indian domestic courts cannot properly set aside a foreign award. White, thereafter, initiated its appeal to the Supreme Court in response to the internationally wrongful assertion of jurisdiction by the Calcutta High Court.
- 4.3.14 White says that the bulk of the delay experienced in this matter stems from the inability of the Indian Supreme Court to hear and determine finally a matter that ought to have been determined promptly. This delay, (namely, over seven years), in failing to come to a view, one way or another, as to whether the Calcutta High Court has jurisdiction to set aside a foreign award is itself an unacceptable delay which amounts to a breach of India’s BIT obligations. That such a simple appeal has still not been heard or determined is sufficient to shock or surprise a sense of judicial propriety.

¹¹ *Local remedies in International Law (2nd edition 2004) at 210.*

4.3.15 As regards India's defence that White knew, or ought to have known, that Indian law allows challenges to arbitral awards rendered outside India, White says that a State may not justify its breach of its international obligations by pointing to its domestic law. Article 3 of the ILC Articles states that:

“the characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.”

4.3.16 White argues that this fundamental principle of international law is reflected in Article 27 of the Vienna Convention on the Law of Treaties 1969 (“**Vienna Convention**”) which provides that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”.

4.3.17 White also points out that the fair and equitable treatment standard contained in Article 3(2) of the BIT is expressed without qualification. Thus, the resulting protection against denial of justice is unqualified, including by reference to “domestic” law.

Frustration of White's Legitimate Expectations

4.3.18 White also submits that it has long been recognised that the “fair and equitable” treatment requirement in international law requires the host State to provide to investments treatment that does not affect the legitimate expectations which the investor had at the time of making the investment (see, for instance, *Tecnicas Medioambientales Tecmed v United Mexican States* (2004) 32 ILM 133 (“**Tecmed**”)).

4.3.19 The matters which are said to give rise to a breach of White's legitimate expectations can be summarised as follows:

- (a) the provisions of the New York Convention are binding upon India as a matter of international law¹².
- (b) the Contract which was entered into on 28 September 1989, called for disputes to be settled by ICC arbitration;
- (c) at the time of the investment, White had a legitimate expectation that, if an arbitration arose, India would abide by its treaty obligations concerning any resulting award pursuant to the New York Convention; and
- (d) despite White's legitimate expectations at the time of making the investment, and contrary to its obligations pursuant to the New York Convention, India has allowed its courts to assert jurisdiction to hear Coal India's application to set aside the Award. As noted above, it is a breach of the New York Convention, and international law, for a State's domestic courts - which are not the seat of the arbitration - to purport to have jurisdiction to set aside an award.

4.3.20 There was a legitimate expectation on the part of White that India would afford justice to White by allowing it to enforce the Award, in the courts of India, in a fair and reasonably timely manner.

4.3.21 As a result of the manner in which the Indian courts have dealt (or failed to deal) with the enforcement of the Award, White's legitimate expectation that India, as a party to the New York Convention, would apply the Convention properly and in accordance with international standards, has been frustrated. Consequently, White has been denied fair and equitable treatment.

Coal India's Improper Taking and Retention of the Bank Guarantee

¹² On 13 July 1960, India became a signatory to the New York Convention. The New York Convention entered into force in India on 11 October 1960. India's ratification was subject to certain reservations, however, these are not relevant to the present case.

- 4.3.22 White says that Coal India's conduct regarding the Bank Guarantee engages the responsibility of India under Article 3(2).
- 4.3.23 First, Coal India was never entitled to take or retain the Bank Guarantee. In its Award (at page 45), the ICC Tribunal concluded that White had met its performance targets such that it was entitled to a bonus payment from Coal India in excess of any applicable penalties as well as the return of A\$2,772,640 taken by Coal India under the Bank Guarantee. It follows, White asserts, that Coal India wrongly drew upon the Bank Guarantee. The improper nature of this behaviour is said to be aggravated by the fact that Coal India has continued to retain the Bank Guarantee even in the face of the ICC's Tribunal's award against it. The conduct of Coal India is attributable to India for the reasons outlined above.
- 4.3.24 Second, the failure of India to exercise proper supervision of Coal India and thereby to correct this unlawful retention constitutes conduct in breach of the fair and equitable treatment standard. In essence, White says that India has failed to use due diligence in ensuring respect by Coal India for the fundamental requirements of the fair and equitable treatment standard.
- 4.3.25 White contends that these two acts are inconsistent with the obligation of India to deal with the investor in good faith. The initial taking of the Bank Guarantee was not in good faith because, on the facts found by the ICC Tribunal, Coal India lacked a proper factual basis for taking the Bank Guarantee. In any event, there can be no doubt that the continued retention of the Bank Guarantee after the making of the ICC Award, including the failure of India to exercise proper supervision by requiring Coal India to pay the damages required by the Award and return the Bank Guarantee funds, is entirely at odds with the most fundamental requirements of good faith and fair

dealing.

4.3.26 Third, the retention of the Bank Guarantee is arbitrary in that it is inconsistent with reasonable, principled conduct. Such behaviour cannot be characterised as even-handed or just conduct of the kind required by the fair and equitable treatment standard in the circumstances of the present case. Coal India took the Bank Guarantee because it could and when an ICC Tribunal found that Coal India was not entitled to take or keep the Bank Guarantee, it simply ignored the decision.

4.4 Breach of Article 4(2) of the BIT

4.4.1 White contends that India has breached its obligations under Article 4 (2) of the BIT because it has treated White's investment on a less favourable basis than treatment afforded to investments of investors of a third country.

4.4.2 Article 4 (2) of the BIT - a "most favoured nation" clause - provides that:

"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".

4.4.3 White refers to Article 4 (5) of the Agreement Between the Republic of India and the State of Kuwait for the Encouragement and Reciprocal Protection of Investments, 27 November 2001, ("**India-Kuwait BIT**") which provides that:

"each Contracting State shall maintain a favourable environment for investments in its territory by investors of the other Contracting State. 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."

4.4.4 White notes that almost identical wording appears in Article II (7) of the Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investments, 27 August 1993 (“**US-Ecuador BIT**”):

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

4.4.5 White relies on the conclusions of the tribunal in *Chevron - Texaco v Ecuador*¹³ that Article II (7):

“... constitutes a lex specialis and not a mirror statement of the law on denial of justice ... a distinct and potentially less-demanding test is applicable under this provision as compared to denial of justice under customary international law ...” (at 242, 244)

“For any ‘means’ of asserting claims or enforcing rights to be effective, it must not be subject to indefinite or undue delay. Undue delay in effect amounts to a denial of access to those means The Ecuadorian legal system must thus ... provide foreign investors with means of enforcing legitimate rights within a reasonable amount of time ... some of the factors that may be considered are the complexity of the case, the behaviour of the litigants involved, the significance of the interests at stake in the case, and the behaviour of the courts themselves.” (at 250)

“The tribunal ultimately concludes that the Ecuadorian courts have had ample time to render a judgement in each of the seven cases and have failed to do so.” (at 262)

“The question of whether effective means have been provided to the Claimants for the assertion of their claims and enforcement of their rights is ultimately to be measured against an objective, international standard.” (at 263)

4.4.6 Against this background, White contends that nine years for the enforcement of an international arbitration award in a country which is a party to the New York

¹³ Partial Award on the Merits, 30 March 2010, at pp 242, 244, 250, 262 and 263.

Convention is an unacceptable delay by objective and international standards. Here, the matter is not complex, and White has pursued the enforcement of the Award with vigour. Accordingly, India's failure to enforce the Award constitutes a breach of the "effective means" obligation under Article 4(2) of the BIT, under which Claimant is entitled to the benefit of Article 4 (5) of the Kuwait-India BIT.

4.5 Breach of Article 7 of the BIT

4.5.1 White argues that India has breached its obligation under Article 7 of the BIT not to expropriate the investments of the investors of the other Contracting Party except against compensation prescribed by the BIT.

4.5.2 By entertaining the application of Coal India to set aside the Award, the courts of India have asserted jurisdiction to set aside an international arbitration award made in another country in breach of international law (including the New York Convention) under which an international award may be set aside only by the courts of the place where the award was made.

4.5.3 In addition, the effect of the Indian courts' delays in dealing with White's application to enforce the award has deprived White of the benefit of the Award and of its rights to have the Award enforced in a manner consistent with India's obligations under international law, including the New York Convention.

4.5.4 Because the courts of India are an organ of the Republic of India, the delays occasioned by the Indian courts constitute an expropriation which is attributable to the Republic. White is thus entitled to receive compensation for this expropriation.

4.6 Breach of Article 9 of the BIT

4.6.1 White says that Coal India's improper call on the Bank Guarantee and its improper

retention of those funds constitute a breach by India of its obligations under Article 9 of the BIT to permit all funds of an investor related to an investment to be transferred freely without unreasonable delay and on a non-discriminatory basis.

4.7 Compensation is Due under the BIT

4.7.1 Based on the *Chorzow Factory* decision¹⁴, White says it is entitled to be restored to the position it would have enjoyed had the breach of the BIT not occurred. That is to say, White would (a) have received the sums due to it under the Award; (b) not have incurred the costs which it has incurred in pursuing litigation through the Indian Courts; (c) not have incurred the costs which it has incurred in attempting to settle the dispute with India; and (d) not have incurred the costs in bringing this arbitration.

4.7.2 White thus claims compensation as follows:

- (a) the amount of A\$4,085,180 payable under the Award;
- (b) the amount of A\$4,033,397.07, being interest (at the rate of 8% as set out in the Award) from 24 March 1998 to 27 July 2010, on the Award (and continuing at a rate of A \$ 895.38 per day from 27 July 2010) until the date of payment;
- (c) the amount of US \$84,000 payable under the Award for the fees and expenses of the arbitrators (converted to Australian dollars as at the date of the Award), being A \$150,892;
- (d) the amount of A\$500,000 payable under the Award (for White's costs in the arbitration);

¹⁴ 1928 P.C.I.J. No. 17.

- (e) the costs incurred by White in pursuing the Indian court proceedings, settlement negotiations and this arbitration (such costs to be assessed); and
- (f) interest on the amounts set out in (c), (d) and (e) above.

5. INDIA'S CASE

5.1 Objections to Jurisdiction and Admissibility

White is not a "Investor" / has no "Investment" in India

- 5.1.1 India says that Claimant has not discharged its burden of proving that this Tribunal has jurisdiction *rationae materiae* in this case. Specifically, India argues that White is not an "investor" with an "investment" in India that is entitled to the protections in the BIT. What constitutes an "investment", India asserts, must be determined from the ordinary meaning of the term in the context of the BIT and having regard to its object and purpose (as opposed to in the abstract).
- 5.1.2 India says that White misrepresents the writings of Zachary Douglas in suggesting that he restricts his proposed definition of an "investment" to "investments" under the ICSID Convention. Rather, Douglas sets out a more general test which is applicable to all investment treaty claims. The applicable legal test as to what constitutes an "investment" is said to be summarised by Douglas' Rules 22 and 23:

"Rule 22: The legal materialization of an investment is the acquisition of a bundle of rights in property that has the characteristics of one or more of the categories of an investment defined by the applicable investment treaty where such property is situated in the territory of the host State or is recognised by the rules of the host State's private international law to be situated in the host State or is created by the municipal law of the host State.

Rules 23: The economic materialization of an investment requires the commitment of resources to the economy of the

*host State by the claimant entailing the assumption of risk in expectation of a commercial return”.*¹⁵

5.1.3 India asserts that the pertinent elements of an “investment” have been defined in the so-called *Salini* test (originally developed in relation to Article 25 of the ICSID Convention). That test is said to identify four elements as indicative of an “investment” for the purposes of the ICSID Convention:

- (a) a contribution of money or other assets of economic value;
- (b) a certain duration over which the project is implemented;
- (c) a sharing of operational risks; and
- (d) a contribution to the host state’s development.

5.1.4 India asserts that none of the categories of alleged “investment” relied on by White meets these requirements

White’s Contractual Rights

5.1.5 India argues that the Contract was an ordinary commercial contract for the supply of goods and services and as such, does not constitute an “investment”.

5.1.6 India says that such contracts do not satisfy the test found in *Douglas*, to the effect that rights *in personam* do not generally qualify as an investment independently of rights *in rem*.¹⁶

5.1.7 Reliance is also placed on the tribunal’s decision in *Malaysian Salvors v Malaysia* which held that the salvage contract in question there did not constitute an investment

¹⁵ Zachary Douglas, *The International Law of Investment Claims* (CUP, 2009) V, p. 161.

¹⁶ Douglas, Chapter V, p. 161, Rule 24.

because:

"while the contract did provide some benefits to Malaysia, they did not make a sufficient contribution to Malaysia's economic development to qualify as an 'investment' for the purposes of Art. 1 (a) of the BIT".¹⁷

5.1.8 India contends that the requirement that the right in question be a right *in rem* stems not from the terms of the BIT alone, but also from the ordinary meaning of the term "investment" applying Article 31 (1) of the Vienna Convention. Using the ordinary meaning of the term, the analysis of whether a contractual right can amount to an "investment" must consider whether the contractual right in question gives rise to a proprietary interest. As Douglas explains:

"Of all the investment categories considered ... it is a 'claim to money' or 'right to future income' which generates the most controversy in practice. There is clearly a significant degree of overlap between each of these rights and an analysis of them must grapple with an additional problem of distinguishing between rights in rem capable of constituting an investment pursuant to Rule 22 and simply contractual rights that are not. The problem is the subject of a separate Rule 24 and much of the discussion accompanying it is directly relevant to the investment category now under consideration. Investment securities confer a right in rem to a 'claim for money' and therefore are capable of being a 'investment' pursuant to Rule 22. The category of 'rights to money or future income' tends to feature in BITs where there is no separate reference to investment securities, such as the Germany Model BIT. Insofar as the category under consideration is introduced in the Germany Model BIT as an 'asset', it would seem to follow that there must be a proprietary foundation for any alleged investment in the form of 'claim to money or future income'".¹⁸

5.1.9 India points out that White's rights under Part I of the Contract were to payment; and detailed provisions on advance payment, progress payment and final payments were

¹⁷ *Malaysian Salvors v Malaysia*, Preliminary Objections, Para. 143.

¹⁸ Douglas, *supra*, page 184, para. 385.

included in the Contract. Under Part II of the Contract, White had certain rights, most notably the right to compensation in the form of fees for the development of the project.

5.1.10 India contends that it follows, inexorably, that White does not have any rights under the Contract or under the Bank Guarantee which can be described as rights which have a “propriety foundation” and therefore that none of White’s rights are *in rem*. India notes that this point has been addressed expressly by Justice Srikrishna, who confirms that - as a matter of applicable Indian law - the rights created by the Contract or the Bank Guarantee are not rights *in rem*.

5.1.11 India also argues that White’s purported “investment” does not satisfy the requirement that White assumed an element of risk, which is recognised as a criterion for an investor to be regarded as having made an “investment”. This is because the financing structure entered into by Coal India, White Industries, AUSTRADE and EFIC - which enabled Coal India to enter into the transaction - meant that White bore no risk in the Piparwar project, other than as to its own performance.

5.1.12 In sum, India asserts that White’s rights under the Contract cannot be considered an “investment” because they do not satisfy the meaning of “investment” under the BIT, as they are merely rights *in personam* without any proprietary foundation. Further, White’s rights under the Contract do not meet the additional criteria which have been accepted in arbitral case law as applying to the term “investment”.

White’s Rights in Relation to the Bank Guarantee

5.1.13 India contends that the starting point here is White’s admission that its alleged rights

under the Bank Guarantee are a “sub-set of the rights under the Contract”.¹⁹

Accordingly, on White’s own case, the Bank Guarantees were not an independent investment in their own right, but were part and parcel of the Contract. Thus, if, as submitted above, the Contract was not an investment, neither were the Bank Guarantees.

5.1.14 To the extent that White argues that the Bank Guarantees were independent assets “invested” by it into India, this is said to be plainly wrong. The guarantee in question is the CHP/ CPP Performance Bank Guarantee. India argues that none of the Bank Guarantees put in place by White provided it with any substantive rights. Rather, the guarantees were issued in favour of Coal India so as to provide Coal India with the guarantee that it would be entitled to immediate payment in case it believed that White had defaulted on its obligations. At most, White’s right under the Bank Guarantees was to ensure that no payment would be taken except in the contractually stipulated circumstances which allowed Coal India to effect a draw under the Bank Guarantees. However, there has never been any suggestion that these were breached in any way or that the bank ought not to have effected payment to Coal India under the Bank Guarantees. White’s real complaint is not that “its” Bank Guarantee has been “improperly retained” or “expropriated”. Rather, it believes it is now entitled to a refund of funds drawn down under the Bank Guarantee, not of the Bank Guarantee itself which has long since expired. India notes that the Bank Guarantee expired seven days after Coal India drew down A\$2,772,640 on 24 March 1998. Thus, it cannot be said that the expired guarantee has in any way been “retained” by Coal India, let alone by India.

¹⁹ Claimant’s Memorial, para 1.7 and para. 1.101.

5.1.15 In sum, the contention by White that the Bank Guarantees constitute an investment must be rejected. Such rights that White had thereunder were purely contractual *in personam* rights and not rights *in rem*. Further, Bank Guarantees were constituted in favour of Coal India, not White, and did not grant or create any substantive rights in favour of White and were not an “asset” of White.

5.1.16 Reliance is also placed on the tribunal’s decision in *Joy Mining Machinery v Egypt* where the claim, brought under the UK-Egypt BIT, related to performance guarantees given by the claimant to an Egyptian state-controlled enterprise.²⁰ The *Joy* tribunal is said to have held that the contract amounted to no more than an ordinary sales contract on “normal commercial terms” which was to be distinguished from investment activity, and the guarantees were no more an “investment” than the contract itself.

White’s Rights under the Award

5.1.17 India states that White’s suggestion that the *Saipem* tribunal “determined that an ICC Award was an investment for the purposes of the Italy-Bangladesh BIT” is completely incorrect.

5.1.18 To the contrary, it points out that the *Saipem* tribunal expressly found that an arbitral award was *not* an investment. As the tribunal explained:

“The Tribunal agrees ... 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.”²¹

²⁰ *Joy Mining Machinery v Egypt Award on Jurisdiction* (ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004).

²¹ *Saipem*, para 113 (emphasis in original).

5.1.19 India also relies on the ICSID tribunal's decision in *GEA Group AG v Ukraine* which ruled definitively that an ICC Award is not an "investment" for the purposes of Article I of the Germany-Ukraine BIT (which is said to contain a similar definition to Article I of the BIT). That tribunal held that:

"161. ... Whether tested against the criteria of Article I of the BIT or Article 25 of the ICSID Convention, 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" ...).

162. even if - arguendo - the Settlement Agreement and Repayment Agreement could somehow be characterised as 'investments' ... 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 II of the BIT or (if needed) Article 25 of the ICSID Convention".²²

5.1.20 India further says that the Award is plainly not an "asset ... invested ... [in India]

As Douglas puts it, the Award does not satisfy the additional requirements for the alleged "asset" to be an "investment"; there has been no additional commitment to the resources of the host State and there has been no assumption of risk in expectation of commercial return.

Tribunal Lacks Jurisdiction over the Acts / Omissions of Coal India

5.1.21 India argues that the Tribunal does not have jurisdiction over the acts and omissions

²² *GEA Group AG v Ukraine*, ICSID Case No. ARB/084/16, Award of 31 March 2011, paras 161-162 (emphasis in original).

of Coal India because:

- (a) such acts are not attributable to India;
- (b) the tribunal has no jurisdiction *rationai temporis* over such acts;
- (c) White's claims based on such acts are not admissible

5.1.22 As regards attribution, India notes that White has now conceded that it is not relying on Articles 4 and 5 of the ILC Articles on State Responsibility (“**ILC Articles**”), and that the sole basis on which it seeks to contend that the acts of Coal India are attributable to India is that provided in Article 8 of the ILC Articles (“Conduct Directed or Controlled by the State”).

5.1.23 Article 8 provides:

“the conduct of a person or group of persons shall be considered an act of State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of the State in carrying out the conduct.”

5.1.24 With respect to White's conclusion that:

“given the practical control which India has over Coal India, and the history of India's exercise of that control, it follows that (at the relevant time), Coal India had such a close relationship with India that Coal India could be said to have been acting ‘on the instructions of, or under direction of’ the Republic of India, in accordance with Article 8 of the ILC Articles”,²³

India says that even if this was a correct factual assertion, this makes no difference.

5.1.25 This is because the test under Article 8 is not concerned with organisational structure of the State agency, the manner of appointment of directors, and the frequency of

²³ Claimant's Memorial, para 2.20.

consultation on issues such as pricing. Rather, the test under public international law for whether a State “controls” or “directs” the acts and omissions of a person or group of persons is set extremely high. As the ICJ held in *Nicaragua v United States of America*, for the conduct there to have given rise to legal responsibility of the United States, it would have to have been proven that the United States had “effective control” of the military or para-military operations in the course of which the alleged violations were permitted.²⁴

5.1.26 India notes that the application of the “effective control” test in the context of State-owned and controlled enterprise was discussed by the ILC in its commentary to Article 8 as follows:

“the fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity. Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, prima facie their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of government authority within the meaning of Article 5.”

5.1.27 The test of “effective control”, as developed by the ICJ, was considered in the context of an investment treaty claim by the ICSID tribunal in *Jan de Nul NV and Dredging International NV v Egypt*. There the tribunal held that:

“international jurisprudence is very demanding in order to attribute the act of a person or entity to a State, as it requires both a general control of the State over the person or entity and a specific control of the State over the act the attribution of

²⁴ *Nicaragua v United States of America*, at pp. 62, 64-65, paras 109 and 115.

which is at stake; this is known as the 'effective control' test".²⁵

5.1.28 Here, although Coal India oversees the coal mining sector which is owned and controlled by the GOI, it functions and acts as a commercial undertaking and is a profit driven enterprise. It has a distinct personality, which can sue or be sued in its corporate name. It is entitled to enter into contracts without the need to comply with Article 299 of the Constitution. In these circumstances, India says that it is clear that Coal India was not carrying out any act *de jure imperii*, or discharging any sovereign function, but was carrying out purely commercial acts, *de jure gestionis*. Thus none of its acts - whether the calling of the performance guarantee or otherwise - are attributable to India.

5.1.29 As regards the tribunal's jurisdiction *rationai temporis*, India says that all of the acts / omissions of Coal India which White seeks to attribute to India occurred prior to 28 June 1999, when White filed its Request for Arbitration with the ICC, and prior to the entry into force of the BIT on 4 May 2000. India argues that a treaty cannot have retroactive effect under public international law and that the provisions of Article 2(1) of the BIT (that the BIT applies "... to all investments made by investors ..., whether made before or after the coming into force of [the BIT]") has no impact on the operation of the temporal rule. It simply provides that the Host State must, from the date of entry into force of the BIT, treat pre-existing investments in accordance with the standards set out in the BIT. It does not impose those standards retroactively.

5.1.30 With respect to White's characterisation of Coal India's draw down on the CPP/CHP Guarantee as a "continuing act" India says that the draw down was the very opposite

²⁵ *Jan de Nul NV and Dredging International NV v Egypt*, ICSID No. ARB/04/13, Award of 6 November 2008), para 13173.

of a “continuing act”. It was a one-off draw down which did not have the effect of “taking” or “retaining” or “expropriating” the Bank Guarantee. And as noted above, India points out that Coal India has not “retained” any Bank Guarantee which has long since expired.

5.1.31 Finally, regarding the admissibility of White’s claims, India says the alleged breaches of conduct by Coal India all arise out of the Contract and thus are subject to the exclusive jurisdiction of the forum contractually agreed in the Contract, *i.e.*, an ICC tribunal constituted under Clause 3 of Part III of the Contract.

5.1.32 Moreover, for a breach of Contract to be elevated into a breach of a treaty, an exercise of sovereign authority is required, but here White has not led a shred of evidence that India instructed or directed Coal India not to return the Bank Guarantee.

5.1.33 India notes that it is not a party to the Contract and that White has not identified any exercise by the State of sovereign authority in this case. It concludes that there were no such acts and the relevant contractual claims are not admissible.

5.2 Breach of Article 3 (2) of the BIT

Fair and Equitable Treatment Standard

5.2.1 India argues that White’s reference to, and reliance on the *Tecmed* decision with respect to the concept of legitimate expectations in relation to the fair and equitable treatment standard is inappropriate and misleading. This is because the *Tecmed* tribunal’s apparent reliance on the foreign investor’s expectations as the source of a host State’s obligation is questionable. A host State’s obligation towards foreign investors derives from the terms of the applicable investment treaty and not from a set of expectations investors may have or claim to have.

5.2.2 India argues that there is a high threshold for finding a violation of the fair treatment standard. The approach taken by the tribunal in *Waste Management (II)* is said to represent a balanced approach and to constitute the prevailing international position.

The *Waste Management II* approach is that:

“... the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice or involves the lack of due process leading to an outcome which offends judicial propriety - as might be the case with manifest failure of natural justice in judicial proceedings or complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which was reasonably relied on by the claimant.”²⁶

5.2.3 India says that the *Tecmed* tribunal went wrong when it sought to treat the concept of legitimate expectations as involving an independent treaty standard. Rather, legitimate expectations are concerned with due process in administrative decision-making, ensuring the consistent application of the law and enforcing representations by the host State only where these were made specifically enough to the particular investor to justify reliance.

5.2.4 India contends that tribunals generally require specific and unambiguous representations (encouraging remarks do not of themselves give rise to legitimate expectations) by a host state to the investor and that the investor’s reliance be justifiable and reasonable based on objective criteria. The latter requirement of reasonableness of reliance carries the consequence that breach of the standard is not determined by the investor’ subjective expectations.

²⁶ *Waste Management v United Mexican States*, Award, 30 April 2004, 43 *ILM* 203, 967, para. 98.

- 5.2.5 India asserts that the breadth of the concept of fair and equitable treatment is limited by two further principles: that the investor must take the host State law as it finds it and that the standard does not operate as a guarantee against all subsequent changes in host State law.
- 5.2.6 As regards Mr Travers Duncan's allegations as to purported specific representations made to him by Indian officials, to the effect that it was safe for Claimant to invest in India and that the Indian legal system was, to all intents and purposes, the same as the Australian legal system, India says that they do not come close to meeting the standard required to be found a legitimate expectation the frustration of which would constitute a breach of Article 3(2) of the BIT.
- 5.2.7 With regard to White's complaint that India "failed to return White's Bank Guarantee", Coal India did not in fact "fail to return the CHP/ CPP Performance Guarantee". It affected a partial draw down thereon, as it was entitled to, and there is an ongoing dispute between Coal India and White as to whether White is entitled to a refund of the monies drawn down. Regardless, India simply did not "direct" or "control" the conduct of Coal India.
- 5.2.8 With respect to White's argument that India has failed to treat the Award consistently with its "international obligations in respect of the enforcement of arbitral awards", the New York Convention deals with the recognition and enforcement of arbitral awards. It does not legislate for, nor impose a regime with respect to, challenges to awards, or the circumstances in which a court may or may not exercise jurisdiction with respect to a setting aside application.
- 5.2.9 Finally, concerning White's argument that India's courts have failed to treat its case with reasonable transparency, India argues that White has simply not provided any

evidence which supports this allegation.

Alleged denial of Justice

5.2.10 At the outset, India states that White has no real answer to the point that an investor must take the conditions of the host State as it finds them. It says that White's attack on India's explanation that its judicial system is and has always been notoriously slow misses the point that the standards against which a State's conduct is to be measured is to take into account the circumstances of the host State.

5.2.11 India concedes that a State may, in principle, be liable for the acts of its judiciary. However, as stated by the *Mondev* tribunal, the test for denial of justice is a stringent one. For the *Mondev* tribunal:

"The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection. In the end, the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in light of all the available facts that the impugned decision was clearly improper and discreditable with the result that the investment has been subjected to unfair and inequitable treatment".²⁷

5.2.12 The tribunal in *Chevron Corporation and Texaco Petroleum Company v Ecuador* agreed that:

"the test for establishing a denial of justice sets ... a high threshold. While the standard is objective and does not require an overt showing of bad faith, it nevertheless requires the

²⁷ *Mondev International Ltd. v United States* (ICSID Case No. ARB (AJ)/99/2, Award of 11 October 2002), para 127.

demonstration of “a particularly serious shortcoming and egregious conduct that shocks, or at least surprises, a sense of judicial propriety.”²⁸

5.2.13 India contends that the events in this case plainly fall far short of this high threshold.

It says that the factors to be taken into account in determining whether there has, in the present case, been a denial of justice are: (a) the complexity and sensitivity of the proceedings, as well as the significance of the issues at stake; (b) the need for swiftness in the resolution of the case, including whether the claimant may be compensated for loss by any delays; (c) the conduct of the litigants involved, including the diligence of the claimant in prosecuting the proceedings; (d) the behaviour of the courts themselves; and (e) the circumstances of the host State.

5.2.14 With respect to the complexity of the issues at stake, India says it is clear that the question whether the Indian Courts can entertain an application for an arbitral award to be set aside, where that award was not made in India, has been and is a hotly debated point of Indian arbitration law. The progress of White’s application has, accordingly, been hampered by the complexity of the issue requiring resolution.

5.2.15 Dealing next with the need for swiftness in the resolution of the case, this has been an issue in the context of proceedings and applications before human rights courts where there is particular need for the urgent resolution of the case. In the present case, those same considerations do not apply.

5.2.16 With regard to the diligence of White in prosecuting the proceedings (and the conduct of the litigants), India says that the time taken in the proceedings before the courts of

²⁸ *Chevron Corporation and Texaco Petroleum Company v Ecuador* (Partial Award on the Merits of 30 March 2010), para. 244.

India is directly attributable to the litigation strategy adopted by White. Had White not challenged the maintainability of Coal India's application before the Calcutta High Court, the application would by now have been heard on the merits and been disposed of.

5.2.17 As regards the behaviour of the Indian courts themselves, India submits that it is not possible to criticise their conduct. The courts have in fact heard White's various applications and petitions within a number of months, not years, with, in all cases, with one exception. The latter relates to the hearing on the merits of White's complex jurisdictional challenge by the Supreme Court which took three and a half years to come up for hearing but had to be remitted to a three-judge bench in view of its complexity and the existence of directly relevant authority. There simply can be no suggestion whatever that the Indian courts have in any way been culpable of undue delay.

5.2.18 Finally, this Tribunal must take into account the circumstances of the Host State. And it is clear, as a matter of law, that India, as a developing country, with a population of over 1.2 billion people and an over-stretched judiciary, must be held to different standards than, for example, Switzerland, the United States or Australia.

5.2.19 Having regard to the facts of this case, India asserts that there has been no denial of justice because:

- (a) there has been no decision in this case, and the matter is awaiting determination before the Supreme Court on a preliminary point of jurisdiction raised by Claimant;
- (b) there has been no undue delay. Here the time that has been taken is due to Claimant's litigation strategy. In any event, delay is a natural, well-known

and entirely predictable feature in the Indian court system. It reflects no illegitimate conduct directed at White; and

- (c) White knew, or ought to have known, that Indian law allowed and allows a challenge to an arbitral award rendered outside India. The Indian courts in this case have simply applied, *bona fide*, Indian law, as it would be applied to anyone else, and as they are obliged to do.

5.2.20 In this case there also has been no specific representation to White, and no reliance, (let alone reasonable reliance, on any such representation). Indeed, White's alleged "legitimate expectations" are directly contradicted by the investment environment which prevailed at the time that White made its alleged investment in India.

5.3 Breach of Article 3(1) of the BIT

5.3.1 India argues that Claimant's case based on breaches of Article 3(1) of the BIT (that India failed to "encourage and promote favourable conditions for investors of the other Contracting Party to make investments in its territory") contains no indication of the applicable legal test.

5.3.2 However, the provisions of Article 3(1) are similar to the general, introductory and hortatory "investment promotion" and provisions found in many BITS which, commentators agree, do not give rise to substantive rights.

5.3.3 Moreover, India says that Article 3(1) fails to specify any promotional activities that must be taken to encourage and create "favourable conditions". It thus lacks sufficient content to be treated as a stand-alone, positive commitment.

5.3.4 In any event, India asserts that the three complaints made by White with respect to the fair and equitable treatment standard are substantive, post-investment complaints and have nothing to do with the encouragement, promotion or admission of investments in

India.

5.4 Breach of Article 4 (2) of the BIT

- 5.4.1 India says that White's allegations of breach of Article 4(2) of the BIT are misconceived. It argues that White's case, that India has failed to provide "effective means" of asserting claims, must be dismissed for four principal reasons.
- 5.4.2 First, Article 4 (5) of the India-Kuwait BIT cannot be incorporated into the BIT. This is because it is clear, on the face of the BIT, that both Contracting Parties placed a strong and unusual emphasis on the application of national laws to investments. Bearing this in mind, the provisions of Article 4 (2) must be interpreted to take into account this balance of the BIT. Thus, Claimant's arguments concerning the wholesale and incorporation of Article 4 (5) of the India-Kuwait BIT must be rejected.
- 5.4.3 Second, even if Article 4 (5) of the India-Kuwait BIT can be incorporated into the BIT, India says that the obligation stated in that provision can only be applied to events occurring after the entry into force of the BIT, which is 28 June 2003. Accordingly, any alleged delays that occurred prior to that date cannot be taken into consideration in determining whether India breached the alleged "effective means obligation".
- 5.4.4 Third, the obligation found in Article 4 (5) of the India-Kuwait BIT is a different obligation to that contained in Article II (7) of the US-Ecuador BIT, so the reasoning of the *Chevron* tribunal is not applicable. In the present case, India argues, all that has happened is that White's claim has been dealt with just like any other piece of litigation in the Indian courts. The delay that has been caused in the Indian judiciary's consideration of the issue has been occasioned both by the conditions of the Host State and also, and most importantly, by White's own litigation strategy.

5.4.5 Fourth, even if the reasoning of the *Chevron* tribunal is somehow relevant, the facts of the present case are clearly distinguishable from those in *Chevron*. In the *Chevron* case the “delay” was between 13-15 years from the commencement of the court proceedings until the commencement of the BIT claim. It is also noteworthy that the *Chevron* tribunal expressly found that there was no evidence that any action by the Claimants had actively and significantly contributed to the delay. Indeed, a review of the chronology of the various Indian proceedings - on the basis of White’s own evidence - shows that there have been no “prolonged periods of complete inactivity on the part of the [Indian] courts” and, unlike in *Chevron*, it cannot be said that there is “no evidence that any action by the Claimants has actively and significantly contributed to the delays”.²⁹ To the contrary, the principal contributing factor to any delay complained of by White is its own litigation strategy in India.

5.4.6 On these facts, India contends that this part of Claimant’s claim adds nothing to its case for denial of justice.

5.5 Breach of Article 7 of the BIT

5.5.1 India says that White’s case on expropriation is hopeless for four principal reasons.

5.5.2 First, to the extent the “asset” alleged to have been expropriated is the Award, this is not an “investment”. With respect to White’s rights in the Contract and the Bank Guarantee, India also denies that these are “investments” within the meaning of the BIT.

5.5.3 Dealing first with White’s rights under the Contract, India argues that the only form of contractual rights that are capable of being “expropriated” are those that are a form

²⁹ *Chevron*, paras 256 and 255.

of intangible property, such as “a right over natural resources granted by a public act of the Host State”³⁰ Here, however, the contractual rights in question are rights under a run-of-the-mill commercial contract for the supply of goods and services.

5.5.4 As regards the Bank Guarantee, India argues that it did not create any substantive rights in White’s favour which could be expropriated. To the extent that White had any limited rights under the Bank Guarantee, they are said patently not to be rights which are capable of being understood as “intangible property”. Rather, they were rights *in personam*. In any event, the Bank Guarantee cannot have been said to have been expropriated. It was simply drawn upon by Coal India in the amount of A\$2,772,640 and it subsequently expired according to its terms seven days thereafter.

5.5.5 India asserts that the correct test to determine whether an expropriation has occurred does not consider the impact on the value of the investment, but rather the impact on the rights of the investor in the investment.

5.5.6 Second, even if the courts of India have acted wrongfully, and deprived White of any right to enforce the Award, the Award would not thereby have ceased to exist or have been “expropriated”.

5.5.7 Third, the courts of India have not, in fact, acted wrongfully in any way. Rather, Claimant has pursued a litigation strategy apparently designed to prevent the Indian courts from engaging in any meaningful review of the Award, and to the extent it is now aggrieved, it has only itself to blame.

5.5.8 Fourth, there has yet to be any determination of the challenge proceedings or the

³⁰ Zachary Douglas, *The International Law of Investment Claims* (2009), p. 214.

enforcement proceedings.

5.5.9 India also says that White's expropriation case is undermined by the fact that it was or should have been aware of the Indian enforcement and challenge regime.

5.5.10 For the foregoing reasons, White's argument that India as expropriated its alleged "investment" should be rejected as completely unfounded.

5.6 Breach of Article 9 of the BIT

5.6.1 India proposes that White's case relating to the free transfer of funds (and breach of Article 9) must fail for two reasons.

5.6.2 First, the acts of Coal India, which are not attributable to India, are not within the jurisdiction of the Tribunal and/or admissible in this arbitration.

5.6.3 Second, the acts complained of do not bear any relationship with the subject matter of Article 9, which relates the free transfer of funds as a matter of exchange control and the like. Coal India's entitlement to call upon the Bank Guarantee, as it did, has nothing to do with the freedom of movement of capital in and out of India.

5.6.4 Finally, India says that the passage from *Biwater Gauff v Tanzania*, cited by White is fatal to its own argument. The passage reads:

"The Arbitral Tribunal agrees with the Republic that Article 6 of the BIT is not a guarantee that investors will have funds to transfer. It rather guarantees that if investors have funds, they will be able to transfer them, subject to the conditions stated in Article 6. The free transfer principle is aimed at measures that would restrict the possibility to transfer, such as currency control restrictions or other measures taken by the host State which effectively imprison the investors' funds, typically in the

*host State of the investment. No such measures have been taken in the present case.*³¹

5.7 Compensation Due under the BIT

- 5.7.1 India says that even if White succeeds on liability, it cannot demonstrate that it has suffered any loss or is entitled to any compensation.
- 5.7.2 This is because White has not demonstrated that Coal India's setting aside application and motion to resist enforcement have no reasonable prospect of success. Indeed, Coal India has very good grounds to challenge the Award and to resist its enforcement.³² Thus, had the Supreme Court determined White's jurisdictional challenge to Coal India's setting aside application, it would, in all likelihood, have ruled that the Calcutta High Court has jurisdiction to hear Coal India's setting aside application.
- 5.7.3 But, even if it had ruled to the contrary, this would still have left White with the task of persuading the Delhi High Court that the Award should be enforced in India. And in either a setting aside or enforcement proceeding, Coal India would have been able to raise the defences set out in its setting aside application.
- 5.7.4 India argues that White cannot therefore show that it would have obtained an order allowing execution against Coal India and that it would have been able to execute that order against Coal India up to the full value of the Award.

³¹ *Biwater Gauff (Tanzania) Ltd v Tanzania* (ICSID Case No. ARB/05/22, Award of 24 July 2008), para. 735.

³² The Award was the result of an obviously flawed arbitral process. Coal India is justified in considering that the ICC arbitration contravened basic notions of due process and fairness. Coal India is also justified in concluding that there was, at the very least, an appearance of bias in the ways that the Chairman of the ICC arbitration, Mr Abrahamson, conducted the arbitration. Further, Coal India has, on its face, an unimpeachable argument that the Award was rendered outside the agreed time of six months, meaning the arbitral procedure was not in accordance with that agreed by the parties. Finally, Coal India is also justified in considering that the Award is contrary to the public policy of India.

5.8 Relief Requested

5.8.1 In these circumstances, India requests the Tribunal to adjudge and declare that:

- (a) On the issues of jurisdiction and admissibility;
 - (i) the Tribunal has no jurisdiction over White's claims, as White has not made an "investment" in India;
 - (ii) in any event, the conduct of Coal India cannot be attributed to India;
 - (iii) in any event, the impugned conduct of Coal India occurred prior to the entry into force of the BIT, and is therefore outside the BIT's (and the tribunal's) jurisdiction; and
 - (iv) the claims concerning Coal India was inadmissible.

- (b) On White's substantive claims:
 - (i) India's conduct does not amount to a denial of justice in breach of Article 3 (2) of the BIT;
 - (ii) Coal India's alleged improper taking and retention of the Bank Guarantee is not a breach of Article 3 (2) of the BIT;
 - (iii) India's conduct does not amount to a frustration of White's alleged legitimate expectations;
 - (iv) India has not breached any asserted obligation to provide "effective means of asserting claims";

- (v) India has not breached the obligation to encourage and promote favourable conditions for investors under Article 3 (1) of the BIT
- (vi) India has not expropriated White's alleged investment, contrary to article 7 (1) of the BIT;
- (vii) India has not breached the obligation to allow the free transfer of funds, contrary to Article 9 of the BIT;
- (viii) White is not entitled to any compensation.

6. TRIBUNAL'S APPROACH TO THE CASE ON THE MERITS

6.1 Issues for Consideration

6.1.1 At the conclusion of the hearing it was apparent that eight principal questions require to be addressed by the Tribunal. These are:

- (a) is White an "investor" in India and has it made an "investment" pursuant to the BIT?
- (b) does the Tribunal have jurisdiction over the acts and omissions of Coal India?
- (c) has India failed to encourage and promote favourable conditions for investors, in breach of Article 3 (1) of the BIT?
- (d) does India's conduct amount to a breach of the fair and equitable standard and thus a breach of Article 3 (2) of the BIT?
- (e) does India's conduct amount to a failure to provide "effective means of asserting claims" and thus constitute breach of Article 4 (2) of the BIT?
- (f) has India expropriated White's investment, contrary to Article 7 of the BIT?

- (g) has India breached Article 9 of the BIT by failing to allow White freely to transfer funds related to the investment?, and
- (h) is White entitled to compensation for any breach of the BIT?

6.1.2 Each of these questions is dealt with in successive Sections of this Award below.

7. WHITE AS AN INVESTOR AND ITS INVESTMENT

7.1 Questions to be Addressed

7.1.1 In this Section the Tribunal requires to address five questions, as follows:

- (a) does White qualify as an “Investor”;
- (b) where a contractual right is relied upon to establish an “investment”, must the contract create rights *in rem*;
- (c) do White’s rights under the Contract qualify as an “investment”;
- (d) do White’s rights under the Bank Guarantees qualify as an “investment”; and,
- (e) do White’s rights under the Award qualify as an “investment”?

7.2 White as an Investor

7.2.1 Article 1 of the BIT provides that an “investor” may be a “company” or a natural person (where the latter must be either a citizen or permanent resident). It further defines a “company” as including any corporation that is “incorporated, constituted, set up or duly organised” under the laws of a Contracting Party.

7.2.2 Although India does not dispute that White is a company incorporated in Australia, it argues that it is not an “investor” for the purposes of the BIT based on its assertion that White has not made an “investment” under the BIT.

7.2.3 Under these circumstances, there being no denial of White’s claim to be an “investor” in India, both limbs of India’s defence in this respect will be disposed of should the Tribunal find that White has made an “investment”.

7.3 The Required Attributes of an Investment

7.3.1 The definition of “investment” in the BIT is set out in broad terms. Article 1 of the BIT defines “investment” as follows:

*“investment means every kind of asset, including intellectual property rights, invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and investment policies of that Contracting Party, and in particular, **though not exclusively, includes:***

- (i) moveable and immovable property as well as other rights such as mortgages, liens, or pledges;*
- (ii) shares, stocks, bonds and debentures and any other form of participation in a company;*
- (iii) right to money or to any performance having a financial value, contractual or otherwise;*
- (iv) business concessions and any other rights required to conduct economic activity and having economic value conferred by law or under a contract, including rights to search for, extract and utilise oil and other minerals;*
- (v) activities associated with investments, such as the organisation and operation of business facilities, the acquisition, exercise and disposition of property rights including intellectual property rights.” (emphasis added)*

7.3.2 The correct approach to be adopted by the Tribunal in assessing whether an “investment” has been made is to consider the plain and ordinary meaning of the words used in the BIT in their context and in the light of its object and purpose and to determine whether the matters relied on by White satisfy the definition employed in the BIT.

7.3.3 India's principal arguments against White having made an "investment" are based on the writings of Zachary Douglas, who sets out what he considers to be an appropriate general test of what constitutes an "investment". This test is said to be applicable in all investment treaty claims - regardless of whether they are brought under the ICSID Convention, the UNCITRAL or any other rules of arbitration.

7.3.4 For Douglas, it is essential than an "investment" have certain legal and economic characteristics. These are described in his "Rules" 22 and 23, which provide:

"Rule 22: the legal materialization of an investment is the acquisition of a bundle of rights in property that has the characteristics of one or more of the categories of an investment defined by the applicable investment treaty where such property is situated in the territory of the host State or is recognised by the rules of the host State's private international law to be situated in the host State or is created by the municipal law of the host State..

Rule 23: the economic materialization of an investment requires the commitment of resources to the economy of the host State by the Claimant entailing the assumption of risk in the expectation of commercial return.

7.3.5 Douglas's requisite legal characteristics are derived from the non-exhaustive examples of an "asset" that constitutes "investments" in investment treaties. This forms the basis of Rule 22, which generalises the requirement as the acquisition of property rights in the host State.

7.3.6 The requisite economic characteristics are derived from what is described as the common economic concept of foreign direct investment. In Rule 23, they are "codified" as the transfer of resources into the economy of the State and the

assumption of risk in the expectation of commercial return.³³

7.3.7 India further relies on Douglas's proposition that, where a claimant relies upon a contract to establish an investment pursuant to Rule 22 and 23:

*“the Tribunal should differentiate between rights **in personam** as between the Contracting Parties and rights **in rem** that are memorialised by the contract. The rights **in personam** do not generally qualify as an investment independently of the rights **in rem**.”³⁴*

7.3.8 The difficulty with India's position on this point is that the BIT simply does not provide that, in order to be a covered investment, the investment must be a right “*in rem*”, or must have Douglas's economic characteristics. Indeed, the BIT expressly includes in its definition of an “investment” what can only be *in personam* rights, namely: the “right to money or to any performance having a financial value, contractual or otherwise”. And this is precisely what White had under the Contract: a “right to money” from Coal India for the performance of its obligations under the Contract.

7.4 White's Contractual Rights

7.4.1 It is also generally well established that rights arising from contracts may amount to investments for the purposes of many BITs.³⁵

7.4.2 An example of such a conclusion is found in *SPP v Egypt*, where the tribunal there explicitly rejected the distinction relied upon by India - namely that between rights *in*

³³ In this latter respect, India also relies on the “*Salini Test*”, as developed in *Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco*, and adopted in varying measure in *Phoenix Action, Ltd. v the Czech Republic* (ICSID Case No. ARB/06/5 Award, 15 April 2009) and *Jan de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt* (ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006).

³⁴ Douglas, Chapter 5, p. 161, Rule 24.

³⁵ Christoph H. Schroeter et al, *the ICSID Convention: A Commentary* (Cambridge, 2nd Ed, 2009) at 126.

rem in and rights *in personam*:

*“Clearly those rights and interests were of a contractual rather than **in rem** nature. However, there is considerable authority for the proposition that contract rights are entitled to the protection of international law and that the taking of such rights involves an obligation to make compensation therefore.”³⁶*

- 7.4.3 In its Statement of Defence, at paragraphs 97 and 98, in making the point that ordinary commercial contracts of the sort represented by the Contract do not constitute an “investment”, India referred to what is described as “a substantial body of jurisprudence in the field”. This, it indicated, would be elaborated in due course.
- 7.4.4 Because this elaboration was not to be found in India’s subsequent Memorials , the Tribunal drew counsel for India’s attention to this point during the hearing and requested that any further case law or jurisprudence be identified in their closing speeches. In the event, no further case law or jurisprudence was drawn to the Tribunal’s attention.
- 7.4.5 As to whether White’s rights pursuant to the Contract qualify as an investment, it seems evident from the Contracting Parties’ definition of “investment” that they intended that the BIT would capture investments in the broadest sense. The Contract also plainly conferred on White a “right to money” for the purposes of sub-paragraph (iii), as well conferring a right to “conduct economic activity” for the purposes of sub-paragraph (iv).
- 7.4.6 With respect to India’s contention that the Contract simply provided for payment to White for the “provision of services”, this is not determinative of whether the

³⁶ *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* (ICSID Case No. ARB/84/3, Award, 20 May 1992).

performance of White's obligations under the Contract constitute an "investment". It is also clear White's commitment under the Contract extended far beyond the provision of equipment and technical services.

7.4.7 In these circumstances, having regard to the definition of "investment" in the BIT, which clearly include White's rights under the Contract, and the decisions of other tribunals that rights arise from contracts may amount to investments,³⁷ the Tribunal concludes that the fact that White's rights under the Contract may be *in personam* rather than *in rem* does not exclude the Contract from qualifying as an investment.

7.4.8 As regards the so-called "*Salini Test*" for what constitutes an investment, this test was developed in order to determine whether an "investment" had been made for the purposes of the ICSID Convention. The cases cited by India in support of these requirements were also ICSID decisions.

7.4.9 The present case, however, is not subject to the ICSID Convention. Consequently, the so-called *Salini Test*, and Douglas's interpretation of it, are simply not applicable here. Moreover, it is widely accepted that the "double-check" (namely, of proving that there is an "investment" for the purposes of the relevant BIT *and* that there is an "investment" in accordance with the ICSID Convention), imposes a higher standard than simply resolving whether there is an "investment" for the purposes of a particular BIT.

³⁷ See *Chevron Corporation and Texaco Petroleum Company v Republic of Ecuador* (UNCITRAL, PCA Case No. 34877, Interim Award, 1 December 2008); *Inmaris Perestroika Sailing Maritime Services GmbH v Ukraine* (ICSID Case No. ARB/08/08, Decision on Jurisdiction, 8 March 2010); *ATA Construction, Industrial and Trading Company v the Hashemite Kingdom of Jordan* (ICSID Case No. ARB/08/02, Award, 18 May 2010); *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* (ICSID Case No. ARB/84/3, Award, 20 May 1992); *Tokios Tokelès v Ukraine* (ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004); *Impregilo S.p.A. v Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005), at [255]; *Eureko B.V. v Republic of Poland* (Ad Hoc Arbitration, Partial Award, 19 August 2005).

- 7.4.10 However, if it could properly be said that *Salini's* elements of an investment (i.e., a substantial commitment, a certain duration, a regularity of profit and return, an assumption of risk and a contribution to the host State's development) were the appropriate measure in this case, White has shown them to exist in connection with the Contract.
- 7.4.11 First, it is beyond doubt that White made a substantial commitment in India pursuant to the Contract.
- 7.4.12 Despite India's assertion to the contrary, White financed its own performance of the project, thus committing its own working capital, subject to payments by Coal India.³⁸
- 7.4.13 White also provided substantial funds to Coal India by way of the Bank Guarantees, as well as equipment, personnel, training and know-how.
- 7.4.14 White hired and paid approximately one hundred local contractors to provide technical construction services on the project. It trained Coal India's work force both in Australia and India (45 in Australia, 100 on site in India). It maintained a technical staff of 34 expatriate and local employees at the Piparwar site; a full time administrative staff of four at its office in Calcutta and a full-time administrative staff of three at its office in Ranchi, as well as an office in Piparwar with full-time administrative staff of five. It transferred its "Mobile In-Pit Crushing and Conveying" technology, the use of which it pioneered in open-cut coal mines in Australia and it transferred its own coal-washery technology.

³⁸ The financing requirements were substantial. The actual cost of the equipment supplied was approximately A\$140 million. The cost of ocean freight and marine insurance came to approximately A\$9.9 million. Project related financing costs in the amount of A \$9.1 million were incurred, all of which required a substantial commitment by White of its working capital to the project.

7.4.15 Second, as regards the so-called duration element, it cannot be sensibly be contended that White failed to satisfy the “duration” limb of *Salini*. The Piparwar coal mine was to be developed within sixty-six months of the date the Contract came into force. The Contract itself was to be for six years but was eventually extended to over eight years.

7.4.16 The third limb of the *Salini Test* involves consideration of the “risk” undertaken by the investor. Again, the Tribunal concludes that White’s investment in India satisfies any such risk threshold. For example, White was only entitled to be paid the fee stipulated in the Contract, regardless of the expense it incurred over the term of the Contract. Should the project’s costs have ballooned, White would have been substantially out of pocket. In addition, over the term of the Contract, White provided Coal India with over A\$45 million in Bank Guarantees to secure White’s proper contractual performance. White was therefore vulnerable to the risk of draw downs on these Bank Guarantees. Finally, White took the risk of having to pay Coal India a substantial penalty under the Contract (of up to A\$26 million) and also had a substantial bonus at risk (of up to A\$10 million).

7.4.17 As to the *Salini* profit/return element, the fact that White was to earn in excess of A\$206 million over the term of the Contract satisfies this requirement.

7.4.18 The final *Salini* element is the contribution, through the investment, to the host State’s development. In this regard, it is to be remembered that Piparwar was initiated by the GOI and that White collaborated with and assisted CMPDI in its feasibility assessment to find ways to improve the productive capability of the project. This, together with the increased production and refining of coal achieved by the performance of the Contract were of direct benefit to the Host State’s development, and meets this limb of the test.

7.4.19 It is thus clear from White's operation under the Contract as a whole that it has made an investment in India for the purposes of the *Salini Test*. The substantial financial and work-based commitments, along with the duration of those commitments, the high risk it assumed and the indisputable contribution to India's development as a result of those commitments, comprehensively satisfied any *ratione materiae* test that may be said to exist under the BIT.

7.5 Bank Guarantees are not an Investment

7.5.1 Having concluded that the provision by White of the Bank Guarantees is properly to be considered (under the elements of substantial commitment and assumption of risk) in assessing whether White has made an "investment" for purposes of the *Salini Test*, the Tribunal does not consider that White's rights under those guarantees, standing alone, constitute an "investment" under the BIT.³⁹

7.5.2 The Bank Guarantee in question is the CHP/CPP Performance Bank Guarantee. Under Article 12.2.3 of the Contract, White was required to provide a "Performance Bank Guarantee ... as Project Performance in the amount of \$12.0 Million in mutually agreed form." The Bank Guarantee was to "remain valid till finalization of Bonus Penalty Payment under Article 13.3, Part-II of this Agreement."

7.5.3 Article 13.1 of the Contract contains the "Project Performance Guarantees", and these applied to the Coal Production Plant ("CPP") and the Coal Holding Plant ("CHP").

7.5.4 Article 13.3.7 made provision for the payment of any bonus or penalty.

7.5.5 The performance guarantee put in place by White (including the CHP/CPP

³⁹ In this respect, White argues that the Bank Guarantees are plainly captured by the broad scope of the BIT, specifically Article 1(c) (iii), being a right to money.

Performance Guarantee on which Coal India eventually drew down) did not provide White with substantive (if any) rights. They were guarantees put in place by White *in favour* of Coal India for the purpose of providing Coal India with the guarantee that it would be entitled to immediate payment in case it believed that White had defaulted on its obligations.

7.5.6 At most, White had the right under the Bank Guarantees to ensure that payment would not be taken thereunder, except in the contractually stipulated circumstances which allowed Coal India to effect a draw down.

7.5.7 The Bank Guarantees did not grant or create any substantive rights in favour of White and, accordingly were not an “asset” of White. In these circumstances, the Tribunal rejects White’s argument that its rights under the Bank Guarantees constitute an “investment”.

7.6 White’s Rights Under the Award

7.6.1 White’s position as to whether the Award constitutes an “investment” has been argued somewhat inconsistently. In paragraph 1.106 of its Memorial, it asserts that the Award is an “investment” because it constitutes a “right to money or to any performance having a financial value, contractual or otherwise” as provided by Article 1(c)(iii) of the BIT.

7.6.2 However, in paragraph 1.107 of the Memorial it is stated that “White Industries does not, however, allege that its rights under the Award represent an investment *in itself*, but rather that the Award, is part of the original investment.

7.6.3 The Tribunal concludes that this latter statement more accurately describes the status of the Award.

7.6.4 The *Saipem* tribunal reached a similar conclusion when it held that:

*“The rights embodied in the ICC Award were not created by the Award but arise out of the Contracts. The ICC Award crystallized the parties’ rights and obligations under the original contract.”*⁴⁰

7.6.5 Similar reasoning was employed by the tribunals in *Mondev*, *Chevron*, and *Frontier Petroleum Services*. In those decisions, the tribunals characterised arbitral awards as “continuing” an investment under a contract.

7.6.6 India has cited the recent decision in *GEA Group Aktiengesellschaft v Ukraine* (ICSID Case No. ARB/08/16), Award, 31 March 2011 in support of its argument that White’s rights pursuant to the Award are not a covered investment for the purposes of the BIT.

7.6.7 However, the Tribunal notes that the statement made at paragraph 161 of the *GEA* Award, (“the ICC Award - in and of itself - cannot constitute an ‘investment’ . . . Properly analysed it’s 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’ . . .)”) was *obiter dicta* in light of the tribunal’s finding that neither the Settlement Agreement nor the Repayment Agreement were “investments” for the purposes of the Germany-Ukraine BIT.

7.6.8 The Tribunal considers that the conclusion expressed by the *GEA Tribunal* represents an incorrect departure from the developing jurisprudence on the treatment of arbitral awards to the effect that awards made by tribunals arising out of disputes concerning “investments” made by “investors” under BITs represent a continuation or

⁴⁰ *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, 21 March 2007), at 127. See also *ATA Construction, Industrial and Trading Company v The Hashemite Kingdom of Jordan* (ICSID Case No. ARB/08/2, Award, 18 May 2010), at 115 where the tribunal observed that: “measured by the standards in *Saipem*, the Final Award at issue in the present arbitration would be part of an ‘entire operation’ that qualifies as an investment”.

transformation of the original investment.⁴¹

7.6.9 The tribunal in the *Chevron* Jurisdiction Award concluded:

*“Once an investment is established, it continues to exist and be protected until its ultimate disposal ‘has been completed’.”*⁴²

7.6.10 Accordingly, the Tribunal concludes that rights under the Award constitute part of White’s original investment (i.e., being a crystallisation of its rights under the Contract) and, as such, are subject to such protection as is afforded to investments by the BIT.

8. THE TRIBUNAL’S JURISDICTION OVER COAL INDIA

8.1 The Acts and Omissions of Coal India Are Not Attributable to India

8.1.1 In its Statement of Claim, White concedes that it is not relying on Articles 4 (“organ of the State”) and 5 (“exercise of Governmental authority”) of the ILC Articles. Thus, the sole basis upon which White seeks to contend that the acts of Coal India are attributable to India is that provided in Article 8 of the ILC Articles (“conduct directed or controlled by the State”).

8.1.2 This was a proper concession as Coal India is patently, not an organ of the state within the meaning of Article 4, nor does it exercise elements of the Governmental authority within the meaning of Article 5. This was confirmed in the Expert Report of Justice Srikrishna.

8.1.3 Article 8 provides that:

⁴¹ Rather than define awards as “investments” in and of themselves, tribunals such as *Mondev*, *Chevron* and *Frontier Petroleum Services* have characterised their findings as providing protection to the subsisting interests that [the investor] continued to hold in the original investment.

⁴² *Chevron Corporation and Texaco Petroleum Company v The Republic of Ecuador* (UNCITRAL, PCA Case No. 34877, Interim Award, 1 December 2008), at 185, referring to *Mondev International Ltd. v United States of America* (ICSID Case No. ARB (A)/99/2, Award, 11 October 2002), at 81.

“The conduct of a person or a group of persons shall be considered an act of State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”

8.1.4 This issue therefore turns on whether the facts in the record support a conclusion of whether Coal India was in fact acting on the instructions of or under the direction or control of India. And as to this, the test is a tough one.

8.1.5 White points to various factors which, in its view, satisfy the test of “direction” or “control”. It refers to the alleged “extraordinary level of top-down control of India by the Republic”, the fact that Coal India is a “Government Company” within the meaning of Section 617 of the India Companies Act 1956; the fact that Coal India was wholly-owned by the Host State at the time of the alleged breaches by Coal India, the fact that India had control over the appointment of Coal India’s board of directors and that India, in fact, regularly exercised direction and control over Coal India. White concludes that:

“Given the practical control which India has over Coal India, and the history of India’s exercise of that control, it follows that (at the relevant time), Coal India had such a close relationship with India that Coal India could be said to have been acting ‘on the instructions of, or under the direction of’ the Republic of India, in accordance with Article 8 of the ILC Articles”.⁴³

8.1.6 To the extent that White relies on the organisational structure of Coal India, the manner of appointment of its directors, and the frequency of consultation on issues such as pricing, these matters are largely irrelevant with regard to Article 8.

8.1.7 The applicable test as set forth by the ILC in the commentary to Article 8, is as follows:

⁴³ Claimant’s Memorial, para 2.20.

*“Such conduct shall be attributable to the State **only if it directed or controlled the specific operation** and the conduct complained of was an integral part of that operation”.*⁴⁴
(emphasis added)

- 8.1.8 Such a test excludes from consideration matters of organisational structure and “consultation” on operational or policy matters.
- 8.1.9 White in the present case complains about Coal India’s call on the Bank Guarantees, its alleged “wrongful retention” of the Bank Guarantee, and its decision to challenge the ICC Award in the Indian Courts.
- 8.1.10 As foreshadowed by the wording of Article 8, the test under public international law for whether a state “controls” or “directs” the acts and omissions of a person or group of persons involves a high threshold.
- 8.1.11 In *Military and Paramilitary Activities in and against Nicaragua*, The International Court of Justice (ICJ) and had to consider whether the conduct of the *Contras* could be attributed to the United States, such that the United States could be held responsible for breaches of international humanitarian law committed by the *Contras*.
- 8.1.12 Although the ICJ observed that the United States was responsible for the “planning, direction and support” given by the United States to the *Contras*, this did not mean that all of the conduct of the *Contras* was attributable to the United States. The ICJ held that:

“[D]espite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf. ... All the forms of United States participation

⁴⁴ James Crawford, *The International Law Commission’s Articles on State Responsibility* (2002), p.110, para 3.

mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the contras without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would have to be proved that the State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.”⁴⁵

8.1.13 In the ILC’s discussion of the *Nicaragua* case, it noted that:

“[W]hile the United States was held responsible for its own support for the contras, only in certain individual instances were the acts of the contras themselves held attributable to it, based upon actual participation of and directions given by that State. The Court confirmed that a general situation of dependence and support would be insufficient to justify attribution of the conduct to the State.”⁴⁶

8.1.14 The ICJ’s test of “effective control”, as developed in the *Nicaragua* case, was reaffirmed by the ICJ in the *Genocide* case in 2007. There, the ICJ stated that:

“[I]t has to be proved that [the persons or groups] acted in accordance with that State’s instructions or under its ‘effective control’. It must however be shown that this ‘effective control’ was exercised, or that the State’s instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.”⁴⁷

8.1.15 The application of this test in the context of state-owned and controlled enterprises was discussed by the ILC in its commentary to Article 8 as follows:

⁴⁵ *Nicaragua v United States of America*, at pp. 62, 64-65, paras. 109 and 115.

⁴⁶ James Crawford, *The International Law Commission’s Articles on State Responsibility* (2002), p. 111, para. 4.

⁴⁷ [2007] ICJ Rep 43, 208, para 400.

“Questions arise with respect to the conduct of companies or enterprises which are State-owned and controlled. ... In discussing this issue it is necessary to recall that international law acknowledges the general separateness of corporate entities at the national level, except in those cases where the ‘corporate veil’ is a mere device or a vehicle for fraud or evasion. The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity. Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, prima facie their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority within the meaning of article 5. This was the position taken, for example, in relation to the de facto seizure of property by a State-owned oil company, in a case where there was no proof that the State used its ownership interest as a vehicle for directing the company to seize the property.”⁴⁸

8.1.16 The test of “effective control”, as developed by the ICJ, was considered in the context of an investment treaty claim by the ICSID tribunal in *Jan de Nul NV and Dredging International NV v Egypt*. That tribunal put the position as follows:

“International jurisprudence is very demanding in order to attribute the act of a person or entity to a State, as it requires both a general control of the State over the person or entity and a specific control of the State over the act the attribution of which is at stake; this is known as the ‘effective control’ test.”(emphasis added)⁴⁹

8.1.17 The test of “effective control” was described in near identical terms by the ICSID tribunal in *Gustav F Hamester GmbH and Co KG v Ghana*.⁵⁰

8.1.18 Thus, for the allegedly wrongful conduct of Coal India to give rise to the

⁴⁸ James Crawford, *The International Law Commission’s Articles on State Responsibility* (2002), p. 112, para. 6 (footnotes omitted), citing, *inter alia*, *SEDCO, Inc v National Iranian Oil Company* (1987) 15 Ir-USCTR 23; *International Technical Products Corporation v Iran* (1985) 9 Ir-USCTR 206; and *Flexi-Van Leasing Inc v Iran* (1986) 12 Ir-USCTR 335.

⁴⁹ *Jan de Nul NV and Dredging International NV v Egypt* (ICSID Case No ARB/04/13, Award of 6 November 2008), para. 173 (emphasis added).

⁵⁰ *Gustav F Hamester GmbH and Co KG v Ghana* (ICSID Case No ARB/07/24, Award of 18 June 2010), para. 179 (emphasis added).

responsibility of India, White has to show that India had both general control over Coal India as well as specific control over the particular acts in question. And to the Tribunal's mind, White has failed to make such a showing.

8.1.19 On the record before us, there is simply no suggestion that the officers and employees of Coal India required or obtained the approval of India to activate the Bank Guarantee. It is also clear that the GOI was not involved, either directly or indirectly, in the negotiation of the detailed contractual terms of the Contract with White - this is clear from the testimony Mr Ghodke and Mr Malhotra. Further, the GOI played no role in the "execution, implementation or completion" of the project - this was for Coal India. As Mr Malhotra explained:

"the role of the Government of India was limited to facilitating and improving CIL's Piparwar Project. As I have explained above, the Government was required to approve the Piparwar Project, because CIL's utilisation of public funds in Piparwar had to be sanctioned by the Government"

8.1.20 Moreover, as Mr Ghodke states:

"the Government did not carry out any 'monitoring' of the project on a day-to-day basis, and it did not guide, direct or instruct Coal India Limited to act or not to act in a particular manner and/or as to how to execute or implement the Contract it had with the Claimant. Coal India, not the Government, was the counter-party to the Contract and was in charge of implementing it, using its expertise in this field."⁵¹

8.1.21 Based on the documentary and testimonial record, the Tribunal therefore concludes that the evidence does not support White's contention that the conduct of Coal India is properly to be attributed to India.

⁵¹ Witness Statement of Mr Ghodke, para 15.

9. ARTICLE 3(1) - FAVOURABLE CONDITIONS FOR INVESTORS

9.1 Article 3(1) of the BIT

9.1.1 Article 3(1) of the BIT provides that:

“[e]ach Contracting Party shall encourage and promote favourable conditions for investors of the other Contracting Party to make investments in its territory. Each Contracting Party shall admit such investments in accordance with its laws and investment policies applicable from time to time.”

9.2 The Extent of the Obligations

9.2.1 As construed by White, Article 3(1) requires each of the Contracting Parties to take concrete, positive steps in the interests of investors generally. It says, on the facts of this case, that this gives rise, at the very least, to three obligations on the part of India:

- (a) to create a suitable governance framework for supervising the action of state-owned corporations, including Coal India, in their dealings with foreign investors;
- (b) to ensure that its arbitration laws are administered in line with India’s New York Convention obligations; and
- (c) to take steps to reduce the backlog of cases in its courts, given the prospect that such backlog must necessarily have significant effect on domestic and international businesses, including investors, as defined under the BIT.

9.2.2 Thus, if India had complied with its obligations under Article 3(1) of the BIT, then India would not:

- (a) have permitted Coal India, improperly to call upon the Bank Guarantee and improperly to retain funds to which White was entitled;
- (b) through its Courts, have breached its obligations under the New York Convention by purporting to exercise jurisdiction to set aside awards made outside India; and

- (c) through its Courts, have denied justice to White, through what it describes as an extraordinary delay in resolving legal proceedings.

9.2.3 As construed by India, Article 3(1) provides for two general obligations. These are:

- (a) First, a pre-establishment obligation (i.e., prior to the admission of the investment), which requires the Contracting Parties to “encourage and promote favourable conditions” for investors; and
- (b) Second, an obligation on each Contracting State to “admit” investments by “investors” of the other Contracting Party (in accordance with its laws and investment policies applicable from time-to-time).

9.2.4 Because White does not argue that India breached the second of these obligations, India says that White’s case must therefore be concerned with the pre-establishment obligation. The Tribunal agrees.

9.2.5 As to the nature of such an obligation, there is very little case law or jurisprudence. The only case cited by Claimant, *National Grid plc v Argentina*, involved a consideration of the terms of the equivalent provision in the United Kingdom-Argentina BIT in the context of its finding on the content of the fair and equitable standard.

9.2.6 As such, the case is of no real assistance, although it is clear that the tribunal there made no finding whatever as to the scope of the obligation “to encourage and promote favourable conditions”.

9.2.7 However, commentators seem to agree that such provisions in BITs do not give rise to substantive rights.

9.2.8 For instance, McLachlan, Shore and Weiniger state that: “BITs usually contain a provision pursuant to which investments are encouraged, but within the legal

framework prevailing in the Host State.” Such provisions are contrasted by the authors with the provisions conferring “substantive rights” on investors which are dealt with separately.⁵²

9.2.9 Likewise, Dolzer and Schreuer, do not include the obligation to “encourage and promote favourable conditions” for investments in their list of substantive standards of protection.⁵³

9.2.10 In their work on investment treaty arbitrations, Newcombe and Paradell write that:

“Promotion Obligations in BITs generally are weak and subject to Host State laws. In most BITs promotion and encouragement are the presumed by-products of specific, substantive and procedural investment protections. General promotion and encouragement obligations do not liberalise admission and establishment nor require States to adopt specific measures to promote FDI.”⁵⁴

9.2.11 The only circumstances in which the authors speculate that such a provision might impose restrictions on the host State are where that State takes:

“certain types of economic measure against its [BIT] treaty partners unless permitted to do so in accordance with its obligations under a specific treaty regime, such as by the United Nations Security Council or the World Trade Organisation.”⁵⁵

9.2.12 The Tribunal is inclined to agree with India’s position that the pre-establishment obligations set out in the first sentence in Article 3(1) of the BIT lack sufficient content to be treated as a stand-alone, positive commitment giving rise to substantive

⁵² McLachlan, Shore and Weiniger, *International Investment Arbitration: Substantive Principles* (2007), p.29, para 2.17 and 2.20.

⁵³ Dolzer and Schreuer, *Principles of International Law* (2008), p.viii, ch. VII (“Standards of Protection”).

⁵⁴ Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, (2009), p. 127.

⁵⁵ *ibid.*, p.128

rights. However, it is not necessary to construe the first sentence of Article 3(1) so broadly, since the Tribunal is satisfied that the language used in Article 3(1) is far too general to support the three specific obligations contended for by White referred to above.

9.2.13 Accordingly, the Tribunal concludes that India has not breached the obligation to encourage and promote favourable conditions for investors under Article 3(1) of the BIT.

10. ARTICLE 3(2) - FAIR AND EQUITABLE TREATMENT

10.1 Questions to be addressed

10.1.1 In this Section the following questions are addressed:

- (a) has India breached the fair and equitable standard by reason of the conduct of Coal India in relation to the Bank Guarantees;
- (b) has India frustrated White's legitimate expectations and thereby breached the fair and equitable standard; and
- (c) has the conduct of India's courts regarding the set aside and/or enforcement applications amounted to a denial of justice to White in breach of the fair and equitable standard?

10.2 Coal India's dealing with the Bank Guarantee

10.2.1 White's first asserted claim in respect of Article 3 (2) of the BIT is that Coal India's alleged "improper taking and retention" of the Bank Guarantee amounts to a breach of the obligation to accord White fair and equitable treatment.

10.2.2 White's specific claims are first that "Coal India was never entitled to take or retain the bank guarantee"⁵⁶ and, second, that India failed "to exercise proper supervision of Coal India and thereby correct this unlawful retention"⁵⁷.

10.2.3 It is apparent that this claim can only get off the ground if the act of Coal India in drawing on the Bank Guarantee and/or improperly retaining the funds drawn under it are attributable to India. Thus, given the Tribunal's conclusion that Coal India's conduct in this regard cannot properly be attributable to India, it follows that White's claim for breach of Article 3(2) of the BIT by reason of this conduct must fail.

10.3 White's Legitimate Expectations

10.3.1 White initially sought to rely on its alleged legitimate expectations that:

- (a) India, as a party to the New York Convention, would apply the Convention properly and in accordance with international standards; and
- (b) India would afford justice to White by allowing it to enforce the Award, in the courts of India, in a fair and reasonably timely manner.⁵⁸

10.3.2 Faced with India's Defence that such vague and general allegations cannot found a claim based on frustration of legitimate expectations, White led evidence from Mr Duncan, one of its directors, concerning a range of representations which were said to have been made to him by (named and unnamed) Indian officials, to the effect that: it was safe for White to invest in India; that the Indian legal system was, to all intents

⁵⁶ Claimant's Memorial, para 4.3

⁵⁷ Claimant's Memorial, para 4.3

⁵⁸ From White's submissions it is clear that it considers that a proper application of the New York Convention requires the courts of a State to decline jurisdiction to vacate a foreign award unless the parties have agreed that the arbitration proceedings giving rise to the award was to be governed by the laws of that State.

and purposes, the same as the Australian Legal system; and, accordingly, it could expect fair treatment.

10.3.3 In his closing speech, Mr Bonnell also referred to India's failure to ensure that its courts treated White's case with reasonable transparency.

10.3.4 For the reasons set out below, the Tribunal concludes that none of White's allegations meet the standard required to establish a legitimate expectation the breach of which would constitute any infringement of Articles 3(2) of the BIT.

10.3.5 To the extent that White relies on the *dicta* of the *Tecmed* tribunal, to the effect that fair and equitable treatment requires a State:

*“to provide to international investment treatment that does not affect the **basic expectations that were taken into account by the foreign investor to make the investment,**”*⁵⁹

the Tribunal notes that the statement has been subject to what it considers to be valid criticism.⁶⁰

10.3.6 The so-called *Tecmed* standard is potentially very broad in application. Indeed, as Douglas has observed, “it is actually not a standard at all; it is rather a description of a perfect public regulation in a perfect world, to which all states should aspire but very few (if any) will ever attain.”⁶¹

⁵⁹ *Tecmed v Mexico* (ICSID Case No ARB (AF)/00/2, Award of 29 May 2003), para. 154 (emphasis added by Tribunal)

⁶⁰ See Douglas, “*Nothing if not Critical for Investment Treat Methanex : Occidental, Eureka and Methanex*” (2006) 22 *Arbitration International* 27 at 28, and *Saluka Investments BV v Czech Republic* (Partial Award of 17 March 2006) para 304.

⁶¹ Douglas, *supra*.

10.3.7 As to the applicable standard, the Tribunal prefers the statement by Newcombe and Paradell that:

“legitimate expectations about the treatment of investments will arise ‘based on the conditions offered by the host State at the time of the investment.’ [Investment treaty] jurisprudence highlights that, to create legitimate expectations, State conduct needs to be specific and unambiguous. Encouraging remarks from government officials do not of themselves give rise to legitimate expectations. There must be an ‘unambiguous affirmation’ or a ‘definitive, unambiguous and repeated assurances’. The conduct must be targeted at a specific person or identifiable group.”⁶²

Expectations Regarding Bank Guarantees

10.3.8 Dealing first with White’s complaint that India failed to return the Bank Guarantee, this aspect of its claim must fail (even assuming a legitimate expectation as alleged could have been created) because the conduct of Coal India is not properly to be attributed to India.

Expectations Regarding Setting Aside

10.3.9 White’s complaints about its treatment by the India courts are dealt with substantively in connection with White’s denial of justice claims at 10.4 below, and its effective means of asserting claims case, at Section 11 below. However, as regards its alleged legitimate expectations in this regard, it has no proper ground for complaint.

⁶² Newcombe and Paradell, *Law and Practice of Investment Treaties : Standards of Treatment* (2009) pp. 281-282. Newcombe and Paradell draw on *Metalclad* (need for specific and unambiguous contract), *GAMS* (need for unambiguous, definitive, repeated assurances) and *Nagel* (encouraging remarks are not enough to give rise to legitimate expectations).

10.3.10 This is because White acknowledges that, at the time of its investment, awards made (in international arbitrations seated) outside of India were subject to being set aside in the Indian courts:

- (a) if the underlying arbitration agreement was governed by Indian law⁶³;
- (b) unless the parties to the arbitration agreement had agreed to exclude the application of the 1940 Act.

10.3.11 Thus, based on what White knew, or ought to have known, at the relevant time about the arbitral law of India, it could only have expected the Indian courts to decline to entertain a setting aside application concerning any future award on the basis that it and Coal India had agreed under the Contract to exclude the application of the 1940 Act (i.e., not because the Indian courts would decline such jurisdiction by reason of the Convention).

10.3.12 Put differently, even assuming a legitimate expectation in this respect could arise in the absence of unambiguous affirmation to the effect by India, the facts simply do not support White's case. Because, at the time the Contract was negotiated, the Indian courts were regularly entertaining set-aside applications in respect of so-called foreign awards, White's only reasonable basis of belief that the Award might not be subject to setting aside rested in the efficacy of its and Coal India's contractual exclusion (India was not a party) of the 1940 Act, and not on any belief as to how India would apply the New York Convention.

⁶³ The Contract itself was governed by Indian law and White made no case that the arbitration agreement contained therein was governed by a different law.

10.3.13 In these circumstances, the Tribunal concludes that White could not legitimately have expected that India would “apply the [New York] Convention properly and in accordance with international standards” as such standards were understood by White.

Expectations Regarding Timely Enforcement

10.3.14 With respect to White’s claimed expectation that it would be allowed to enforce any award in India “in a fair and reasonably timely manner”, White (again) either knew or ought to have known at the time it entered into the Contract that the domestic court structure in India was overburdened. By way of example, when the Law Commission of India examined the functioning of the Supreme Court in 1988, it noted, *inter alia*, that:

“Apart from the continuous rise in the quantum of arrears [of cases requiring disposition] year to year, the more disturbing fact is that the cases, after having been brought to the Supreme Court, are not disposed of for over a decade.”⁶⁴

10.3.15 Quite apart from the point that an investor must generally take a host State (including its court system) as it finds it, on these facts, and absent an express assurance from India that any award would be enforced in a particular manner or timeframe, it is simply not possible for White, legitimately, to have had the expectation as to the timely enforcement of the Award that it now asserts.

10.3.16 Accordingly, the Tribunal concludes that this allegation of breach of the fair and equitable standard must also be dismissed.

Expectations Regarding India as a Place to Invest

⁶⁴ 125th Report in the Supreme Court – A Fresh Look, Law Commission of India, 1988

10.3.17 As regards White's alleged legitimate expectations based on the range of representations said to have been made to Mr Duncan (e.g., that it would be treated fairly, that India was a safe place to do business etc), the Tribunal agrees with India that the alleged representations suffer from vagueness and generality, such that they are not capable of giving rise to reasonable legitimate expectations that are amenable to protection under the fair and equitable treatment standard.

10.3.18 The Tribunal also considers that there was no evidence to show that India turned out to be an unsafe or insecure place in which to invest, that its legal system and laws were not derived from England or that fair treatment before the law was lacking. This is because White's primary complaints go to delays in the Indian court proceedings and the fact that it appears that the courts in India will accept set aside jurisdiction over foreign arbitral awards.

10.3.19 For these reasons, this allegation of breach of the fair and equitable standard must fail.

Expectation Regarding Transparency of Court Proceedings

10.3.20 Finally, as regards an expectation for transparency in court proceedings, there is again simply no evidence to support either such an expectation as being reasonably legitimate, or to show a sufficient lack of transparency to found a breach. As discussed below, certain aspects of the proceedings were admittedly slow and each of the applications remains unresolved more than nine years later, but a lack of speed does not equate to a lack of transparency. No more so does the fact that the Supreme Court does not fix specified dates for when its appeals are to be heard until close to the actual hearing date.

10.3.21 The Tribunal thus concludes that White's case for breach of Article 3(2), based on a lack of transparency in the court proceedings must fail.

10.4 Denial of Justice

10.4.1 White's case for a denial of justice is based on:

- (a) the Indian courts allegedly improper exercise of jurisdiction in asserting that they have the power to set aside the Award;
- (b) the Indian courts' delay in dealing with the enforcement of the Award (i.e., a failure to provide justice to White by allowing the enforcement process – and the dispute and setting aside proceedings – to continue for more than nine years without any realistic end in sight); and
- (c) Coal India's improper call upon the Bank Guarantee and its improper retention of funds.

10.4.2 Having regard to the Tribunal's conclusion that Coal India's conduct, improper or otherwise, cannot properly be attributed to India, the only questions that now need to be dealt with are those in (a) and (b) above.

10.4.3 In this regard, White does not make a distinction between the improper exercise jurisdiction over Coal India's set aside application and the courts' delay in dealing with its own enforcement application.

10.4.4 While White asserts that it is a breach of India's obligations under the New York Convention, and international law, for its domestic courts to purport to have jurisdiction to set aside the Award, in practical terms, White's denial of justice case is founded on the fact that the set aside application/its enforcement application has been

pending for over nine years. Thus, White argues, India has denied it fair and equitable treatment by preventing it from enforcing the Award (which proceeding; in the meantime, is stayed) in India in a fair and reasonably timely manner.

10.4.5 India properly concedes that a State may be liable for the acts of its judiciary. Even if this is so, however, it asserts, as was stated by the *Mondev* tribunal, that the test for denial of justice is a stringent one. The Tribunal agrees.

10.4.6 In *Mondev*, it was held that:

“The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection. In the end, the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in light of all the available facts that the impugned decision was clearly improper and discreditable with the result that the investment has been subjected to unfair and inequitable treatment”.⁶⁵

10.4.7 The tribunal in *Chevron Corporation and Texaco Petroleum Company v Ecuador* agreed, stating that:

“the test for establishing a denial of justice sets ... a high threshold. While the standard is objective and does not require an overt showing of bad faith, it nevertheless requires the demonstration of ‘a particularly serious shortcoming and egregious conduct that shocks, or at least surprises, a sense of judicial propriety’.”⁶⁶

⁶⁵ *Mondev International Ltd. v United States* (ICSID Case No. ARB (AJ)/99/2, Award of 11 October 2002), para 127.

⁶⁶ *Chevron Corporation and Texaco Petroleum Company v Ecuador* (Partial Award on the Merits of 30 March 2010), para. 244.

10.4.8 It is clear that this is a stringent standard, and that international tribunals are slow to make a finding that a State is liable for the international delict of denial of justice. As the Great Britain-Mexico Claims Commission put it:

*“It is obvious that such a grave reproach can only be directed against a judicial authority upon evidence of the most convincing nature.”*⁶⁷

10.4.9 Further, public international law does not provide fixed time limits within which certain classes of cases must be resolved. As the ICSID tribunal observed in *Toto v Lebanon*:

*“international law has no strict standards to assess whether court delays are a denial of justice.”*⁶⁸

10.4.10 The assessment of whether a judicial delay amounts to a denial of justice is obviously highly fact-sensitive. International tribunals have identified various factors which are relevant to the determination of whether delays in judicial proceedings amount to a denial of justice. These include the complexity of the proceedings, the need for swiftness, the behaviour of the litigants involved, the significance of the interest at stake and the behaviour of the courts themselves.

Complexity of the Set Aside / Enforcement Proceedings

10.4.11 Dealing first with complexity, the Tribunal does not consider there to be anything particularly complex about the White’s application to enforce the Award. However, the progress of that application has obviously been affected by Coal India’s own previous application to set the Award aside. And, as to that proceeding, it is clear

⁶⁷ *El Oro Mining Railway Company (Great Britain) v Mexico*, V RIAA 191, 198 (Great Britain-Mexico Claims Commission, Decision No. 55 of 18 June 1931)

⁶⁸ *Toto Costruzioni Generali SpA v Lebanon* (ICSID Case No. ARB/07/12, Decision on Jurisdiction of 11 September 2009), para. 155.

that the question of whether, having regard to India's obligations under the New York Convention, Indian courts can properly entertain an application to set aside an arbitral award not made in India has been, and is, a hotly debated point of Indian arbitration law.⁶⁹

10.4.12 Although the proceedings before the Calcutta High Court in first instance, and on appeal, were completed with reasonable expedition (the Appellant Division of the Calcutta High Court dismissed White's appeal on 7 May 2004), things slowed down

⁶⁹ Although there is Supreme Court authority for the proposition that Indian courts can maintain an application for the setting aside of an award which was not made in India, the relevant cases have been heavily criticised, and some judges of the Supreme Court are themselves clearly open to persuasion the other way. While the point is accordingly not settled, it is evident that, at the time White made its application challenging the jurisdiction of the Calcutta High Court to entertain Coal India's setting aside application, it could not be decided in White's favour at any level lower than that of a three-judge bench of the Supreme Court.

Arbitrator Brower is of the view that it is not surprising that the India courts have been subject to criticism since, to his mind, the clear consensus among States is that only the courts of the seat of arbitration – *i.e.*, “*the country in which . . . th[e] award was made*” (see Article V(1)(e) of the New York Convention) – are competent to set aside a foreign arbitral award. See, *e.g.*, *Steel Corp. of the Philippines v. International Steel Services, Inc.*, U.S. District Court for the Western District of Pennsylvania, 6 Feb. 2008 (United States); *Empresa Colombiana de Vías Férreas v. Drummond Ltd.*, Colombian State Council, 24 Oct. 2003 and 22 Apr. 2004 (Colombia); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, High Court of the Hong Kong Special Administrative Region, 27 Mar. 2003 (Hong Kong). He refers to Professor van den Berg's authoritative treatise on the New York Convention (“The New York Arbitration Convention of 1958” at 350) which explains that: “*The ‘competent authority’ as mentioned in Article V(1)(e) [of the New York Convention] for entertaining the action of setting aside the award is virtually always the court of the country in which the award was made. The phrase ‘or under the law of which’ the award was made [in Article V(1)(e) of the New York Convention] refers to the theoretical case that on the basis of an agreement of the parties the award is governed by an arbitration law which is different from the arbitration law of the country in which the award was made.*”

Arbitrator Brower concludes that, contrary to the Indian courts' findings, a choice of Indian law as the law governing the Contract is not considered under the New York Convention to imply a choice of Indian arbitration law displacing the arbitration law of the seat of arbitration. *Id.* at 293 (“*If the parties provide a general choice of law clause, they intend to give a directive to the arbitrator as to which law he has to apply to the substance. The distinction between substance and procedure would then preclude that the directive given to the arbitrator would also be an ‘indication’ of a choice of the law governing the arbitration. It would therefore seem that the latter can be achieved only by a distinct express agreement. . . . Thus if a contract contains a general choice of law clause and provides in the arbitral clause that arbitration is to be held in a country with a different law, the latter indication [(i.e., ‘that the choice of law clause for the contract in general is not sufficient as choice of law for the arbitral clause’)] must be deemed to prevail over the former [(i.e., that the choice of law clause for the contract in general ‘also applies to the arbitral clause’)].*”).

For Arbitrator Brower, the 1996 Act cannot justify the actions of the Indian judiciary since, as explained by Professor van den Berg, the New York Convention supersedes domestic law concerning the enforcement of foreign arbitral awards: “[S]ome courts still seem to have difficulties in applying the Convention's principle that it supersedes domestic law concerning the enforcement of foreign awards . . . The grounds for refusal of enforcement mentioned in Article V, or, as the case may be, in the corresponding Article in the implementing Act, are exclusive if the enforcement is governed by the Convention, and do not leave any room for reference to the law of the forum on this point.” *Id.* at 268.

in the Supreme Court. However, having regard to the significance of the issue in India, as well as existing Supreme Court precedent, it is not particularly surprising, or shocking, in the Indian context, that the Supreme Court has not disposed of the matter.⁷⁰ Nor does the delay raise concerns with the Tribunal as to the judicial propriety of the outcome.

Significance of Issues

10.4.13 It is evident on the record (the effect of Indian case law to date is not disputed) that the issues involved in the set-aside application are of obvious significance in the field of commercial arbitration in India.

Need for a swift resolution

10.4.14 Turning next to the need for swiftness in the resolution of the matter, the Tribunal considers it relevant to distinguish between criminal proceedings (and applications before human rights courts), where there is a particular need for the urgent resolution of cases, and purely commercial matters such as are involved here. This is not to say that commercial matters can properly be allowed to languish. However, where, as here, the Award also contained an order for the payment of interest, the need for celerity is less compelling.

Behaviour of the Litigants

⁷⁰ After leave to appeal was granted in 2004, White's appeal was listed for an early hearing before the Supreme Court on 8 January 2007. That hearing did not proceed because White's appeal was listed together with another petition that raised similar issues which was not ready to proceed. White's appeal was then directed to be heard together with another petition that raised a similar issue. That matter was then actually heard before a bench of two judges of the Supreme Court on 16 January 2008. When one of the judges concerned expressed reservations as to the correctness of two previous judgments of the Supreme Court, the matter had then to be placed before the Chief Justice in order to be listed before another, three judge bench. At the time of the oral hearing, the appeal had not been scheduled for hearing.

10.4.15 As regards the question of the litigants own behaviour, the Tribunal is not attracted by India's argument that the time which the proceedings have taken before the Indian courts is due entirely to White's litigation strategy (i.e., had White not sought to raise the jurisdictional point, the compatibility of the Award with the Indian legal system would have long since been adjudicated). From the perspective of a tribunal applying international law, White cannot properly be criticised for seeking to be treated by India's courts in accordance with what it reasonably believed were India's New York Convention obligations.

10.4.16 The Tribunal thus rejects India's contention that the delay experienced before the Indian courts results solely from White's attempts to avoid a decision on the merits of Coal India's setting aside application.

Behaviour of the Indian Courts

10.4.17 Finally, with respect to the behaviour of the Indian courts themselves, the Tribunal notes that both the Calcutta High Court and the Delhi High Court heard White's various applications and petitions within months, not years. It is also evident, given the many interim issues that arose, that matters progressed in both of those courts with reasonable celerity until: (a) in the case of the setting aside application, the Supreme Court granted leave to appeal on 29 September 2004; and (b) in the case of the enforcement application, the Delhi High Court ordered a stay on 9 March 2006.

10.4.18 The Tribunal considers it also to be relevant, when examining the behaviour of the courts, to bear in mind that India is a developing country with a population of over 1.2 billion people with a seriously overstretched judiciary.

10.4.19 The most recent delay in this case stems from the apparent inability of the Supreme Court to impanel a three judge bench in a timely manner and from the stay ordered of the enforcement proceedings by the Delhi High Court (of which more in Section 11 below).

10.4.20 In *El Oro Mining and Railway Co*, the Great Britain-Mexico Claims Commission stated that:

“the amount of work incumbent on the Court and the multitude of law suits with which they are confronted, may explain, but not excuse, the delay. If this number is so enormous as to occasion an arrear of nine years, the conclusion cannot be other than the judicial machinery is defective.”⁷¹

10.4.21 In the present case, although more than nine years have elapsed since the commencement of the set aside and the enforcement proceedings in September 2002, for the purposes of determining whether White has been denied justice, the Tribunal considers that it is appropriate to focus on the delay that has resulted from the Supreme Court’s failure to constitute an appropriate panel to hear White’s jurisdictional appeal – i.e., just under four years. This is because it considers that the proceedings in the Calcutta and Delhi High Courts moved at a not unreasonable pace in the context of a denial of justice assessment.

Tribunal’s Overall Conclusion

10.4.22 Bearing in mind these various factors, the Tribunal concludes that, while the duration of the proceedings overall, as well as the delay by the Supreme Court in hearing and determining the jurisdiction appeal, is certainly unsatisfactory in terms

⁷¹ *El Oro Mining and Railway Co (Ltd) (Great Britain) v United Mexican State*, V RIAA191 (Great Britain-Mexico Claims Commission, Decision No. 55 of 18 June 1931)

of efficient administration of justice, neither has yet reached the stage of constituting a denial of justice.

10.4.23 While the most recent delay is regrettable, there being no suggestion of bad faith, it does not amount in the Tribunal's mind to "a particularly serious shortcoming" or "egregious conduct that 'shocks or at least surprises, a sense of judicial proprietary'".⁷²

10.4.24 Accordingly, the Tribunal concludes that White's Article 3(2) case based on a denial of justice must fail.

11. ARTICLE 4(2) - EFFECTIVE MEANS OF ASSERTING CLAIMS

11.1 Article 4(2) of the BIT

11.1.1 Article 4(2) of the BIT provides that:

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

11.1.2 Article 4(2) is what has become known as a "most favoured nation" ("MFN") clause.

11.1.3 In this connection, White asserts breach by India of the obligation it took on pursuant to Article 4(5) of the Agreement Between the Republic of India and the State of Kuwait for the Encouragement and Reciprocal Protection of Investments, 27 November 2001 ("**India-Kuwait BIT**").

11.1.4 Article 4(5) of the India-Kuwait BIT provides, in pertinent part:

"Each Contracting State shall maintain a favourable environment for investments in its territory by investors of the

⁷² Supra, at para 244

other Contracting State. 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... .” (Emphasis added by the Tribunal)

11.1.5 It is White’s contention that a delay of over nine years in a party’s application to enforce an international arbitral award in a country which is a party to the New York Convention represents an unacceptable delay by objective and international standards and, accordingly, India’s failure to enforce the Award constitutes breach of the Republic’s obligation to provide “effective means of asserting claims and enforcing rights” with respect to White’s investments.

11.2 Does Article 4(2) of the BIT incorporate Article 4(5) of the India-Kuwait BIT?

11.2.1 With respect to India’s assertion that Article 4(2) of the BIT does not incorporate Article 4(5) of the India-Kuwait BIT, because to do so would: (a) fundamentally subvert the carefully negotiated balance of the BIT; and (b) be contrary to the emphasis in the BIT on domestic law; the Tribunal agrees with White that neither of these arguments is sustainable.

11.2.2 On the first point, the concern of McLachlan, Shore and Weiniger to this effect (relied upon above by India) is confined to the use of an MFN clause to obtain the benefit of a dispute resolution clause in another treaty.⁷³

11.2.3 However, that is not the situation in the present case, which is qualitatively different. Here, White is not seeking to put in issue the dispute resolution provisions of the BIT, but is instead availing itself of the right to rely on more favourable substantive provisions in the third-party treaty.

⁷³ 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.”

11.2.4 This does not “subvert” the negotiated balance of the BIT. Instead, it achieves exactly the result which the parties intended by the incorporation in the BIT of an MFN clause.

11.2.5 With regard to India’s second point, that use of the MFN clause in question would be contrary to the “strong emphasis” on domestic law said to be found in the BIT, the Tribunal concludes that the protection of Article 4(5) of the India-Kuwait BIT is in no way contrary to any of the provisions of the BIT.

11.2.6 The provisions of the BIT referred to in paragraph 16 of India’s Defence (where India points to the provisions of the BIT which are said to place unusual emphasis on and deference to national law) are not in any way unusual in BITs.⁷⁴ When construed in accordance with ordinary rules of treaty interpretation, such provisions do not mean that national laws “trump” international laws, or that the content of national laws affects the interpretation to be given to obligations freely given by the State in BIT.

11.2.7 In any event, as noted above, the Tribunal sees no conflict between these provisions and Article 4(5) of the India-Kuwait BIT; certainly India failed to explain how these provisions could be inconsistent with that Article. Moreover, there is no express carve-out or limitation to Article 4(5), and nothing in the Article (or any provision of the BIT) would require the result contended for by India.

11.2.8 In considering whether the protection provided by the MFN clause in the India-Kuwait BIT should be limited by reason of the BIT’s “strong emphasis” on India’s

⁷⁴ See (for example): agreement between *Australia and the Czech Republic on the Reciprocal Promotion and Protection of Investments* 1994, Articles 3(1), 3(3), 5(1), 5(2), and 12; *Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments* 1993, Articles 2(1), 3(3) and 8(1); *Agreement between the Government of Canada and the Government of the Republic of Argentina for the Promotion and Protection of Investments* 1991, Articles II(2) and IV; and *Agreement between Canada and the Slovak Republic for the Promotion and Protection of Investments* 2010, Articles II(2), II(3) and III(4).

domestic law, the Tribunal accepts as apposite the approach suggested by Stephan Schill, who proposes that:

“The sole relevant factor is whether MFN treatment applies or whether it is subject to an explicit or implicit exception. Furthermore, distinguishing between specifically negotiated provisions and other provisions would introduce different classes of provisions within the same treaty period ... [there is] no room for creating a specific class of ‘specifically negotiated’ provisions of the basic treaty that is per se immune from circumvention by more favourable treatment in third-party BITs, unless those provisions can be read as constituting an exception to MFN treatment.”⁷⁵

11.2.9 In this case, as earlier foreshadowed, the Tribunal considers that it would be inappropriate to read-in an exception to MFN treatment by reason of the references in the BIT to domestic law.

11.3 The Effective Means Standard

11.3.1 The “effective means standard” found in Article II(7) of the Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and a Reciprocal Protection of Investments, 27 August 1993 (“**US-Ecuador BIT**”) was considered in *Chevron-Texaco v Ecuador*⁷⁶.

11.3.2 The *Chevron* tribunal produced a comprehensive analysis of the meaning and application of the “effective means” standard which can be summarised as follows:

- (a) the “effective means” standard is *lex specialis* and is a distinct and potentially less demanding test, in comparison to denial of justice in customary international law;

⁷⁵ Stephan W Schill, “*Multilateralizing Investment Treaties through Most-Favourite-Nation Clauses*” (2009)

⁷⁶ Article II(7), which employs almost identical wording to that found in Article 4(5) of the India-Kuwait BIT, provides that “*each party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements and investment authorizations.*”

- (b) the standard requires both that the host State establish a proper system of laws and institutions and that those systems work effectively in any given case;
- (c) a claimant alleging a breach of the effective means standard does not need to establish that the host State interfered in judicial proceedings to establish a breach;
- (d) indefinite or undue delay in the host State's courts dealing with an investor's "claim" may amount to a breach of the effective means standard;
- (e) court congestion and backlogs are relevant factors to consider, but do not constitute a complete defence. To the extent that the host State's courts experience regular and extensive delays, this may be evidence of a systemic problem with the court system, which would also constitute a breach of the effective means standard;
- (f) the issue of whether or not "effective means" have been provided by the host State is to be measured against an objective, international standard;
- (g) a claimant alleging a breach of the standard does not need to prove that it has exhausted local remedies. A claimant must, however, adequately utilise the means available to it to assert claims and enforce rights. It will be up to the host State to prove that local remedies are available and the claimant to show that those remedies were ineffective or futile;
- (h) whether or not a delay in dealing with an investor's claim breaches the standard will depend on the facts of the case; and

- (i) as with denial of justice under customary international law, some of the factors that may be considered are the complexity of the case, the behaviour of the litigants involved, the significance of the interests at stake in the case and the behaviour of the courts themselves.

11.3.3 The Tribunal considers this description of the “effective means” standard to be equally appropriate for application in this case.

11.4 Application of the Standard

11.4.1 White argued its case (for breach of the effective means standard) on the basis of overall delay experienced to date from the beginning of the set aside and enforcement proceedings, both of which commenced in September 2002. It did not seek to analyse the two proceedings separately in connection with an assessment of “effective means”.

11.4.2 In the set aside proceedings, even though Coal India was the applicant, White can properly be described as having been “asserting claims” that the Indian courts lacked set aside jurisdiction on the facts before them. In the enforcement proceedings, however, White, as the applicant was acting to “enforce [its] rights” in connection with the Award. That being the case, India was under an obligation to ensure it had “effective means” to deal with its interests in each of the two proceedings.

11.4.3 Because Article 4(5) of the India-Kuwait BIT deals with effective means of *asserting claims* and *enforcing rights* with respect to investments, the Tribunal considers it more appropriate to examine each of the two proceedings on their own.

The Enforcement Proceedings

11.4.4 The history of the enforcement proceedings, which is not disputed, is as follows:

- (a) On 11 September 2002, White applied to the High Court at New Delhi to have the Award enforced. On 13 September 2002, the registry cleared the application for hearing, and on 16 September 2002, the matter was listed for 17 September 2002.
- (b) On 17 September 2002, White's application was heard. The Delhi High Court ordered that Coal India be given notice of the petition and, at the request of White for a short return date, the matter was made returnable for 27 November 2002.
- (c) On 23 September 2002, White served Coal India with notice of application in the High Court at New Delhi and filed its Affidavit of service.
- (d) On 27 November 2002, White's application was heard in the Delhi High Court. Coal India entered an appearance and requested that the court stay the proceedings. The court did not stay the proceedings and directed Coal India to file a short reply within three weeks, before 19 December 2002. The court further ordered White to file a rejoinder to the reply before the next date of hearing. The court ordered that the matter be listed for hearing on 14 February 2003.
- (e) On 14 February 2003, White's application was heard. Coal India again requested the court to stay the proceedings and further requested that it be given additional time in which to file its reply. The court did not stay the proceedings but granted Coal India one final opportunity to reply and ordered Coal India to file a reply within three weeks, by 8 March 2003. The court further ordered White to file a rejoinder in two weeks after Coal India had filed its Reply. On the insistence of White for a short return date, the court

posted the matter for argument on 28 May 2003. Coal India further advised the court that it would be filing an application to stay the enforcement proceedings until the proceedings of the Calcutta High Court were decided. Coal India did not file a reply within the stipulated timeframe.

- (f) On 22 March 2003, White applied to the court to have Coal India's right to file objections and a reply dismissed on the basis that Coal India had failed to file its reply within the stipulated timeframe.
- (g) On 31 March 2003, White's application to dismiss Coal India's right to file a reply was listed for hearing for 3 April 2003. At the hearing on that date Coal India requested a further two weeks to file a reply which the court granted as the final opportunity. The court further ordered that White file a rejoinder two weeks thereafter and posted the matter for arguments on 20 May 2003.
- (h) On 21 April 2003, Coal India filed its reply and on 22 April 2003 applied for an urgent stay of the enforcement proceedings, pending disposal of the set aside proceedings in the Calcutta High Court. The Delhi High Court heard Coal India's reply on 20 May 2003. During the hearing, Coal India requested the court to hear arguments on its application to stay the Delhi proceedings. White contested the application for a stay and filed a reply. In view of the pending proceedings in the Calcutta High Court, the Delhi High Court posted the matter for arguments on 8 August 2003. White filed an Affidavit in opposition to Coal India's reply to its enforcement application on 5 August 2003.
- (i) On 28 January 2004, the court directed Coal India to file any objections to the enforceability of the Award within three weeks, before 18 February 2004.

Coal India did not file its objections by 18 February 2004 and, on 11 May 2004 sought further time in which to do so. The court granted Coal India final extension of two weeks until 1 June 2004. Coal India did not meet this further deadline and on 7 July 2004, White filed an urgent application to dismiss Coal India's right to file any objections.

- (j) On 23 September 2004, Coal India filed its objections to White's enforcement application.
- (k) On 25 November 2004, White filed its reply to Coal India's enforcement objections.
- (l) On 30 November 2004, the court ordered Coal India to file its enforcement rejoinder by 25 January 2005.
- (m) On 25 January 2005, Coal India not having filed its enforcement rejoinder, White sought an order that it not be entitled to do so. Coal India requested further time to do so and was granted a further three weeks. It was also ordered to pay Rs 5,000 for failing to file its enforcement rejoinder as required. At the same time, Coal India's further request for the stay of the enforcement proceedings (until after Coal India's setting aside petition in the Calcutta High Court had been heard) was declined.
- (n) On 17 February 2005, Coal India filed its enforcement rejoinder late.
- (o) On 10 May 2005, Coal India sought leave from the court for its late filed enforcement rejoinder to be admitted to the record. It also renewed its request for a stay of the Delhi High Court proceedings. The court listed Coal India's stay application for argument on 31 August 2005.

- (p) On 31 August 2005, Coal India's renewed stay application was heard before Mr Justice Kumar. The argument could not be concluded and, on consent, the matter was postponed until 14 September 2005.
- (q) On 14 September 2005, during the hearing of the stay application, the court asked Coal India why it had not filed its stay application in the Calcutta High Court or the Supreme Court and why the Delhi high Court should stay the proceedings when neither of the other courts had done so. Coal India was granted time to take instructions on this question and 22 September 2005 was fixed for disposal of the application.
- (r) The 22 September 2005 continuation of the stay application argument was adjourned at the request of Coal India. Thereafter the matter was again adjourned, this time at the request of White.
- (s) The stay application argument was taken up again on 8 November 2005 but could not be concluded and the matter was adjourned until 22 November 2005.
- (t) The 22 November 2005 date for argument was adjourned on two further occasions. The adjournments were granted at the request of Coal India and White respectively as their counsel were not available.
- (u) Thereafter, Mr Justice Kumar, who had been hearing the stay application was transferred to another bench. Coal India's stay application was therefore adjourned until 9 March 2006 before Mr Justice Lokur.
- (v) On 9 March 2006, following argument, the court directed that White's enforcement petition be stayed *sine die*, with leave to White to revive the execution proceedings upon the decision of the Supreme Court or the High

Court of Calcutta. Mr Justice Lokur was of the view that it would not be in the interest of justice to invite conflicting decisions between the Calcutta High Court and the Delhi High Court (this was a possibility, because the Supreme Court, when it granted White's leave to appeal application, refused to stay the Calcutta set-aside proceedings). Lokur J went on to say that since the set aside proceeding was pending in the Calcutta High Court, it would be appropriate for him to restrain himself from proceeding further until the objections were disposed of one way or another by that court. To his mind, since an earlier petition was pending in the Calcutta High Court under Section 34 of the 1996 Act, it was required that the Delhi High Court proceeding be stayed until the disposal of the proceedings in the Calcutta High Court.

(w) White did not appeal this decision.

Analysis

11.4.5 It is fair to describe this procedural history as less than ideal. Coal India was allowed to file its initial reply in an untimely manner; its formal objections were also permitted to be filed late; and, thereafter, matters dragged on through the completion of the parties' further written submissions (reply and rejoinder) and the on-again-off-again hearing of Coal India's stay application. All of this took approximately three and a half years. Thus, given the stay granted in March 2006, White's enforcement application remains unresolved more than nine years later.

11.4.6 However, on the facts before us, the Tribunal considers that the effective means standard requires to be tested first against the three and a half year delay, before looking at the six years of further delay.

- 11.4.7 Dealing only with the three and a half year period from September 2002 until the March 2006 stay, the Tribunal concludes that it cannot be said that India failed to provide White with effective means to enforce its rights simply because it took this long to get to this point.
- 11.4.8 It is true that the Delhi court was generous with Coal India when it extended several pleadings deadlines, but this accounts for only several months of the three and a half years. The reality is that White's application was being strenuously defended and the pleadings schedule was not exceptional, either in the Indian context or otherwise. Moreover, the length of time the Delhi court took in dealing with Coal India's stay application seems to have been attributable both to exigencies of a busy court docket and the availability of counsel (both sides sought and were granted adjournments to accommodate on several occasions).
- 11.4.9 Because White does not suggest that India has not established a proper system or laws and institutions, the question is, thus, whether the Delhi High Court worked effectively in handling White's enforcement application. This turns on the question of whether White's enforcement application was subject to "indefinite" or "undue" delay (during this three and a half year period).⁷⁷ And, for the reasons noted above, the Tribunal thinks not.
- 11.4.10 With regard to the further six years of delay following the stay, which, on its face, seems excessive, it is important to consider the relevance of White's decision not to appeal the order of Mr Justice Lokur.

⁷⁷ The Tribunal agrees with the *Chevron* tribunal that "For any 'means' of asserting claims or enforcing rights to be effective, it must not be subject to indefinite or undue delay. Undue delay in effect amounts to a denial of access to these means."

11.4.11 It is common ground that White had a right of appeal from this decision. That being the case, India has shown the availability of local remedies. Given that White chose not to appeal, it was therefore for it to show that such an appeal would have been ineffective or futile.

11.4.12 But on this point, no evidence was offered. Moreover, it cannot be said that any appeal would have been futile or ineffective just because White had already appealed to the Supreme Court on its denied jurisdictional objection. The question to be determined in an appeal against Lokur J's order would have been different than that raised on the jurisdictional appeal.

11.4.13 Put another way, because the issue that had earlier been placed before the Supreme Court related only to the jurisdiction of the Indian courts to take on set aside applications in respect of foreign awards, there is no evidence before the Tribunal (or other basis) upon which it can properly conclude: (a) that the Divisional Court, or indeed the Supreme Court would not have dealt with an appeal from the order of Justice Lokur in a timely manner (the question it would have had to address would have been a straight forward one - i.e., the propriety of staying White's enforcement application; or (b) what the outcome of that appeal might have been.

11.4.14 In these circumstances, White having failed to show that an appeal of the stay order would have been ineffective or futile, the Tribunal concludes that the further six years of delay is to be disregarded in its assessment of whether India failed to provide to White effective means of enforcing its rights under the Award.

11.4.15 Based on this analysis, the Tribunal holds that White has not shown that India failed to provide effective means for it to enforce its rights under the Award.

The Set Aside Proceedings

11.4.16 The question of whether White's claims in the set aside proceedings (i.e. that the Calcutta High Court lacked jurisdiction to entertain Coal India's application to set aside the award) were subject to indefinite or undue delay is, however, another matter entirely.⁷⁸

11.4.17 In his opening, when discussing the delay White has faced in the Supreme Court, Mr Landau said that it was extraordinary that it had not made a further application for expedition after the hearing of 16 January 2008, or not made an appointment with the Chief Justice of India to complain about the pace of proceedings.⁷⁹ To the Tribunal's mind, these steps were not required.

11.4.18 Having already applied for and obtained an order for expedited hearings in 2006 and 2007, White appears to have done everything that could reasonably be expected of it to have the Supreme Court deal with its appeal in a timely manner. Mr Bonnell made the point in his closing speech, with which the Tribunal agrees, that there was no effective course open to White to seek to expedite the appeal further. He noted that:

*"It has already been granted the right to an 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."*⁸⁰

11.4.19 In these circumstances, and even though we have decided that the nine years of proceedings in the set aside application do not amount to a denial of justice, the

⁷⁸ As already noted, the "effective means" standard is different from and less demanding than the "denial of justice" standard. Moreover, with respect to a forward looking promise by a State to provide "effective means" of enforcing rights and making claims, 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. This is because the focus of such a *lex specialis* is whether the system of laws and institutions work effectively at the time the promisee seeks to enforce its rights / make its claims.

⁷⁹ Transcript, Day One, pp 86/14 – 87/16

⁸⁰ Transcript, Day 2, p 45

Tribunal has no difficulty in concluding 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 providing White with "effective means" of asserting claims and enforcing rights.

11.4.20 Accordingly, India is in breach of Article 4(2) of the BIT.

12. ARTICLE 7 – EXPROPRIATION

12.1 Article 7(1) of the BIT

Article 7(1) provides that:

“neither Contracting Party shall nationalise, expropriate or subject to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as ‘expropriation’) the investments of investors of the other Contracting Party except for a public purpose, on a non-discriminatory basis, in accordance with its laws and against fair and equitable compensation.”

12.1.1 White argues that India has expropriated its investment in India, in breach of Article 7(1) of the BIT. Originally, in its Notice of Arbitration, White alleged only that the Award had been expropriated. However, in its Memorial it claims that its rights in relation to the Contract and Bank Guarantee have also been expropriated.

12.2 Expropriation of the Bank Guarantees

12.2.1 Having regard to the Tribunal's conclusion that the Bank Guarantees do not constitute an investment for the purpose of the BIT, it follows that India cannot be found in breach of its obligations under Article 7(1) in that regard.

12.3 Expropriation of the Contract

12.3.1 India's first point in connection with the alleged expropriation of White's contractual

rights is that the only form of contractual rights that are capable of being expropriated are those that are a form of intangible property such as “a right over natural resources granted by a public act of the host state”.⁸¹

12.3.2 The Tribunal disagrees. In the case of *Phillips Petroleum Co v Iran* (16 Yearbook Commercial Arbitration 75 (1989), Award, 12 June 1989), a case relied upon by White, the tribunal was concerned with the termination of a development agreement for the exploitation of natural resources. The tribunal concluded that contractual rights, whether tangible or intangible, are capable of being expropriated:

“Expropriation by or attributable to a state of the property of an alien gives rise under international law to liability... and this is so whether the property is tangible ... or intangible, such as the contract rights involved in the present case (emphasis added).”

12.3.3 In similar circumstances to the present case, the tribunal in *Saipem* determined that the residual contract rights arising from the investment, as crystallised in the ICC Award, were an “investment” within the BIT’s definition and were also capable of expropriation.⁸²

12.3.4 For White, the relevant test as to whether expropriation has occurred is the effect of the government’s action on the investor’s investment. However, it is not clear whether White considers that an expropriation should be identified by its impact on the *value of an investment*, or by its *impact* on the rights of the investor and the

⁸¹ Zachary Douglas, *The International Law of Investments* (2009), p.214.

⁸² ICSID Case No. ARB/05/07, *Decision on Jurisdiction and Recommendation on Provisional Measures*, 21 March 2007 at 133.

investment.⁸³

12.3.5 For India, the correct test does not consider the value of *the investment*, but rather the impact of the State's behaviour on the *rights of the investor in the investment*. The test therefore, as to whether there has been indirect expropriation (there is no suggestion of direct expropriation in this case), is whether there has been a substantial deprivation of the investors' rights in the investment.

12.3.6 The Tribunal is not required to choose between these two competing tests because of its conclusion that neither the value of White's investment (whether it be its rights in the Contract or as crystallised in the Award) nor its rights under the Contract (as crystallised in the Award) have been substantially affected by the fact that the Indian Courts have yet to dispose of either Coal India's set-aside application or White's Application for Enforcement of the Award. The Award has not been "taken" or set aside. All that has happened is that the determination of its validity has not yet occurred. This does not sound in expropriation.

13. ARTICLE 9 - FREE TRANSFER OF FUNDS

13.1 Article 9 of the BIT

13.1.1 Article 9 of the BIT provides that:

"each Contracting Party shall permit all funds of an investor of the other Contracting Party related to an investment in its territory to be freely transferred without unreasonable delay and on a non-discriminatory basis ..."

13.2 Claim Based on Conduct of Coal India

13.2.1 White's case for breach of Article 9 of the BIT is based upon the conduct of Coal

⁸³ By reliance on the awards in *Compañia des Arrollo de Santa Elena v. Costa Rica* and *Metalclad Corporation v Mexico*, White appears to consider that what is important is whether the value of the investment is adversely effected.

India in calling on the Bank Guarantees, and its subsequent retention of those funds following the making of the Award.

13.2.2 The Tribunal concludes this claim must fail.

13.2.3 Apart from the fact that Article 9 is clearly aimed at restrictions on the movement of capital and exchange of currency imposed by a Contracting Party, rather than the assertion of a contractual right to funds provided for in a bank guarantee, the claim is entirely based on the conduct of Coal India.

13.2.4 Accordingly, the Tribunal having determined that the conduct of Coal India is not attributable to the Republic, there is no basis for a claim that India acted in any way in breach of its obligations created by Article 9 of the BIT.

14. COMPENSATION

14.1 Questions to be addressed by the Tribunal

14.1.1 The Tribunal addresses two questions in this Section as follows:

- (a) is the Award enforceable under the laws of India; and
- (b) if so, what compensation is required to restore White to the position it would have enjoyed had India's breach of the BIT not occurred?

14.2 Enforceability of the Award in India

14.2.1 India says that White is not entitled to compensation, even if breach of the BIT is found, because White has not demonstrated that Coal India's setting aside application and motion to resist enforcement have no prospects of success.

14.2.2 During the course of the oral hearing (against the possibility of a finding of BIT

breach by India), the Tribunal asked the parties whether they considered that it was in a position, without further evidence or submissions, to determine whether the Award was enforceable in India. The parties agreed that sufficient material had been provided to the Tribunal to enable it to undertake this task, if it arose, and that it should determine the question in that event.

Grounds for Resisting Enforcement

14.2.3 Coal India relies on four grounds for resisting enforcement. These are:

- (a) the ICC tribunal's bias – based on the chairman's alleged gross misconduct during the proceedings;
- (b) the tribunal having exceeded its jurisdiction – by asking the parties five additional questions following the first hearing (these are said to be beyond the Terms of Reference) and holding an additional hearing;
- (c) delay – the Award was not issued within six months of the execution of the Terms of Reference and was, thus, not in accordance with the arbitral procedure agreed by the parties; and
- (d) the Award being contrary to Indian public policy – because of the apparent bias of Mr Abrahamson and the “illegal application of Indian law” (i.e., what is said to be the clearly flawed reasoning of the Tribunal).

14.2.4 Before dealing with these four issues, it is necessary to set out a short procedural history of the ICC arbitration.

History of ICC Arbitration

14.2.5 On 28 June 1999, White submitted its Request for Arbitration, in which it sought: (a)

payment of A\$3,203,873 as payment for the bonus under the Contract; (b) A\$2,772,640 in connection with the wrongful retention of the performance guarantee; (c) interest; and (d) costs.

14.2.6 After this (it is not clear on what date), Coal India submitted its Answer.

14.2.7 On 20 September 1999, Coal India submitted its Counter-Claim, in which Coal India claimed payment of A\$7,940,720 and interest.

14.2.8 On 12 December 1999, White submitted its Answer to Coal India's Counter-claim.

14.2.9 On 6 March 2000, the Terms of Reference were settled.

14.2.10 A hearing, attended by both parties, was held in Paris between 15 and 25 May 2000.

14.2.11 On 25 May 2000, White provided to the tribunal its "Claim for Bonus on CHP", its "Claim for Bonus on CPP", and a document headed "Total Moisture."

14.2.12 On 26 June 2000, Coal India submitted its Reply in Rejoinder to White's new claim.

14.2.13 On 11 July 2000, White submitted a summary of the costs which it had incurred in the arbitration.

14.2.14 On 21 July 2000, White submitted its Reply to Coal India's Counter Claim and its Reply to Coal India's Reply in Rejoinder.

14.2.15 On 4 August 2000, Coal India submitted a summary of the costs which it had incurred in the arbitration.

14.2.16 On 30 October 2001, the Chairman of the Tribunal wrote to the parties, requesting that the parties make submissions on all or any of five questions. The Chairman

requested that the parties provide submissions by 30 November 2001, and any reply to the other party's submission within 14 days of receiving the submissions. The Chairman noted that a further hearing would then be held in Paris on 9 January 2002.

The five questions raised by the Tribunal were:

- “1. *Is it open to the Tribunal to assess the probative value of the recorded sampling and test results, and determine the actual ash or moisture content of coal produced: Or is the Tribunal bound by, or to choose between, any party figures submitted for such ash or moisture content?*
2. *Where relevant, what numbers, places and kinds of samples and tests are sufficient to prove the actual ash and moisture content of a day's production, And for what days is such proof available?*
3. *Is the Tribunal entitled to disregard a trivial excess over limit in a day's production?*
4. *If the actual ash or moisture content of any day's production has not been proven, is the production of that day to be treated as Beneficiated or non-Beneficiated for bonus/penalty?*
5. *Do the ICC Rules, the Terms of Reference or applicable principles of pleading bar any case relied upon by either party on any of these questions, absolutely or subject to any discretion of the Tribunal?”*

14.2.17 On 29 November 2001, Coal India submitted a challenge pursuant to Article 12(1) of the ICC Rules, requesting that the ICC reconstitute the tribunal and recommence the proceedings, *de novo*. Coal India asserted that the new questions issued by the tribunal gave rise to a serious apprehension of bias. This appears to be on the basis that: (a) the tribunal's questions "did not arise and were not mentioned in the Terms of Reference"; (b) were not issues which had been raised by the parties; and (c) consequently, it was not "proper for the Tribunal to try and make out a case which was never pleaded by the parties."

- 14.2.18 On 30 November 2001, White submitted its submissions in response to the tribunal's request of 30 October 2001.
- 14.2.19 On 30 November 2001, White wrote to the ICC, noting that it did not agree with Coal India's challenge to the tribunal.
- 14.2.20 On 3 December 2001, the ICC wrote to White and the tribunal, requesting comments on Coal India's application to reconstitute the tribunal.
- 14.2.21 On 3 and 4 December 2001, Mr Morling QC (one of the tribunal members), wrote to the ICC (copied to the parties). Mr Morling stated his view that there was no basis for Coal India's challenge.
- 14.2.22 On 3 December 2001, Justice Reddy (one of the tribunal members), replied to the ICC, in relation to Coal India's challenge to the tribunal. Justice Reddy was not prepared to agree that there was evidence of bias.
- 14.2.23 On 6 December 2001, White wrote to the ICC in relation to the ICC's request for comments on Coal India's application to reconstitute the tribunal. In its letter, White noted that there was no basis to Coal India's challenge.
- 14.2.24 On 17 December 2001, the ICC wrote to the parties to advise that the Court would consider Coal India's challenge at the Plenary Session in December 2001.
- 14.2.25 On 20 December 2001, the ICC wrote to the parties and the tribunal, stating that:

"The ICC International Court of Arbitration, at its Plenary Session of 20 December 2001 and pursuant to Article 12(3) of the ICC Rules of Arbitration, decided to reject the challenge filed by Respondent against the Arbitral Tribunal."

- 14.2.26 On 20 December 2001, Coal India wrote to the tribunal requesting an adjournment of

the hearing set for 9 and 10 January 2002. This request was rejected by the tribunal in its letter dated 21 December 2001.

14.2.27 On 9 and 10 January 2002, a hearing was held in Paris in relation to the questions raised by the tribunal on 30 October 2001, which both parties attended.

14.2.28 On 16 January 2002, Coal India submitted its "Submissions on Behalf of the Respondent/Counter-Claimant".

14.2.29 On 21 January 2002, White submitted its "Final Submission in Response to the Tribunal's Request dated 30 October 2001," in reply to Coal India's submissions of 16 January 2002. On 24 January 2002, White submitted an updated summary of its costs in the arbitration.

14.2.30 On 3 February 2002, Coal India sent to the tribunal and White, its "Submission in Response to the tribunal's Request Dated 30 October 2001". In its submissions, Coal India addressed each of the questions raised by the tribunal in the tribunal's letter of 30 October 2001.

14.2.31 On 22 February 2002, Coal India submitted an updated summary of its costs in the arbitration.

14.2.32 On 27 May 2002, the tribunal issued its Award.

Grounds for Refusing to Enforce an Award

14.2.33 Before reviewing the alleged grounds on which Coal India relies for setting aside/not enforcing the Award, it is to be noted that, under the New York Convention (and the 1996 Act):

- (a) the Award may only properly be refused, if one of the (exhaustive) grounds set

out in the Convention (or the 1996 Act) is established⁸⁴; and

- (b) the onus is firmly on Coal India to establish the existence of such grounds.

14.2.34 Pursuant to Article V of the Convention, the enforcement of the Award may be refused, at the request of Coal India, only if Coal India furnishes to the competent authority (in this case the Tribunal) proof that:

- (a) the parties to [the arbitration] agreement were, under some incapacity, or the agreement itself is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the Award was made (no such issue is raised here); or
- (b) the party against whom the Award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case (no such issue is raised here); or
- (c) the Award deals with a difference not contemplated by, or not falling within , the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; or
- (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (e) the Award has not yet become binding on the parties, or has been set aside or

⁸⁴ The grounds in the Convention and the 1996 Act are virtually identical.

suspended by a competent authority of the country in which, or under the law of which, the Award was made (no such issue is raised here).

Allegations of Tribunal Bias

14.2.35 Although it is unclear which ground of the New York Convention (or the 1996 Act), Coal India is seeking to invoke in connection with its assertion of tribunal bias it must be either (c) or (d) above.

14.2.36 Coal India's contentions of bias appear to be based on: (a) the fact that the Award was reserved for 17 months, following which further questions were issued and a further hearing held on those issues; (b) the majority of the Tribunal having failed to act impartially and having committed serious misconduct in law; and (c) the Chairman having issued a response to Justice Reddy's dissenting opinion.

14.2.37 India contends, and the Tribunal agrees, that the test for bias to be applied by the Tribunal is that which the Indian courts would have applied in determining Coal India's allegations of bias.

14.2.38 Justice Srikrishna sets out the applicable test in the following terms:

“The test of bias under the 1996 Act is the same as that under the general law of India. The question is not whether the judge or an arbitrator is actually biased or has decided partially, but whether the circumstances are such as to create a reasonable apprehension in the minds of others that there is a likelihood of bias affecting the decision. If there is a reasonable likelihood of bias it is in accordance with natural justice and common sense that the judge or the arbitrator is likely to be so biased should not be permitted to sit. The basic principle

underlying this rule is that justice must not only be done but must also appear to be done.”⁸⁵

14.2.39 Having regard to this test, the Tribunal sees no basis for concluding that either the Chairman or Mr Morling were biased.

14.2.40 The mere fact that 17 months had elapsed and further questions were then asked does not show or prove bias. Moreover, the responses by the arbitrators to the ICC Court (when it was dealing with the bias issue) detailed the reasons why further questions were needed to be asked and reject totally any bias on their part. The Tribunal has no reason not to accept those responses as being anything other than truthful.

14.2.41 In addition, the questions do not appear to have been issued by the Chairman on some whim, without involving (or contrary to the wishes of) his co-arbitrators, as India implies. Instead, it appears that the questions are as likely to have emanated from Justice Reddy, as he was concerned about Coal India having an opportunity to address those issues.⁸⁶

14.2.42 It is also apparent that the procedure adopted by the tribunal (in raising further questions) was foreshadowed at the conclusion of the May 2000 hearing where the Chairman stated:

⁸⁵ Additional Expert Report of Justice Srikrishna, para. 28. White referred to the decision in *Suez, Sociedad General de Aguas de Barcelona SA, InterAguas Servicios Integrantes del Aguas SA, Vivendi Universal SA v Argentina Republic* as somehow setting out the test which the Indian courts should apply to determine Coal India's allegation of bias. The reference to the *Suez* case seems to ignore the fact that the Tribunal, in determining the enforceability of the Award sits, in effect, as an Indian court which, in considering bias, would do so from the perspective of bias under Indian law.

⁸⁶ In his letter dated 3 December 2001 (in response to the ICC's request for comments on Coal India's allegation that the questions issued by the Tribunal demonstrated bias), Mr Abrahamson noted that "the three members of the Tribunal have agreed the issues for the hearing, as fully covering Justice Reddy's objections". Also, in his comments on Justice Reddy's dissent, the Chairman notes: I regret particularly that having demanded an additional hearing to deal with his complaints, and the hearing having been arranged and conducted with his full agreement and participation, Mr Justice Reddy alleges in his Opinion after the hearing is over that even it 'does not improve the matter'".

“... there is a lot of material anyway for us to absorb. If in the course of reviewing that material, speaking for myself, I have any new thoughts or any mathematical or, practical, or legal points strike me which I feel we did not put to the parties during opening, then I will certainly raise them. In the process of doing that, I think the only way to deal with the position is that I will attempt to ensure that everybody gets an opportunity to reply to new points.”⁸⁷

14.2.43 There was no objection from the parties to such an approach, at the time. Further, it is impossible to see how the questions raised any inference that a tribunal member might have been prejudiced against one or other party. The questions are precisely that: questions. They do not pre-suppose a particular answer. Indeed, as contended by White, it might just as easily have said that the questions showed bias against it. The truth of the matter is that the questions show no evidence of bias against either party.

14.2.44 As noted by Mr Morling and Justice Reddy, the mere asking of questions by the tribunal does not evidence bias. Further, Coal India entirely fails to explain how the preparation of a response by the Chairman to Justice Reddy’s dissent could amount to bias.

14.2.45 In this case, after carefully examining the various allegations of bias and misconduct made by Coal India, the Tribunal concludes that it has failed to establish, either: (a) that there was bias in this case; or (b) that its allegations satisfy the requirements in the New York Convention to decline to enforce the Award.

Excess of Jurisdiction

14.2.46 Coal India contends that the ICC tribunal “made an award which is beyond the scope and Terms of Reference and/or contains decisions on matters beyond the cope of the

⁸⁷ Transcript of hearing on 25 May 2000, page 69.

submission to arbitration”.⁸⁸

14.2.47 This contention appears to be based on the assertions that: (a) the questions raised by the Tribunal, by its letter of 30 October 2011, were outside the scope of the Terms of Reference or the Request for Arbitration; (b) having regard to the parties’ evidence and submissions, it was not open to the Tribunal to evaluate the test results; and (c) the Award is based on contentions which were contrary to its submissions.

14.2.48 Although it is not entirely clear from the submissions made by Coal India in the Delhi and Calcutta High Courts, Coal India seems to have argued that: (a) as the parties did not expressly plead that, on the days when less than six samples were taken in accordance with Indian Standard 436, the ICC tribunal ought to conclude that there was insufficient evidence to find that non-beneficiated coal was produced for the purposes of determining the penalty payable by White; and (b) as the ICC tribunal adopted this approach in its Award, that award is outside the scope of the Terms of Reference.

14.2.49 Coal India’s current objection to enforcement on this basis must fall under Article V(1)(c) of the New York Convention.

14.2.50 Article V(1)(c) of the Convention (as well as sections 34(1) and 34(1)(iv) and 48(1)(c) of the 1996 Act) contains two limbs, namely:

- (a) the Award deals with a “difference” or “dispute” not contemplated by, or not falling within, the terms of submission to arbitration (“**first limb**”); and
- (b) the Award contains decisions on matters beyond the scope of submission to

⁸⁸ See Coal India’s Application to Set Aside the Award to the Calcutta High Court, dated 9 September 2002.

arbitration (“**second limb**”).

14.2.51 For the reasons noted below, the Tribunal concludes that Coal India has failed to establish that either of these limbs is satisfied in the present case.

14.2.52 In relation to the first limb, the “difference” or “dispute” submitted to arbitration includes the question of what, if any, penalty or bonus White was entitled to receive or liable to pay. This is evident from a review of the Terms of Reference and the submissions and evidence of the parties. Moreover, this is precisely the “difference” or “dispute” which the ICC tribunal decided in the Award.

14.2.53 In relation to the second limb, as the “difference” or “dispute” was properly referred to the ICC tribunal, its decision in the Award as to what, if any, penalty or bonus White was entitled to receive, or liable to pay, cannot be said to be a decision on a matter “beyond the scope of the submission to arbitration”. Both parties made extensive submissions on the issue and two hearings were held.

14.2.54 In any event, the argument which appears now to be put in issue by Coal India (that on the days when less than six samples were taken, the tribunal could conclude that there was insufficient evidence for it to find that non-beneficiated coal had been produced), was clearly and expressly raised by White in its submissions.

14.2.55 On these facts, it must follow that the tribunal’s decision on the issue of the penalty/bonus which should flow from the Contract was within its jurisdiction. Likewise, the tribunal raised the issue of what should happen if the requirements for penalty/bonus were not established and the parties made submissions on that issue.

14.2.56 In consequence, it is not now open to India to argue that the Award dealt with a difference not contemplated by or falling within the terms of the submission to

arbitration, or contained decisions on matters beyond the scope of the submission to arbitration.

Delay

14.2.57 The delay argument asserted by Coal India and relied upon now by India was raised for the first time before the Calcutta High Court in Coal India's setting aside application.

14.2.58 In that application, Coal India contended that the Award was "vitiating" by the "inordinate delay" in issuing the Award. In its Reply Memorial in these proceedings, India bases its delay argument on the Award not having been issued in accordance with the arbitral procedure agreed by the parties, as it was not issued "within six months from the signing of the Terms of Reference".

14.2.59 It is true that Article 24 of the ICC Rules provides that an arbitral tribunal must render its final award within six months from the date of the last signature by the arbitral tribunal or by the parties of the Terms of Reference.

14.2.60 However, this rule must be read in conjunction with the provisions of Article 33 of the ICC Rules which state that:

"a party which proceeds with the arbitration without raising its objection to a failure to comply with any provision of these Rules, or of any other rules applicable to the proceedings, any direction given by the Arbitral Tribunal, or any requirement under the arbitration agreement relating to the constitution of the Arbitral Tribunal, or to the conduct of the proceedings, shall be deemed to have waived its right to object."

14.2.61 The Tribunal also takes notice of the fact that it is the norm in ICC proceedings for tribunals to issue their awards outside of the six month period allowed by the Rules.

14.2.62 This is because it is only in the rarest of cases that the parties and the tribunal will be in a position to get out an award within this six month period. Accordingly, the ICC Court routinely corresponds with the parties during the course of an arbitration to advise that it has extended the six month period in which the award may be issued.

14.2.63 It is true that the record before us does not contain such correspondence from the ICC Court extending the time limit in this case. However, given the absence of any evidence of complaint by Coal India as to the non-compliance by the Tribunal with the provisions of Article 24, the Tribunal is entitled to assume that Coal India consented to the tribunal's jurisdiction to issue the Award after the expiration of the six month period. In any event, by reason of Article 33, it has waived its right to do so.

14.2.64 In these circumstances, it is not now open to India to argue that the Award was not in accordance with the arbitral procedure agreed by the parties, contrary to Article V(1)(d) of the New York Convention.

Public Policy of India

14.2.65 Coal India's arguments that the Award is in conflict with the public policy of India is based on its assertion that the tribunal was biased and that the Award is therefore illegal. Having regard to the Tribunal's conclusion above on bias, this ground for not enforcing the Award falls away.

Conclusions on Enforceability

14.2.66 Having determined that none of the four grounds advanced by Coal India for resisting enforcement of the Award support such an outcome, the Tribunal concludes that the Award is enforceable under the laws of India.

14.3 White's Entitlement to Compensation

14.3.1 In its Statement of Defence, India contends that White cannot demonstrate that it has suffered any loss as, even if the Calcutta High Court had declined jurisdiction to set aside the Award this would still have left White Industries with the task of persuading the Delhi Courts that the ICC Award should be enforced in India.

14.3.2 For present purposes, that requires White to have persuaded the Tribunal that the Award should be enforced, and it has.

14.3.3 In accordance with international law, White is thus entitled to be restored to the position it would have enjoyed had the breach of the BIT not occurred (see, *The Chorzow Factory case (Germany v Poland)*, 1928 P.C.I.J. No. 17).

14.3.4 In the present case, had India not failed to provide White with "effective means" of asserting its claims, the Indian courts ought by now to have determined the Award to be enforceable in India.

14.3.5 Had this occurred, White would:

- (a) have received the sums due to it under the Award, including interest;
- (b) not have incurred the costs which it has incurred in pursuing litigation through the Indian courts;
- (c) not have incurred the costs which it has incurred in attempting to settle the dispute with India; and
- (d) not have incurred the costs in bringing this arbitration.

14.3.6 Having reached the conclusion that an Indian court, acting reasonably and complying

with India's international obligations, would conclude that Coal India had not established that the Award ought to be set aside or not enforced, the Tribunal determines that White is entitled to full compensation for the loss it has suffered as a consequence of India's breach of the BIT. This compensation includes:

- (a) the amount of A\$ 4,085,180 payable under the Award;
- (b) interest on this amount at the rate of 8% from 24 March 1998 until the date of payment;
- (c) the amount of US\$ 84,000 payable under the Award (for the fees and expenses of the Arbitrators); and
- (d) the amount of A\$ 500,000 payable under the Award (for White's costs in the ICC arbitration);

15. COSTS

15.1 Parties' Statements of Costs

15.1.1 In response to the Tribunal's request, each of the parties submitted statements and proposed allocations of costs on 14 October 2011. As noted above, Respondent commented on Claimant's statement on 21 October 2011.

15.1.2 Claimant submits that the proper approach to be adopted by the Tribunal in this case is that each party ought to bear its own legal costs⁸⁹, except that Respondent ought to bear all of the costs and expenses of Claimant's witnesses.⁹⁰

⁸⁹ This approach was said to be common in investment treaty arbitrations. The fact that the issues were novel and complex and that the arbitration was conducted efficiently was cited in support.

⁹⁰ Claimant argued in support of this proposition that it had suggested that all witnesses be examined by video conference, and no examination was, in the end, conducted.

15.1.3 In the event that the Tribunal should decide to award costs on the basis that “costs follow the event”, Claimant claims a total of A\$ 923,040.75 and US\$ 52,374. These amounts were broken down as follows:

(a)	Mallesons’ legal fees	A\$ 787,543.20
(b)	Mallesons’ disbursements	A\$ 49,247.73
(c)	Luthra & Luthra legal fees	US\$ 52,374.00
(d)	Witness fees and expenses	A\$ 86,249.82

15.1.4 Respondent sought an award of costs on the basis that costs should follow the event. It claimed:

(a)	Fox Mandal legal fees and expenses	INR 13,020,513.00
(b)	Counsel fees	GB£ 465,022.44
(c)	Witness fees and expenses and arbitration expenses	INR 2,523,766.00 US\$ 8,394.00 SG\$ 535.00 GB£ 12,628.00

15.1.5 In its comments on Claimant’s bill of costs, Respondent submitted that there is no reason to depart from the normal rule that costs should follow the event. It also argued that there is no basis for Claimant’s attempt to have Respondent bear the whole cost of the evidence when the decision that no witnesses should be cross-examined was taken by both parties.

15.2 Decision on Costs

15.2.1 Article 12(3)(vii) of the BIT provides that:

“Each Party concerned shall bear the cost of its own arbitrator and its representation in the arbitral proceedings. The cost of the Chairperson in discharging his or her arbitral function and the remaining costs of the tribunal shall be borne equally by the

Parties concerned. The tribunal may, however, in its decision direct that a higher proportion of costs shall be borne by one of the two Parties, and this award shall be binding on both Parties.”

15.2.2 Under Article 38 of the UNCITRAL Arbitration Rules, the Tribunal is directed to fix the costs of the arbitration in its award. The term “costs”, as defined, includes the various heads of fees and expenses claimed by the parties.

15.2.3 Pursuant to Article 40 of the Rules, the costs of the arbitration (other than the costs of legal representation and assistance – which are to be dealt with pursuant to Article 40(2), which is to say, in its discretion) shall, in principle, be borne by the unsuccessful party.

15.2.4 However, pursuant to Article 38(e) of the Rules, the Tribunal may make an award in favour of the successful party for its costs of legal representation and assistance *only* if such costs are claimed in the arbitration proceedings.

15.2.5 This being the case, White having prevailed but having taken the position that costs (except for witness expenses) should follow the event, the Tribunal concludes that each party should bear its own costs with the exception of those relating to Claimant’s witness fees and expenses. As to the latter, India shall pay these fees and expenses in the amount of A\$ 86,249.82.

16. THE TRIBUNAL’S OPERATIVE DECISION

16.1.1 Based on the foregoing the Tribunal ORDERS, DECLARES AND AWARDS as follows:

- (a) The Republic of India has breached its obligation to provide “effective means of asserting claims and enforcing rights” with respect to White Industries

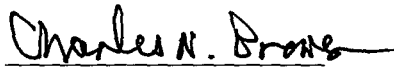
Australia Limited's investment pursuant to Articles 4(2) of the BIT incorporating 4(5) of the India-Kuwait BIT;

- (b) The Republic of India shall pay to White Industries Australia Limited the amount of A\$ 4,085,180 (payable under the Award), together with interest thereon at the rate of 8% per annum from 24 March 1998 until the date of payment;
- (c) The Republic of India shall pay to White Industries Australia Limited the amount of US\$ 84,000 (for the fees and expenses of the arbitrators in the ICC arbitration), together with interest thereon at the rate of 8% per annum from 24 March 1998 until the date of payment;
- (d) The Republic of India shall pay to White Industries Australia Limited the amount of A\$ 500,000 (for White's costs in the ICC arbitration), together with interest thereon at the rate of 8% per annum from 24 March 1998 until the date of payment;
- (e) The Republic of India shall pay to White Industries Australia Limited the amount of A\$ 86,249.82 (for its witness fees and expenses), together with interest thereon at the rate of 8% per annum from the date of this Award until the date of payment;

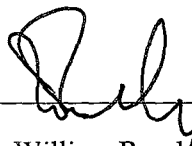
- (f) the costs of the arbitration shall otherwise be borne equally by the parties;
- (g) all other claims are hereby dismissed.

Place of Arbitration: London, United Kingdom

30 November 2011



The Hon Charles N.
Brower



J. William Rowley QC
(Chairman)



Christopher Lau SC