AN ANALYSIS OF GOVERNMENTAL BODIES CONDUCT AS A PARTY TO ARBITRATION

DISSERTATION

SUBMITTED TO:

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CERTIFICATE

This is to certify that this dissertation titled 'AN ANALYSIS OF GOVERNMENTAL BODIES CONDUCT AS A PARTY TO ARBITRATION' submitted by Mr. Obbattu Sudheendra Kumar (ID No. LLM/945/2020) in partial fulfilment of the requirements of LL.M. Degree for the academic session 2020-21 at National Law School of India University, Bengaluru, is a bonafide research work carried out by him under my guidance and supervision.

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DECLARATION

I, the undersigned, solemnly declare that this dissertation titled as 'AN ANALYSIS OF GOVERNMENTAL BODIES CONDUCT AS A PARTY TO ARBITRATION', submitted to National Law School of India University, Bengaluru for LL.M. Degree (2020-21), is an original and bonafide research work carried out by me under the supervision of my guide Prof V Nagaraj. In case the contributions of others are involved, every effort has been made to give due credit to them through reference to the literature. The information contained in this work is true to the best of my knowledge. This dissertation or any part thereof has not been submitted for the award of the degree, diploma, certificate or fellowship nor has it been sent for any publication purpose.

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ABBREVIATIONS

1. ACA …….Arbitration and Conciliation Act, 1996
2. ATC ……...Australian Trade Commission
3. AEFIC ……..… Australian Export Finance and Insurance Corporation
4. LCI ……..…… Law Commission of India
5. PSE ……. Public Sector Enterprise
6. BIT …… Bilateral Investment Treaty
7. CAG ……... Comptroller and Auditor General of India
8. CBI ……. Central Bureau of Investigation
9. CIL ……. Coal India Ltd
10. CPC …… Civil Procedure Code
11. CPWDM …… Central Public Works Department Manual
12. CUHL …….. Cairn UK Holdings Ltd
13. CVC ……. Central Vigilance Commission
14. DMRC ……... Delhi Metro Rail Corporation
15. DoS …….. Department of Space
16. ECIL ……. Electronic Corporation of India Ltd
17. ED ……. Enforcement Directorate
18. FET …… Fair and Equitable Treatment
19. ICC ……. International Chamber of Commerce
20. ICJ …….. International Court of Justice
21. ICSID …….. International Centre for Settlement of Investment Disputes
22. ISRO ……... Indian Space Research Organization
23. JSEB …… Jharkhand State Electricity Board
24. KBC ……... Kharsia Branch Canal
25. KFD ……... Karnataka Forest Department
26. MFN …….. Most Favoured Nation
27. MHA …… Ministry of Home Affairs
28. NCLT ……... National Company Law Tribunal
29. NCTD …… National Capital Territory of Delhi
30. PA ……... Performance Audit
31. PHD ……. Public Health Department
32. PMA ……... Permanent Machinery of Arbitration

33. PPP …….. Public Private Partnership
34. PWD …… Public Works Department
35. USD …… United States Dollars
36. UT ……Union Territory
37. WRD ……...Water Resources Department

CHAPTER 1

INTRODUCTION

DON'T LITIAGE, IF NECESSARY, ARBITRATE[1] has been touted as the panacea to address the problem of lack of swiftness in resolution of disputes. In a country like India, where judiciary is overburdened by too many cases,[2] it appears prudent to give preference to arbitration over litigation. Theoretically, there appears no reason why arbitration should be less beneficial than litigation as the disputes shall be decided by an arbitrator or panel of arbitrators who assume such positions usually after the parties' consent or the parties' no-objection. Timely resolution of disputes has been touted as one of the advantages that parties enjoy in arbitration proceedings compared to litigation proceedings.

In fact, the Law Commission of India (LCI) in its 126th report lamented that if any social audit is conducted over litigation strategies of government and Public Sector Enterprises (PSE) it would reveal that the government officials are recklessly litigating at the cost of public exchequer and the lawyers that these PSEs deploy are eating away 'fat fees'[3]. But did this situation change after arbitration is preferred as a method of dispute resolution is the question for which answers have to be found.

whether it is litigation or arbitration or even mediation or conciliation, the most important element required for any successful resolution of disputes is the willingness or forthcomingness of the parties involved in the dispute to resolve the dispute. The willingness of the parties to ensure that the dispute resolution process is successfully organized, and the outcome of the dispute resolution is successfully enforced holds significant importance for any successful resolution of disputes.

[1]Law Commission of India, *Government and Public Sector Undertaking Litigation Policy and Strategies* (Law Comm No 126, 1988) [2.1]

[2] 'India's Pending Court Cases on the Rise: In Charts' *(Bloomberg Quint,* 29 Sep 2020) <https://www.bloombergquint.com/law-and-policy/indias-pending-court-cases-on-the-rise-in-charts> accessed 10 June 2021.

[3](n 1) Ibid.

In India, the governmental bodies[4] play a huge role in the growth and development of economy. Since the LPG reforms of 1991[5], though the government wants to reduce its active involvement in the shaping of economy by policies like disinvestment and encouragement of private investment, the footprint of the governmental bodies like Public Sector Enterprises and various Public Corporations is too big. Some of the reasons being offered for the renewed interest and attention towards Privatization is that the private enterprises are more result-oriented and more focused towards profit making and innovation. It is also often argued that the officials and employees in the PSEs or more generally in the public sector are lethargic and risk averse.

In this dissertation, an attempt shall be made to understand, if the nature of the position, the powers enjoyed, and duties owed by a government official incentivizes the official to not actively engage in arbitration proceedings which stalls the successful resolution of disputes through arbitration proceedings. An attempt shall be made to understand if the existing structures of hierarchy in PSEs and public corporations facilitate a tendency to not actively engage in the arbitration proceedings. An attempt shall also be made to see if there are any structural factors that disincentivize the govt official from complying with any adverse arbitral awards.

1.1 Statement of Problem

Arbitration has been considered as a better alternative to litigation for quick resolution of disputes. It has also been considered that since arbitration is less adversarial than litigation, the parties involved may be incentivized to comply with the arbitral award, even if it turns out to be adverse. However, the Indian State (includes both the Union government and State governments along with their PSEs and Corporations) has been found to be lacking in its willingness to actively participate in the arbitral proceedings and comply with adverse arbitral awards, if any, at various stages. From domestic arbitration proceedings regarding dispute over construction of a minor canal to international investment arbitration proceedings regarding

[4] For the purposes of this dissertation, the term "governmental bodies" include all those bodies which are instrumentalities of state as covered under Art. 12 of the Constitution of India. The main focus shall be upon the Public Sector Enterprises (PSE) and government departments.

[5] LPG reforms – Liberalisation-Privatisation-Globalisation reforms have been ushered in the Indian economy in the year 1991 to ease up the government control over the economy as well as to encourage involvement of foreign players in the economy. The reforms have ushered a change from the "commanding heights of economy" model to a liberalized version of economy. 'EYE Special: 25 years of reforms' (*The Indian Express*, 25 July 2016) <https://indianexpress.com/article/lifestyle/life-style/25-years-of-reforms-india-after-liberalisation-2932683/> accessed 10 June 2021.

breach of commitments made in an international treaty, the Indian State is apparently uncomfortable with arbitration as a form of dispute resolution.

1.2 Importance of Study

India as a major developing country wants to attract as much investment as possible from foreign jurisdictions. India also wants its local businessmen and businesswomen to conduct their business without any hassles. Constantly, the country is aiming for improving its ease of doing business.[6] One of the most important criteria for Ease of Doing Business ranking is the contract enforcement. Hence, "**Ease of Arbitration"** also plays a key role in improving India's business ecosystem.[7] As the governmental bodies play a major stake in the business ecosystem of the country, their active engagement in the arbitration process is very much important.

1.3 Aims and Objectives

The aims and objectives of the Study are as follows:

A. To understand if any structural factors are motivating the governmental bodies to not comply with adverse arbitral awards
B. To understand if any institutional factors are responsible for the 'delays' that the governmental bodies are accustomed to in their conduct as a party to the arbitration.

1.4 Hypotheses

The officials in charge of taking important decisions in relation to arbitration proceedings tend to avoid taking any decisions within time due to the fear of prospects of investigation by anti-corruption agencies like Central Bureau of Investigation ('CBI') and Enforcement Directorate ('ED') and negative remarks from CAG. The tendency to automatically challenge almost any adverse arbitral award is also caused due to the fear of prospects of investigation by anti-corruption agencies like CBI and ED and negative remarks from CAG. The pressure to project better performance and better financial results also majorly contributes to these tendencies.

1.5 Research Questions

[6] 'Doing Business 2020: Reforms Boost India's Business Climate Rankings; Among Top Ten Improvers for Third Straight Year' (*The World Bank,* 24 Oct 2019) <https://www.worldbank.org/en/news/press-release/2019/10/24/doing-business-india-top-10-improver-business-climate-ranking> accessed 7 June 2021.
[7] '"Arbitration ecosystem vital for ease-of-doing business"' (*Outlook India,* 16 Nov 2019) <https://www.outlookindia.com/newsscroll/arbitration-ecosystem-vital-for-easeofdoingbusiness/1664206> accessed 7 June 2021.

On the basis of the hypothesis taken, the researcher attempts to answer within the scope of the present study, the following research questions:

A. Why do the governmental bodies almost always prefer to challenge adverse arbitral awards even as merits of a case indicate that the likelihood of succeeding in challenging the arbitral award is very low?
B. Why are the governmental bodies prone to 'delay' in taking appropriate actions while being as a party to arbitration proceedings?

1.6 Research Methodology

The researcher has taken a doctrinal approach in conducting the research. Even though, the researcher made efforts to do empirical research, those efforts have not fructified due to the severe challenges posed by the second wave of the pandemic. The researcher has undertaken to analyze various CAG reports which deal with the conduct of a governmental body as a party to arbitration. Awards of international investment tribunals have also been analyzed to look into the factors which are contributing to the antipathy of the Government of India in enforcing the adverse arbitral awards.

1.7 Mode of Citation

In this dissertation, the researcher has adopted the OSCOLA (4th ed.) format of citation. The mode of citation is uniform throughout the Report.

1.8 Scope and Limitation of the Study

The study is limited to understanding the conduct of various governmental bodies through CAG reports, judgements rendered by courts/tribunals. No empirical or analytical research has been conducted. The study basically deals with domestic arbitrations in which one of the parties is a governmental body and international investment arbitrations where Republic of India is a party. The research only cursorily refers to international commercial arbitrations.

1.9 Review of Literature

Vijay Kelkar and Ajay Shah in their *In Service of the Republic: The Art and Science of Economic Policy* write about the art and science of economic policy. They focus on how sudden and unthoughtful decisions without wide public consultations usually result in big failures even though the original intentions of bringing such policy might have been good. They also focus upon the causes for the 'delays' that have become routine in the affairs of governments. They

also focus upon the negative and unintended consequences of CAG reports, investigations by CBI etc.

Prabhash Ranjan & Pushkar Anand in their '*Indian Courts and Bilateral Investment Treaty Arbitration'* article focus upon the factors that are contributing to the poor culture in enforcing the investment arbitration tribunal awards in India.

126th Law Commission of India report titled as '*Government and Public Sector Undertaking Litigation Policy and Strategies'* analyses the factors that are contributing to weak litigation policies of the government bodies and what are the reforms that need to be implemented to address this problem.

260th Law Commission of India's report titled as '*Analysis of the 2015 Draft Indian Model Bilateral Investment Treaty'* extensively analyses the draft Indian Model BIT, 2015 and makes some recommendations to improve the same by referring to the models of various foreign jurisdictions.

1.10 Research Gap

Though there is a lot of pre-existing literature dealing with the individual facets of an arbitration involving governmental body as a party like appointment of arbitrators, challenging the mandate of arbitrator, enforcing the arbitral awards etc there is no good research available with regards to why the governmental bodies conduct themselves in the way they conduct and are there any structural factors that contribute to the way the governmental bodies conduct themselves as a party to arbitration.

1.11 Contributions of the Study

This research makes a humble effort to study if there are any structural factors that guide the conduct of governmental bodies when they are a party to the arbitration and also when they are supposed to comply with the adverse arbitral awards. The research uses various CAG reports, judgements of tribunal/courts for this purpose.

1.12 Chapter Scheme

In Chapter 2 *"Equal Treatment or Differential Treatment for Government?"* the researcher explores if the governmental bodies are provided with any kind of special privileges vis a vis private parties in the arbitration proceedings with the aid of judgements of Supreme Court.

In Chapter 3 titled as *"Analysis of tendency to not take decision"* the researcher explores to find out if there are any structural reasons for the 'delays' observed in the conduct of governmental bodies when they are a party to arbitration as well as when they are supposed to comply with the arbitral awards (mainly adverse). Various CAG reports have been referenced for this purpose.

In Chapter 4 titled as "*International Investment Arbitration"* the researcher explores as to why Republic of India loses more than it wins in investment arbitration cases with the aid of cases that have already been decided against it.

In Chapter 5 titled as *"Suggestions and Conclusion"* the researcher concludes the study by giving suggestions based on the observations made in the research.

CHAPTER 2

EQUAL TREATMENT OR DIFFERENTIAL TREATMENT FOR GOVERNMENT?

2.1 Section 18 and Pam Developments Case

One of the most important provision in the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'ACA') is Section 18 which reads as follows:

"The parties shall be treated with equality and each party shall be given a full opportunity to present his case"

Interestingly, even though this provision falls under Chapter V (conduct of arbitral proceedings) of Part I of ACA, the Supreme Court upheld the principle laid down by this provision in interpreting Section 36 of the Act which deals with enforcement of arbitral awards and falls under Chapter VIII (finality and enforcement of arbitral awards) in Part I of ACA in the case of *Pam Developments Pvt Ltd* V *West Bengal*[8]('Pam Developments') decided by a two-judge bench of the apex court.

The general presumption in favour of government under Civil Procedure Code ('CPC') is that the government is always solvent and hence will always honour its commitments. Therefore, Order XVII Rule 8A states as follows:

"No such security as is mentioned in rules 5 and 6 of Order XLI shall be required from the Government or, where the Government has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity"

Rule 5 and Rule 6 of Order XLI of CPC which have been exempted for government by Order XVII Rule 8A deal with Stay of decree and security in cases where execution of decree is appealed. They state the general rule that when an application for stay of decree is filed, it doesn't mean that the proceedings under the decree are stayed and the party initiating the appeal proceedings must necessarily make deposit or furnish a security in order for the court to stay the execution of the decree.

The facts in the case of *Pam Developments* were as follows:

The Govt of State of West Bengal invited tenders under its 'Special Repair Programme 2000-2001' to repair stretches of National Highway. Pam Developments has successfully submitted

[8]AIR 2019 SC 3937.

its bid after which a contract was registered. Pam Developments fulfilled its obligations but not within the time. The extensions for completion of the work were granted by the government. Pam Developments attributed the delay to the government and has filed an application under Section 11(6) of ACA for appointment of an arbitrator. The High Court of Calcutta appointed Retd. Justice Sujit Kumar Sinha as the sole arbitrator who partially awarded the sums prayed for by Pam developments. Against this arbitral award, the govt of West Bengal filed an application under Section 34. In the meanwhile, the Parliament has amended Section 36 of ACA through the Arbitration and Conciliation Amendment Act, 2015 ('2015 AA'). The new version of Sec. 36 of ACA provides that an application under Sec. 34 will not mean that the arbitral award is automatically stayed. An arbitral award will be stayed only when the court orders it to be stayed. In the case of *Board of Control for Cricket in India* V *Kochi Cricket Pvt Ltd*[9], the apex court clarified that the amended Section 36 will also be applicable to pending proceedings under Sec. 34. After this, Pam Developments filed an Execution Application before the Executing Court. The Executing Court adjourned the matter and said that if no stay of award is granted till the adjourned date, an amount of Rs. 2.75 crores (arbitral award amount) standing to the credit of govt of West Bengal will be attached. The Stay Application filed by the govt of West Bengal before the Calcutta High Court was dismissed *in limine*. When the Executing Court was considering releasing the sum of Rs. 2.75 crores to Pam Developments, the West Bengal govt cited Order XXVII Rule 8A to argue that when the decree is against the government, for stay of the decree, no furnishing of security or making of deposits by the government shall be required.

The Counsel for State of West Bengal argued that Order XXVII Rule 8A will necessarily apply in relation to an application filed for stay of an award under Sec. 36(2) of ACA. To support this position, reliance was placed on Proviso to Sec. 36(3) of ACA which reads as follows:

"Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908)." [emphasis supplied]

The use of word "shall" mean that the provisions of CPC shall mandatorily apply, according to the Counsel for State of West Bengal.

[9] (2018) 6 SCC 287.

But the court declined to accept this position by relying upon *Shri Sitaram Sugar Company Ltd* V *Union of India*[10]wherein the words 'having due regard to' have been held to be only directory in nature and not mandatory.[11] Even otherwise, if it is to be held that Order XVII Rule 8A is applicable to a Stay Application filed under Sec. 36, government can get relaxation only to the extent of furnishing security. The relaxation or concession to be granted under Order XVII Rule 8A cannot be extended to mean that government is not required to make a deposit![12]

The court further opined that:

"The Arbitration Act is a special Act which provides for quick resolution of disputes between the parties and Section 18 of the Act makes it clear that the parties shall be treated with equality. Once the Act mandates so, there cannot be any special treatment given to the Government as a party."[13]

Further the court said that unlike CPC, ACA doesn't provide any special treatment for government and listed some of the key differences as follows:

A. Unlike Section 80 of CPC which provides for a notice of two months to be given before any suit is instituted against the government, ACA provides for no such notice before invoking arbitration.[14]
B. Unlike CPC which states that no ex-parte injunction can be granted against the government, there is no such provision in ACA under Section 9 or Section 17 of ACA.[15]
C. Section 36 of ACA also does not provide for any special treatment to government while dealing with a Stay application unlike Order XVII Rule 8A of CPC.[16]

It is pertinent to note that there is no provision in Arbitration Act, 1940 which corresponds to Section 18 of ACA even as equal treatment of parties was a requirement of principles of natural justice in the arbitration regime established by Arbitration Act, 1940.

[10] (1990) 3 SCC 223.
[11] (n 8) [17].
[12] Ibid [20].
[13] Ibid [24].
[14] Ibid [25].
[15] Ibid.
[16] Ibid [26].

2.2 Appointment of Arbitrators and Likelihood of Bias

If Sec. 18 is to be strictly interpreted in the context of appointment of arbitrators, the many of the existing procedures for selecting the members of arbitration panel in arbitrations involving governmental bodies may have to be invalidated.

The persons who are appointed as arbitrators hold a position of great importance in any arbitral proceedings. Their impartiality and fairness towards the parties arbitrating before them is key for successful resolution of the disputes. But how to measure their fairness and impartiality? What is the procedure enshrined to challenge the appointment of any arbitrator? What if the original arbitration clause in the commercial contract itself creates unequal position between the parties and places one party in a less comfortable position in the matter of appointing the arbitrators? Afterall, the Supreme Court in the landmark case of *Central Inland Water Transport Corporation Ltd and Anr* V *Brojo Nath Ganguly and Anr*[17] held that in a commercial transaction between two businessmen, there is no scope for striking down a contract on the grounds of unfairness or unreasonableness.[18] The apex court applied the same rationale in a contract between a contractor and the government of State of Haryana in the case of *SK Jain* V *State of Haryana*[19]

To a large extent, these questions have been addressed by the Amendment Act of 2015. Sub-Section 5 of Section 12 of ACA states that any person who enjoys a relationship with any of the parties which is categorized under Schedule VII is ineligible to be appointed as arbitrator notwithstanding any prior agreement. However, the ineligibility can be waived by the parties by an express agreement, if they intend so, after the dispute has arisen.

The first entry in the Seventh Schedule clarifies that if the arbitrator is an employee, advisor or consultant or has any past or present business relationship with a party, then the person is ineligible to be appointed as an arbitrator. But whether an ex-employee can be appointed as an arbitrator is a question that doesn't find any answer in the Seventh Schedule. In *Govt of Haryana PWD Haryana (B and R Branch)* V *M/s G.F. Toll Road Pvt Ltd & Ors*[20]the apex court held that Para 1 of Schedule VII doesn't make ineligible the appointment of an ex-employee in the following way:

[17] (1986) 3 SCC 156.
[18] Ibid [89].
[19] (2009) 4 SCC 357.
[20] (2019) SCC OnLine 2.

"An arbitrator who has "any other" past or present "business relationship" with the party is also disqualified. The word "other" used in Entry 1, would indicate a relationship other than an employee, consultant or an advisor. The word "other" cannot be used to widen the scope of the entry to include past/former employees"[21]

Only a justifiable and reasonable apprehension of bias can be a ground to object the appointment of an arbitrator.[22] The only reason why the contractor's objection was found to be unjustifiable was that the appointed arbitrator is a person who retired from the service of govt of Haryana 10 years before his appointment. But the important issue that needs to be contemplated is if a person has worked till his retirement as an employee for the government and is also getting retirement benefits from the government and who also gets his new role as an arbitrator only because of the government's active support, why is the presumption that he might act in favour of the government an unjustifiable one?

In *Voestalpine Schienen GmbH* V *Delhi Metro Rail Corporation*[23]the apex court dealt with appointment of panel arbitrators. The constitution of arbitral tribunal happens from a panel of arbitrators maintained by the Delhi Metro Rail Corporation (DMRC). Initially, DMRC sent a panel of 5 arbitrators from which Voestalpine has to choose one arbitrator. However, Voestalpine challenged this on the ground that the panel list sent to it violates Sec. 12(5) r/w Schedule VII Entry I, even though some of the persons in the panel sent to it didn't work under DMRC but under Railways or Public Works Department. The Supreme Court in this case held that a panel of 5 members is not sufficiently broad-based to choose from for any opposite party to arbitration. The apex court also wanted DMRC to send the full 31- member panel list that it has at its disposal from which Voestlpine can choose an arbitrator. Even though, it cannot be denied that 31 member list gives a much better scope for Voestalpine to choose an arbitrator who is fair and impartial, it cannot be assumed that the DMRC will not fill all the 31 members with those persons who have a bias favouring it. The other problem that emanates from this judgement is that how can one determine objectively that sending 31 member list is the only correct way to quell any prospect of choosing an impartial arbitrator?

Interestingly, in *Central Organization for Railway Electrification* V *ECI-SPIC-SMO-MCML (JV)*[24] which was decided much later than *Voestalpine,* the apex court held that the Railways

[21] Ibid [23].
[22] Ibid [24].
[23] (2017) 4 SCC 665
[24] 2019 SCC OnLine SC 1635.

had given a "wide-choice"[25] to the contractor when the contractor was supposed to choose two names out of four names sent to him for selection of arbitrator. Out of the two names, which the contractor will send, the Railways will pick one name for appointment as an arbitrator. The remaining two members of the tribunal shall be decided by Railways. The Presiding Member of the Tribunal shall also be decided by the Railways. Interestingly, even though the Railways can choose majority of members in the arbitral tribunal, the court held that since, the contractor can also choose one arbitrator from among the names proposed by the Railways, the power of Railways has been counter-balanced by the power of contractor.[26]

Even though it is commendable that the Supreme Court has quashed the appointment of an arbitrator by the High Court under Sec. 11(6) of ACA as the said appointment is not in accordance with the contract between the parties, the judgement rendered by the court may still be subject to criticism because it had not specified the reasons as to why it felt that the four arbitrators names sent by the Railways to the contractor had given to the latter a "wide-choice". To this extent, the apex court in this case differs from *Voestalpine* even as the court cites *Voestalpine* to say that technical expertise is the reason why former employees of organization like Railways are chosen as arbitrators.[27]

If Sec. 18 of ACA is strictly to applied in the context of appointment of arbitrators, like it was applied in the context of enforcement of arbitral awards by the apex court in *Pam Developments,* many of the existing procedures for appointment of arbitrators may be invalidated.

[25] [27] ibid.
[26] [36], ibid.
[27] [25] ibid.

CHAPTER 3

ANALYSIS OF TENDENCY TO NOT TAKE DECISION

P.V. Narasimha Rao, the former Prime Minister of India is famously quoted to have said that *"Not taking a decision is also a decision"*[28]. At crucial times, when the pressure to take a decision is huge, sometimes not taking a decision means not subjugating oneself to the quick passions and submitting to the command of time, the power to heal/repair the situation which requires changes or modifications.

What if this tendency or inclination to not take decision is institutionalized? if this tendency to "not take decision" becomes dominant, speedy resolution of disputes through arbitration or for that matter, through any other form of dispute resolution becomes highly difficult. The inclination "to not take decision" usually arises not due to lack of accountability but due to fear of possible inquiries or investigations or departmental inquiries in the future.

Comptroller and Auditor General (CAG) of India is a constitutional body established under Art. 148 of Constitution of India. CAG through various Performance Audits (PA) reviews how a governmental body manages its performances. The audit also looks into aspects like the dispute resolution and the conduct of arbitral proceedings. It has been found that often, the people who hold positions of power in these PSEs and public corporations fear an adverse remark of CAG in the performance audit.

Those Officials who handle the arbitration proceedings also hesitate to settle the proceedings, even when it appears convincingly clear that their claim becoming successful in a proceeding is remote because initiating the steps to settle the dispute in an arbitration proceeding is *considered as admission of wrongdoing or admission of guilt of the organization.* The officials up in the hierarchy may suspect the intentions of the official who seeks to settle the proceedings or wishes to honour the arbitral award. This very act of trying to settle the dispute amicably may be used as a reason as to why certain perks and promotions must not be given to the concerned official. Instead of trying to honour the arbitral award, if the official continues to challenge the arbitral award, for example filing an application under Section 34 of Arbitration and Conciliation Act, 1996, the official has two advantages viz. firstly, the official can show that he is consistent or perseverant enough to challenge the adverse awards so as to stave off

[28]'PV Narasimha Rao took quick decisions, says former Home Secretary' (*Deccan Chronicle*, 1 July 2016) <https://www.deccanchronicle.com/nation/current-affairs/010716/pv-narasimha-rao-took-quick-decisions-says-former-home-secretary.html> accessed 9 May 2021.

the need for paying any awards to the opposite party and thus trying to save the earnings of the organization. Secondly, no one can challenge the official's integrity and commitment towards the organization. At best, the criticism against such official can be that he is *non-practical or rigid.* But if he takes steps to ensure that the arbitral award is honoured, his intentions as well as his integrity and commitment to the organization can always be questioned. In the performance appraisal reports, there is always a danger of being marked negative for making efforts towards settlement of the dispute or enforcement of arbitral awards.

Even in Public Private Partnership (PPP) arrangements created for construction of infrastructure projects or energy, water sanitation, social and commercial infrastructure etc there is a guidance note for Compliance audit of PPP arrangements. In the checklist for auditing of PPP arrangements in the Guidance Note, it is mentioned that while verifying dispute settlement procedures it is necessary to see whether the procedure prescribed for invoking the dispute settlement process has been followed or not and whether the relevant public enterprise has diligently and cautiously followed up its case before the appropriate authority according to the dispute settlement procedure.[29]

Let us observe some of the CAG reports dealing with review of arbitration proceedings to get a more concrete understanding as to the types or remarks that CAG usually gives in the reports.

3.1 CAG Report - Government of the Union Territory of Puducherry- Report No. 1 of 2016

Puducherry Public Works Department:

The work for construction of road over bridge over the upper drain connecting Kamaraj Salai and Maraimalai Adigal Salai was allocated to a contractor without obtaining any approval or sanction due to which the work was stopped by contractor due to non-payment of bills. Thereafter, arbitration proceedings were conducted between the arbitrator and Public Works Department (PWD) of Union Territory of Puducherry. The arbitrator awarded a sum of Rs. 8.12 Crores to be paid by PWD inclusive of the interest to be paid.

The CAG report found fault with PWD of UT of Puducherry on two grounds.

A. Even though the agreement made in 2007 was modelled on the lines of Central Public Works Department Manual (CPWDM), 1996, the PWD of UT of Puducherry stipulated

[29] Guidance Note, Office of CAG, https://cag.gov.in/uploads/guidence_notes/guidanceNotesPracticeGuides-05de4fab15611e6-42982380.pdf DATED 24.08.2016.

that interest on mobilization advance would be 18% instead of 10% as per the revision made in the CPWDM in the year 2003.

B. Even though under the ACA the time period for appeal was only three months, the PWD of UT asked for legal opinion from the legal department only at the end of three months since the passing of the award. When the legal department opined that the filing of appeal would be untenable, already three months have elapsed since the passing of the award. Even when the contractor sought negotiation of interest payment by offering rebate, PWD declined any negotiation and filed an appeal (contrary to the opinion expressed by the Legal Department). Eventually, an appeal was filed after 16 months from the passing of the award by the arbitrator which was decided against the PWD. The government replied to CAG that various "administrative processes" had delayed the filing of the appeal. CAG later noted that the accountability is yet to be fixed for the delay causing "administrative processes".[30]

It is interesting to note that the govt of UT of Puducherry has found fault with only delay in filing the appeal but not with the wrong decision to file the appeal. Even the Legal department of UT of Puducherry expressed the opinion that filing of the appeal would be untenable.

3.2 CAG Report – State of Jharkhand – Report No. 2 of 2013

Jharkhand State Electricity Board:

In the Performance Audit of Jharkhand State Electricity Board (JSEB), CAG has found out that in a contract for constructing transmission lines, the JSEB had not delivered the land in time to the contractor company RPCL for timely construction of project. As a result of this delay, the contract couldn't be executed as scheduled. RPCL then made a request for appointment of an arbitrator. The arbitration proceedings were then initiated. The arbitrator has awarded a sum of Rs. 11 crore to be paid by JSEB to the contractor. Interestingly, JSEB honoured the award but has delayed in filing the appeal. According to the then Sec. 34 of ACA, instead of filing the appeal within 4 months, JSEB filed the appeal after a gap of three years. CAG report has found

[30] Comptroller and Auditor General of India, 'Report of the Comptroller and Auditor General of India Govt of the Union of Puducherry Report No. 1 of 2016' <https://cag.gov.in/webroot/uploads/download_audit_report/2016/Puducherry_UT_Report_No_1_of_2016.pdf> 25-26.

that JSEB sought to justify this delay by mentioning about the time taken in obtaining legal opinion but was unconvinced of the reason for the delay.[31]

3.3 CAG Report on Arunachal Pradesh for the year ended 31 March 2010

Kush Project of Government of Arunachal Pradesh

One more interesting instance to point out is that of 2 X 1000 KW Kush Project of government of Arunachal Pradesh. For the construction of this project, a contract was entered into with the BFL, a company involved in supply of equipment. But BFL supplied the necessary equipment at a government godown in Lilabbari in Assam, 235 km away from the project site. Even then the government has paid an amount of Rs. 8.46 Crores to the contractor BFL. Later, the firm abandoned the project as a result of which dispute settlement proceedings were initiated by constitution of an arbitral tribunal. The arbitral tribunal had held that the contractor BFL is in breach of contract. However, the tribunal withheld from ordering the contractor BFL to pay the amount for equipment back to the government of Arunachal Pradesh because the government failed to pray in the arbitration petition for return of money as well as taking back of equipment by BFL. CAG report noted that the department by failing to pray for its basic rights in the arbitration petition is only signalling **'gross negligence'** and is lacking justification.[32]

3.4 CAG Report – State of Karnataka – Report No 8 of 2017

Karnataka Forest Department:

A. The Government of Karnataka's Forest Department (KFD) by an Order in July 1992 has approved lease of a tourist complex for the purpose of renovating the complex. It was estimated that lessee needs to spend around Rs. 1.20 crores to complete the renovation. The said amount has also been mentioned as an upper limit on the expenditure to be incurred by the lessee according to the terms of the contract.
B. But the lease was terminated by KFD as the requisite *post facto* approval from the Government of India was not forthcoming.

[31]Comptroller and Auditor General of India, 'Report of the Comptroller and Auditor General of India State of Jharkhand Report No 2 of 2013'<https://cag.gov.in/webroot/uploads/download_audit_report/2013/Jharkhand_Report_2_2013_Chap_2.pdf >34.
[32] Comptroller and Auditor General of India 'Report of the Comptroller and Auditor General of India for the year ended 31 March 2010'<https://cag.gov.in/uploads/download_audit_report/2011/Arunachal_Pradesh_civil_2010.pdf > 135.

C. During the arbitration proceedings, the lessee claimed refund of Rs. 9.70 crores along with 24% interest. The amount claimed to be spent by the lessee has not been disputed by KFD during the arbitration proceedings despite there being an upper ceiling.
D. CAG questioned the strategy in not bringing this crucial and material factor to the attention of arbitrator.
E. It is interesting to note that despite witnessing failures before District Court and High Court in invoking *force majeure* as a ground for challenging the arbitral award under Sec. 34, contrary to the advice given by Advocate General of State of Karnataka, KFD went on to challenge the High Court's decision before the apex court. The apex court didn't interfere with the High Court's decision.

CAG report noted that when the Government was asked as to why so many attempts have been made to agitate the matter before the courts, despite repeated failures at the various levels, it was replied as follows:

"all legal departments were consulted at every stage to ascertain the merit of the case and preferred the appeals. The Government also stated that appeal against the award cannot be unilaterally decided by the Department and correspondence with various government forums was inevitable."[33]

3.5 CAG Report - Government of National Capital Territory of Delhi- Report No. 1 of 2017

Govt of NCT of Delhi PWD:

The Public Works Department (PWD) of Government of National Capital Territory of Delhi (NCTD) awarded the construction work of a bridge across Yamuna river to a firm at a cost of Rs. 9.39 Crores with a clearly stipulated starting date and completion date. The firm clearly defaulted to complete the construction within the stipulated time and had even been granted extension of time. As the firm could not complete the work even after extension, it had been paid the money only to the extent of completed bridge work. Against this, the firm had initiated arbitration proceedings. The arbitrator had partially upheld the claims of the firm. Against this, the Government Counsel had advised taking up an appeal before the High Court. But it took

[33]Comptroller and Auditor General of India 'Report of the Comptroller and Auditor General of India State of Karnataka Report NO 8 of 2017<https://cag.gov.in/uploads/download_audit_report/2017/Report_No_8_of_2017_-_Economic_Sector_Government_of_Karnataka.pdf> 65.

the PWD, almost 8 months to finally file an appeal before the High Court. The High Court dismissed the Appeal on the grounds that the PWD appealed 89 days after 90 days which is the time limitation as per the statute. The Condonation of Delay application filed by the PWD was also rejected. Special Leave Petition filed before the Supreme Court against the High Court's order has also been dismissed. The delay between taking the opinion of the government counsel and filing of the appeal has been heavily criticized by the CAG.[34]

3.6 CAG Report – Government of Chattisgarh- Report No 3 of 2013

Chattisgarh Water Resources Department:

In this case, the Chattisgarh Water Resources Department (WRD) has entered into a contract with M/s Integral Construction Company of Vijayawada through three agreements for the purpose of construction of Kharsia Branch Canal (KBC) for a stretch of 2.69 km. However, the contractor declined to perform its obligation as WRD gave the possession of required very lately. But the Executive Engineer (EE) of WRD invoked Clause 4.3.3 of the contract to make the contractor pay the extra costs incurred in the completion of work. Against this, when the contractor initiated arbitration proceedings by moving the High Court, the WRD largely honoured the award by withholding only minute amounts of the award which was also paid after some time. After two years from the date of honouring the award fully, Advocate General of Chattisgarh's opinion was sought about the feasibility of challenging the arbitral award!

The CAG report criticized the WRD of State of Chattisgarh not only for late delivery of land to the contractor but also for lately seeking the opinion of the Advocate General of Chattisgarh. An inherent assumption can be seen in the CAG report that if the opinion of Advocate General was sought in time, he/she would have advised for filing an application under Section 34 to set aside the arbitral award![35]

3.7 Electronic Corporation of India Ltd V PWD of Government of NCT of Delhi

The impact of CAG is however not limited to just Government – Private Contracts, the tremors of CAG audit can also be found in Government – Government contracts. In this context, it

[34]Comptroller and Auditor General of India 'Report of the Comptroller and Auditor General of India Government of National Capital Territory of Delhi Report NO 1 of 2017' <https://cag.gov.in/uploads/download_audit_report/2017/Report%201%20of%202017%20of%20Non-PSUs%20of%20NCT%20Delhi.pdf> 110-111.

[35] Comptroller and Auditor General of India 'Report of the Comptroller and Auditor General of India Government of Chattisgarh Report No 3 of 2013'<https://cag.gov.in/uploads/download_audit_report/2013/Chhattisgarh_Report_3_2013.pdf> 193-195.

would be useful to refer to then Law Secretary's award as Reviewing Authority in the arbitration dispute between two governmental entities viz M/S Electronic Corporation of India Ltd (ECIL) and Public Works Department (PWD) of National Capital Territory of Delhi (NCTD) in accordance with the Permanent Machinery of Arbitration (PMA) mechanism. ECIL supplied to PWD certain security apparatus for the safe conduct of Commonwealth games. After the material was supplied, PWD received a communique from Ministry of Home Affairs of Union of India that apparently the contract with ECIL was over-priced and the CAG report also questions the price of the material. The sole arbitrator held that CAG report is a time barred document which cannot be relied upon after the contract was executed and the CAG report has not sufficiently given attention to the meeting of officials of PWD that had accepted the price of the material. These findings of sole arbitrator though were reverse by the appellate authority were upheld by the review authority.[36]

3.8 Analysis of CAG reports

If we observe the various defects and deficiencies pointed out by the CAG reports in the working of various PSEs/Government departments, there is one thing common in most of them.

The CAG report chides them for not being able to file the appeal within the stipulated time. There is an inherent assumption running across the various CAG reports that once the application to set aside the arbitral award under Sec. 34 of ACA is made the concerned PSE/Government department will succeed in getting the arbitral award struck down. It is not the fault of CAG to have such an inherent bias towards filing the application for setting aside the arbitral award because as it is observed in most of the cases, the concerned PSE/Government department is any how going ahead with filing the application. One cannot find fault with the CAG for questioning the delay in filing the application for setting aside the arbitral award, if the concerned department/ PSE decides to file the application. One cannot criticize the CAG reports for pointing out at the "administrative delays" and "procedural lapses" that cause delays. But when the concerned Department/ PSE chooses to not file an application for setting aside the arbitral award then also CAG is most likely to question the decision to not file an application. This in a way pressurizes the concerned officials in the

[36]Department of Legal Affairs Ministry of Law and Justice 'Electronic Corporation of India Ltd Public Works Department of National Capital Territory of Delhi' <https://legalaffairs.gov.in/sites/default/files/ECIL%20%26%20PWD.pdf> 12.

government department/PSE to go ahead against the arbitral award. At least then the integrity or commitment that they have towards their organization or department will not be questioned.

In this context, it needs to be remembered that:

"Too often in India, interventions are put into place without explicitly stating the problem that is sought to be solved. A first objective is articulated, ***but the moment it is clear that this did not work out, the goalpost is shifted…*** *……* ***Clarity about objectives, and the calculations associated with cost–benefit analysis, will help the Comptroller and Auditor General (CAG) work on policy initiatives in a more effective way.*** *The staff in an intervention, who expect such review, will be more accountable and hence do better work"*[37] [emphasis supplied].

Hence, it can be said that once the suitable policy is framed by the concerned department/PSE with regards to arbitration, it would be easier for even the CAG to estimate if the objective of achieving the goals enshrined in the policy has been successful or not.

It needs to be remembered that

"An integral part of a sound cost–benefit analysis is asking the question: ***Is there another and superior way through which we could got the job done?*** *Could we achieve the desired objective with a lower use of state coercion? When calculations are absent, the policy process tends to degenerate into a contest of rival political influences.* ***Systematic cost–benefit analysis encourages an exploration of alternative policy pathways, and generally yields better thinking****."*[38] [emphasis supplied]

If we think from the perspective of a government official who is in-charge of taking the appropriate steps after an adverse arbitral award is passed against his department/organization, there are two choices available to him:

A. Accept the arbitral award OR
B. Challenge the arbitral award in the court of law

[37] Vijay Kelkar and Ajay Shah, *In Service of the Republic: The Art and Science of Economic Policy* (1st ed, Penguin Random House India 2019) 109.
[38] Ibid 110-111.

Systematic cost benefit analysis is required to be done as to how to choose a better alternative in a given scenario of facts. It is extremely important to remember before choosing any path way that

"The relevant comparison is not the overall expenditures in the path taken, but a comparison against the counterfactual, the path not taken, of either doing nothing or undertaking other decisions."[39]

Every arbitration matter has its own unique set of facts and circumstances. It is impossible to lay out clear guidelines as to what should be done in each set of facts and circumstances. That's where the role of 'discretion' comes into picture. No bureaucracy or executive can function without exercising any of the powers attached with discretion. But how a bureaucrat or the executive exercises his discretionary powers is often watched carefully by not only CAG but also by Vigilance Departments and his decisions taken today may very well be subjected to scrutiny tomorrow by Central Bureau of Investigation (CBI) and Central Vigilance Commission (CVC). The discretionary powers of an executive official is like a necessary evil because[40]

The extreme discretion problem can easily be resolved by relying upon a clearly laid out policy guideline that priorotizes the various objectives of the concerned department/PSE. What can be those priorities among which the ranking should be done? The governmental entity, when entering a contract is itself an economic player in the market. Obviously, it would want to save as much money as possible or to put it in other words it would like to have the work done by the other contracting party as cheaply as possible. Cost-saving would be the number one priority. *But cost-saving should be done at what cost?* Obviously, when an arbitral award is passed against any entity it would be better for that entity to not honour the award financially. **But shouldn't that entity also look into the probability of it failing in its prospective attempt to challenge the award ? what are its probabilities of winning and losing the award ? if its losing probability is high, is it not better for the entity to avoid litigation ? given the resources to be spent on the advocate fees, court expenses and the burden of litigation ?** what if the governmental entity has to pay an extra Rs. 1 lakh if it settles for honouring the arbitral award now instead of filing an application against the arbitral award and toiling for winning the case in the court for say next two to three years ? what about the

[39] Ibid.
[40] Ibid 265.

assignment of staff that a governmental entity has to do to track the progress of this arbitration matter ? Will it not eat up the valuable time that an Officer has in rendering his services to the organization that he works for ? These are some of the questions which the appropriate government has to answer. The choices it makes has a huge impact on the perception of its efficiency in improving the **'ease of doing business'** about which it is so concerned about these days.[41]

It is quite interesting to know that even though Sec. 34 [Application for setting aside arbitral award] says that an arbitral award may be set aside by the court if it finds that the arbitral award is in conflict with the public policy of India and public policy of India has been expressly meant to include anti-corruption. Even then, the Parliament has felt the need to amend Sec. 36 [Enforcement] of ACA. Sub-Section 1 of Section 36 has been amended to insert a second proviso. The second proviso states that if the court is satisfied that a *prima facie* case is made out that the arbitration agreement or contract which is the basis of the arbitral award or the making of the arbitral award has been induced by corruption, then the court **shall unconditionally stay** the execution of arbitral award till the proceedings for setting aside the arbitral award under Sec. 34 are not completed. Interestingly, the second proviso to Sec. 36(3) has been inserted with effect from 23rd October 2015 i.e. the day on which AA, 2015 of ACA came into force. An Explanation has also been inserted to mention that the Second Proviso shall apply to all the court cases irrespective of the timing of commencement of court proceedings or arbitral tribunal proceedings. The intent of the government makes it clear that if a government official seeks to settle the adverse arbitral award and buy peace by paying the dues, he is very likely to be subjected to examination or investigation by anti-corruption agencies.

One more important point that shouldn't be neglected is that the government officials who are at the helm of affairs and who are charged with discretionary powers to take decisions at the crucial juncture of arbitration proceedings, often avoid taking decisions, especially when they are required to comply with adverse arbitral awards because they take a **quarter to quarter approach (short term approach).** They want to show immediate profits and they want to make their organization's balance sheet look good. [paying arbitral awards makes the financial accounts of the organization look less attractive]. If any long-term bad consequences arise from this, those consequences will be faced by some other person in the organization who will be in

[41](n 6).

charge at that time. That need not be a concern for those who are in charge of taking decisions right now. At the moment, they can project a better financial health of their organization. There is a pressure to show and project better financial health of the organization. This approach is also popularly named as **window dressing.** PSEs and governments are often found to have indulged in window dressing by CAG.[42]

[42] Vivek Shukla 'CAG says Railways Ministry resorted to window-dressing, sanctioned financially unviable projects'(*PSU Watch*, 23 Sep 2020) <https://psuwatch.com/cag-railways-ministry-window-dressing-sanctioned-financially-unviable-projects> accessed on 23 Aug 2021.

CHAPTER 4

INTERNATIONAL INVESTMENT ARBITRATION

International Investment arbitration is an area in which India has faced lot of criticism and brickbats more than bouquets for its alleged lack of commitment to the process of arbitration. Any arbitration in the arena of international investment arbitration has as its bedrock, a treaty called Bilateral Investment Treaty ('BIT'). A BIT is entered between two sovereigns that envision the objectives of increasing the flow of investments between the countries being party to it by giving adequate and reasonable protections to the investment[43] made by either natural or juristic nationals of one nation into the other one. The first BIT that India entered into was with United Kingdom (UK) in the year 1994. Since then, the country has contracted 50 BITs in the following decade. Thereafter, India had come up with a model BIT which was to serve as a model for the future BITs. After this model BIT was brought into existence, India entered into BIT arrangements with another 33 countries.[44] But India found the model BIT to be lacking in many ways which is the reason why it sought to replace the model BIT with a new BIT that best suits its interests. There after India came up with a model draft BIT which was finalized after incorporating some suggestions made by Law Commission of India (LCI) in its 260th report.

One of the reasons why India is said to have made these drastic changes is its recurring failures in successfully defending its case against the investors who claim that the country has violated its commitments under the relevant BIT.

India has been respondent State in 26 investor-state disputes till now. India was the home state of claimant in 9 investor-state disputes till now. Out of the 26 investor-state disputes where it is the respondent state, India had only one case gone in its favour. in four cases, the dispute was settled in favour of the claimant-investor. In 10 matters the dispute has been amicably resolved by the parties before the arbitral tribunal has passed its award. In 9 matters the proceedings are still pending. In 2 matters, the proceedings have been discontinued.[45]

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[43] The usual protections given to the investors are Most Favoured Nation (MFN) [a contracting party which confers a benefit to the investor from one State should necessarily give that benefit to the investor from the other state also or in other words there should not be any discrimination between the investors solely on the basis of their nationality], protections from unreasonable expropriation, Fair and Equitable Treatment etc

[44] Law Commission of India, *Analysis of the 2015 Draft Indian Model Bilateral Investment Treaty* (Law Comm No 260, 2015) [1.1].

[45] 'Investment Policy Hub'(*United Nations Conference on Trade and Development)* <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/96/india/investor> accessed 17 July 2021.

So whatever deficiencies that India was concerned about before amending its Model BIT can be clearly understood if one can look at the investment arbitration cases in which India lost to the claimant-investor.[46] Hence, briefly analysing those cases is essential.

4.1 White Industries V Republic of India[47]

On 28 Sep 1989 White Industries Ltd of Australia has entered into a contract with Coal India Ltd for the purpose of supplying equipment to and developing the coal mine at Piparwar. The consideration that White Industries would be taking under the contract is Aus $206.6 million. The contract stipulates that it is to be governed by Indian law. It contains a clause which requires the parties to arbitrate the disputes that may emanate from the contract in accordance with the ICC Arbitration Rules. The contract excluded the operation of the predecessor of ACA i.e. Arbitration Act, 1940. But Coal India Ltd (CIL) was also having limited resources at its possession making it difficult for the PSE to import the foreign equipment. Hence, negotiations were also held with Australian Trade Commission (ATC) and Australian Export Finance and Insurance Corporation (AEFIC) for financing of the imports which eventually became successful.[48] In addition to the consideration amount in the contract there were some stipulations which maintained that if the production gives high quality and good quantity coal, White Industries will be paid a bonus and if the converse happens White Industries will pay a penalty to CIL. After the production started various disputes have arisen as to whether White Industries is entitled to any bonus as they claim or any penalty must be paid by them as claimed by the CIL. The CIL invoked the bank guarantee furnished by White Industries for the purposes of imposing penalties on 24 March 1998.[49] These differences were sought to be settled by the arbitration proceedings as stipulated under the contract. The seat of the tribunal was fixed at Paris even as parties were permitted to give their submissions in London. The arbitral tribunal in 2:1 majority had held that in aggregate, CIL is required to pay certain dues to the White Industries. India challenged this ICC arbitration under ACA in the Calcutta High Court. White Industries sought to enforce the award passed in their favour by approaching Delhi High Court. however due to various delays the matter was pending before the Supreme Court even after 10 years since the passing of the arbitral award.[50]

[46] The four cases in which the issues were decided in favour of the claimant investor are *Cairn V India, Vodafone* V *India(I), Devas* V *India, White Industries* V *India.*
[47] IIC 529 (2011).
[48] [3.2.1 – 3.2.24] ibid.
[49] [3.2.25] ibid.
[50][3.2.60 – 3.2.64] ibid.

White Industries used this as a ground and argued by using Art. 4.2[51] of India – Australia BIT to claim the benefits under Art. 4(5) of India-Kuwait BIT which referred to *"effective means of asserting rights and enforcing claims"*. So, indirectly White Industries was claiming that the judicial system in India is so lethargic and time consuming that by relying upon them one cannot believe that one has effective means of asserting rights.[52]

That apart, what is quite interesting from the perspective of this research is that the decision rendered by the investment arbitral tribunal in this case has been unanimous. The arbitral tribunal comprised of Charles N Browner (nominated by claimant), Christopher Lau SC (nominated by host state- India), William Rowley QC (Presiding arbitrator jointly nominated by co-arbitrators).[53] All of them held that India has violated its BIT commitments by not providing effective means. This shows that even the arbitrator was not convinced of India's case! The costs imposed on India also included the interest that India has to pay i.e. 8% on the Principal amount to be paid from the date of 24th March 1998 i.e. the day when Bank Guarantee was invoked by the CIL.[54] If at all India had not gone to the Indian courts to halt the enforcement of the ICC award, the adverse decision would not have been passed by the investment arbitral tribunal. This doesn't mean that India should always be considerate towards the claims of the claimant. But the crucial point that should not be forgotten is does CIL or Indian government have ever considered the prospects of losing the case in investment arbitration ?

4.2 Cairn Energy Plc and Cairn UK Holdings Ltd V The Republic of India[55]

The facts of this case are that India in 2012 has amended Income Tax Act, 161 with retrospective effect. According to the amended IT Act, 1961 India demanded a sum of Rs. 1.6 billion on Cairn India Ltd as it allegedly failed to deduct withholding tax on transactions which resulted in capital restructuring in the hands of its holding company Cairn UK Holdings Ltd (CUHL). In 2016, when CUHL initiated international investment arbitration proceedings under the 1994 India – UK BIT in 2016, India seized the shareholding of CUHL in another entity,

[51] This provision provides for MFN treatment to the investors of either parties.
[52] (n 47) [3.2.64].
[53] [1.5.1] ibid.
[54] [4.7.2] ibid.
[55] PCA Case No. 2016-07.

seized the dividends which were due to CUHL and had offset a tax refund to enforce the tax demand of Rs. 1.6 billion.[56]

Cairn claimed before the arbitral tribunal that by retrospectively amending Sec. 9(1)(i) of the IT Act, 1961, India had violated its commitments under the India-UK BIT, 1994.

In accordance with Art. 9 of the India-UK BIT, the claimant company appointed Mr. Stanimir Alexandrov as arbitrator. As India didn't take any steps on its part to appoint an arbitrator on its behalf in accordance with the Art. 9(3)(c)(ii) of BIT, the claimant company requested the President of the International Court of Justice (ICJ) HE Judge Ronny Abraham to act as an appointing authority. But after this event, India had informed the claimant company that they had appointed Mr. J Christopher Thomas, QC as arbitrator. The co-arbitrators then appointed Mr. Laurent Levy as Presiding Arbitrator.[57] Interestingly, the award in this case is also unanimous! Once again, the nominee of India has rejected its claims and arguments!

India referred to Art. 4(3)(b) of BIT which reads as follows in its arguments:

"(3) The provisions of this Agreement relative to the grant of treatment not less favourable than that accorded to the investors of either Contracting Party or of any third State shall not be construed so as to oblige one Contracting Party to extend to the investors of the other the benefit of any treatment, preference or privilege resulting from

……

(b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation."

But the tribunal opined that according to the said provision any taxation measure is not under the purview of the BIT only when such measure is examined from the perspective of MFN standard and National Treatment Standard.[58] Hence, according to the Tribunal, it can examine the relevant tax measure and see if such measure meets the standard of Fair and Equitable

[56] Kshama A Loya and Vyapak Desai 'The Cairn Energy V India Saga: A Case of Retrospective Tax and Sovereign Resistance Against Investor State Awards' (*Kluwer Arbitration Blogs,* 2 July 2021). <http://arbitrationblog.kluwerarbitration.com/2021/07/02/the-cairn-energy-v-india-saga-a-case-of-retrospective-tax-and-sovereign-resistance-against-investor-state-awards/#:~:text=On%20December%2021%2C%202020%2C%20the,adopting%20measures%20to%20enforce%20the> accessed 20 June 2021.

[57] (n 55) [11-16].

[58] ibid [805].

Standard (FET). Though it was cautious to make it clear that it is not commenting on any national tax policy.[59]

Finally, the tribunal had unanimously held that India had breached the FET standard by imposing the retroactive tax measure. The concern for this research is not about the appropriateness or inappropriateness of the decision taken by the tribunal in examining the tax measure imposed by a sovereign under the FET standard, but the concern in this research is as to why India couldn't convince its own nominated member Mr J Christopher Thomas, QC that imposing a tax measure is a sovereign right that cannot be examined by an arbitral tribunal? Whether he was not properly briefed about the facts of the case or whether India's claim was so illogical that he was inevitably destined to reject its claim?

After Cairn had won this award, it has started taking measures to enforce the award by not using the judicial process in India but by targeting its assets in foreign jurisdictions. It has also filed a suit in Federal District Court for Southern District of New York for attaching the assets of Air India, claiming Air India to be the *alter ego* of Indian government.[60] Recently, it has also been reported that a French Court has agreed to freeze the residential estate owned by the Government of India in Central Paris. Even though India has challenged the arbitral award passed by the arbitral tribunal in a Dutch Court, it might be extremely difficult for India to convince the Dutch court to nullify or strike down the award rendered by the arbitral tribunal as India's own companies like KLA Construction Technologies Ltd are suing foreign nations for the enforcement of arbitral awards.[61]

In *Vodafone International Holdings BV* V Republic of *India*[62]also more or less the same saga continued. The Vodafone International Holdings (BV) registered in Netherlands has also been affected by the retrospective amendment in Indian Income Tax Act, 1961. Vodafone International Holdings (BV) has invoked Art. 4(1) of India -Netherlands BIT to argue that the India as the host state of investments has failed to provide fair and equitable treatment towards the investment made by the claimant company in mobile telecommunications. The Tribunal held that the imposition of tax demand on the claimant company notwithstanding the Supreme

[59] ibid [1794].
[60]'Cairn lawsuit: Air India has time till mid-July to challenge the case'*(Business Standard*, 20 June 2021) <https://www.businesstoday.in/industry/aviation/story/cairn-lawsuit-air-india-has-time-till-mid-july-to-challenge-the-case-299177-2021-06-20>.
[61] Apurva Vishwanath 'Explained: Why is Cairn going after Indian assets? What are India's options now?' (*The Indian Express*, 15 July 2021) <https://indianexpress.com/article/explained/france-seizure-assets-cairn-energy-7397409/> accessed 13 Aug 2021.
[62] PCA Case No. 2016-35.

Court of India's decision by simply retrospectively amending the legislation is unacceptable under the FET standards.[63]

The arbitral tribunal in this case has been comprised of three members and it had given a unanimous decision. The members of the tribunal are Franklin Berman, L Yves Fortier and Ramesh Chandra Lahoti. L Yves Fortier has been appointed by the claimant company. Franklin Berman has been the President of the Tribunal and Ramesh Chandra Lahoti, the 35th Chief Justice of India was appointed by India. It is interesting to note that not even Former CJI was convinced of India's claims.[64]

Any unanimous decision given by any arbitral tribunal in which both the claimant company and respondent State has appointed a single arbitrator not only gives a legal victory to the winning party to the arbitration but also a **great moral victory**.

4.3 CC/Devas Mauritius Ltd and Devas Employees Mauritius Pvt Ltd and Telecom Devas Mauritius Ltd V The Republic of India[65]

The claimants are companies registered in the country of Mauritius and they have brought their claims under India – Mauritius BIT. The facts of the case are that Devas Multimedia Pvt Ltd, an Indian subsidiary of claimants has entered into an agreement with Antrix Corporation Ltd, an arm of Indian Space Research Organization (ISRO) for the purpose of taking a part of S-Band space spectrum under a lease arrangement in the year 2005. However, in the year 2011, the Government of India cancelled the lease citing security reasons.[66]

Devas Multimedia has appointed Professor Francisco Orrego Vicuña as a member of arbitral tribunal. India has appointed Justice Anil Dev Singh as a member of arbitral tribunal. These co-arbitrators then appointed Marc Lalonde, QC as the Presiding Member of the Tribunal. The interesting thing about the award delivered by the tribunal is that Justice Anil Dev Singh and March Lalonde had authored the majority opinion whereas Professor Francsco Orrego Vicuña dissented.

Devas Multimedia Pvt Ltd had already invoked ICC arbitration against the contracting party i.e. Antrix Corporation Ltd praying for the restoration of the contractual arrangement or in the

[63] Vodafone V India (I)' *(Jus Mundi)* <https://jusmundi.com/en/document/decision/en-vodafone-international-holdings-bv-v-india-i-wednesday-1st-january-2014> accessed 14Aug 2021.
[64] Ibid.
[65] PCA Case No 2013-09.
[66] Ibid [5].

alternative damages. The ICC arbitral tribunal in fact passed an award in favour of Devas Multimedia Pvt Ltd.

In this case the issue is not the contractual breach, here the tribunal has to look into the issue of violation of obligations under the BIT by India. In the tribunal's own words:

"However, what this Tribunal is called upon to address is not whether Antrix breached its contractual obligations but whether the State of India, acting in its sovereign capacity and through the appropriate authority, properly invoked the protection of its essential security interests when it decided to annul the Devas Agreement or whether, in doing so, it breached its obligations under the Treaty and international law"[67]

The tribunal held that by asserting its security interests in revoking the agreement, India can easily defend its actions Art. 11(3) of the BIT[68]. Even otherwise, India had a definite public purpose and the same is covered under Art. 6[69] of the India – Mauritius BIT. However, the Tribunal by a majority opinion also held that India could use *reasonably* only 60% of the allocated spectrum to the Devas Multimedia for the purposes of 'essential security interests' and the remaining 40% might be used for other purposes.[70] Hence, in the operative part of the Order also, the Tribunal by a majority has held that Claimant companies can only claim 40% of their investment as compensation from India.

India challenged this arbitral award at the Hague District Court, Netherlands as the award was delivered in Netherlands.[71]

The interesting thing about this case is that CAG has questioned the laxity of Antrix Corporation in allowing Devas Multimedia to invoke ICC arbitration. Devas Multimedia has been incorporated under the Companies Act, 1956 of India and registered address of the company is located at Bengaluru. If Bengaluru is the registered address of Devas, how did the Agreement between Antrix and Devas Multimedia recognized the latter as international customer ? in fact the CAG also questioned the procedures followed in entering into the contract because the normal procedure of getting the approval of Department of Space (DoS)

[67] Ibid [166].
[68] This provision maintains that the BIT in no way limits the parties from taking any steps in the interests of essential security interests or protection of public health or prevention of diseases in plants or animals and pests.
[69] Art. 6 deals with expropriation.
[70] Ibid [373].
[71] Pushkar Anand 'Antrix-Devas, BIT Arbitrations, and India's Quixotic Approach' <https://thewire.in/business/antrix-devas-bit-arbitrations-isro-india-nclt>(*The Wire*, 31 May 2021) accessed 14 Aug 2021.

[the Department of government of India that deals with the affairs of ISRO] and the vetting by Ministry of Law has not been done in this case.[72] Normally in the leasing of spectrum agreements it was observed by the CAG that the general clause for dispute mentions that the arbitration shall be in accordance with the rules of arbitration of the Indian Council of Arbitration but why this special arrangement of ICC arbitration in case of disputes was allowed for Devas Multimedia has also been questioned by the CAG.[73]

Government is investigating the corruption aspects which may have induced the contract with Devas Multimedia. When the government of India pleaded before the Hague District Court that since the agreement with Devas Multimedia was induced by corruption which is against the fundamental public policy of India, the contract has been vitiated and according to the Indian law, the said contract is *void ab initio,* reportedly the Hague District Court questioned the government as to why it didn't raise the same contentions before the arbitral tribunal. The Hague District Court also reportedly opined that mere registration of cases by investigating agencies would not mean that the agreement was indeed inducted by the corruption or bribery. Unless the corruption allegations are vindicated by a Court's verdict or judgement which is irrevocable it cannot be assumed that the agreement was induced by corruption.[74]

Why didn't the government raise the corruption issue when the arguments were being heard by the arbitral tribunal ? This issue would have been a jurisdictional objection to the arbitral tribunal and would have significantly enhanced the chances of winning the arbitration for the government of India. Recently, the National Company Law Tribunal (NCLT) bench at Bengaluru has ordered the winding up of Devas Multimedia Ltd under Sec. 271(c) of Companies Act, 2013.[75] According to the said Order, Central Bureau of Investigation (CBI), premier investigation agency of India has filed a Chargesheet regarding the corruption involved in the Devas -Antrix deal only on 11.08.2016.[76] The date of delivery of investment arbitral tribunal's award was 25.07.2016. why did it take so long for CBI to find that some kind of corrupt activities have taken place in the deal making ? the agreement was cancelled way back

[72]Comptroller and Auditor General of India 'Report of the Comptroller and Auditor General of India on hybrid satellite digital multimedia broadcasting service agreement with Devas' <https://cag.gov.in/webroot/uploads/download_audit_report/2012/Union_Compliance_Scientic_Department_Multimedia_Broadcasting_Service_4_2012.pdf> 38.
[73] Ibid.
[74] (n 71).
[75] Sec. 271(c) empowers the central government through any authorized person to file an application before the NCLT regarding winding up of a company. The NCLT has to be satisfied that the company's affairs are being conducted in a fraudulent manner or for unlawful purposes.
[76] NCLT Bengaluru, Antrix Corporation Ltd V Devas Multimedia Pvt Ltd CP No 6/BB/2021 order dt 25 May 2021 [12.8].

in 2011. Arbitral proceedings have been initiated way back in 2013. But the CBI could only file a chargesheet after the delivery of arbitral award! Reportedly, former ISRO Chief Madhavan Nair and some officials in the Department of Space and some officials in the Antrix Corporation Ltd have been booked under various sections of Indian Penal Code, Prevention of Corruption Act etc. the case also has been registered on the same date as when the chargesheet was filed.[77]

As the NCLT records in its Order, it has been found that Devas Multimedia has bagged the contract just two months after its incorporation with an authorized share capital of just Rs. 1 lakh. The said company has been incorporated by one of the former employees of ISRO. The contract was awarded to Devas Multimedia without any public invitation for inviting the bids! This crucial factual matrix on the basis of which the criminal investigations have been launched could have very well changed the direction of ruling in the arbitral award.[78]

What if the lease was not cancelled by the central government on the grounds of 'essential security interests' but on a less serious ground and the claimant company wins the investment arbitration against the central government and the latter readily honours the arbitration award? Can an investigation agency like CBI come up and say that the contract was induced by corruption and hence the arbitral award shouldn't have been enforced, therefore the claimant should return the money? Even if CBI issues such a communication will any company oblige with such communication? Not only does the delayed investigations hamper the chances of India in investment arbitration but they also raise serious questions of competence and credibility on investigation agencies. It is not clear as to why the chargesheet was filed so lately but one can definitely say that the delay in filing the Chargesheet and bringing to the light the issue of corruption lately has only damaged India's prospects of winning the arbitration.

As of now the enforcement of the arbitral award proceedings has been kept in abeyance by the Supreme Court till the time Delhi High Court adjudicates upon a plea filed by the government of India seeking to quash the enforcement proceedings on the grounds that the agreement between Devas Multimedia and Antrix was induced by corruption and bribery.[79]

[77] Anuj Srivas 'When Abroad, Modi Govt Backs Antrix-Devas Probe. But at Home, It's a different Story' (*The Wire*, 19 Dec 2018) <https://thewire.in/government/centre-antrix-devas-probe-cbi-lawsuits> accessed 17 Aug 2021.
[78] (n 76) [2].
[79] Ibid [12].

The one international investment arbitration that India had won is *LDA* V *Republic of India*[80]. the unanimous award in that case was primarily due to the fact that the investment made by the claimant company doesn't fall under the category of investment at all! The act of government of India which was alleged to be committed in violation of India – France BIT was an act committed against a company which was indirectly held by the claimant company through a intermediary company in which the claimant company holds less than 51% of share. 51% of share is the minimum threshold of investment under the said BIT. Hence, the claimant company failed to get any compensation from the arbitral tribunal. In fact, the arbitral tribunal awarded that the claimant company has to pay around 7 million USD to India.[81]

But one can easily say that the string of decisions in which claimant companies' claims were upheld against India's objections had a significant impact on the way India perceives BITs. In fact, Vodafone group has initiated two investment arbitration proceedings against India using different companies incorporated in different jurisdictions that had a BIT with India and Devas group also had initiated three investment arbitration proceedings against India in the similar fashion.[82] The model BIT, 2015 had made it mandatory for any investor to utilize the judicial processes within India first. If the investor couldn't get any remedy within 5 years, only then an investor can invoke the arbitration procedures established under the BIT. Significantly, in the newly entered India – Brazil BIT, 2020 there is no provision for investor-state dispute settlement. The said BIT only allows State-State dispute settlement through Joint Consultations. If the said consultations fail, only then a State can invoke the provisions relating to arbitration. Interestingly, there is an express prohibition on any arbitral tribunal from awarding any compensation. So, an arbitral tribunal can only say if a State party to the BIT has complied with or violated the provisions of BIT.[83]

4.4 The Enforcement Problem

As we had observed in domestic arbitrations, the problem of enforcing the arbitral awards continues even in relation to the international investment arbitration awards. India is likely to

[80] PCA Case No. 2014-26.

[81] Nicholas Peacock and Jake Savile-Tucker, 'Tribunal awards India first BIT case win, dismissing claims of French investor' (*Herbert Smith Freehills,* 17 Sep 2018) <https://hsfnotes.com/arbitration/2018/09/17/tribunal-awards-india-first-bit-case-win-dismissing-claims-of-french-investor/> accessed 15 Aug 2021.

[82] Prabhash Ranjan & Pushkar Anand,'Indian Courts and Bilateral Investment Treaty Arbitration' 2020 4(2) Indian Law Review 99, 115.

[83] Ashutosh Ray and Kabir AN Duggal 'Dispute Resolution in the India-Brazil BIT: Symbolism or Systemic Reform?' (*Kluwer Arbitration Blog,* 9 April 2020) <http://arbitrationblog.kluwerarbitration.com/2020/04/09/dispute-resolution-in-the-india-brazil-bit-symbolism-or-systemic-reform/> accessed 15 Aug 2021.

face the ignominy of having its assets attached in foreign jurisdiction in relation to enforcement of arbitral awards and join the company of countries like Pakistan and Venezuela.[84]

How to avoid such ignominy? what are the steps that India need to take to prevent such a scenario? It is now clear that many foreign claimant companies which win the arbitrations face almost insurmountable difficulties in enforcing their arbitral awards in the jurisdiction of India which is the reason why they are eyeing Indian assets located in other jurisdictions. If India can assure that no unreasonable delay shall be caused to them in their attempt for enforcing the arbitral award, they will not file pleas for enforcement in other jurisdictions.

Art. 27.4 of Mode BIT, 2015 mentions that each party shall provide for enforcement in accordance with its law. However, as we know, enforcement has always been difficult in India. India is not a party to ICSID Convention. Even though India is a party to New York Convention, 1958 it has opted for reservation under Art. I(3). This reservation enables India to enforce only those arbitral awards which are considered as "commercial" under the domestic law.[85] The Delhi High Court in the cases of *Union of India* v. *Khaitan Holdings (Mauritius) Ltd.*[86] and *Union of India* v. *Vodafone Group Plc*[87] has held that awards passed by international investment tribunals constituted under BITs cannot be considered as "commercial". The Delhi High Court explained its holding by saying that any claim under a BIT arbitration inevitably relies upon some alleged violation of a treaty obligation which India has entered into with another State as a sovereign power. Whenever a treaty obligation is alleged to be violated, the issue is inevitably linked with the exercise of sovereign power by the state which can never be qualified as 'commercial'. BIT is an instrument of public international law. Hence, any cause of action that arises from violation of BIT is not commercial. But the criticism against this reasoning is that, if this reasoning is to be accepted, even if a country exercises its sovereign power to terminate a contract, no claimant can use a BIT for seeking compensation.[88]

[84] 'Indian government's Cairn episode puts it in league with Pakistan, Venezuela and others: Find out how' (*Free Press Journal*, 16 May 2021) <https://www.freepressjournal.in/business/indian-governments-cairn-episode-puts-it-in-league-with-pakistan-venezuela-and-others-find-out-how> accessed 15 Aug 2021.

[85] Pratyush Miglani , Nikhil Varma & Prakhar Srivastava, 'BIT Arbitral Awards Virtually Non-Enforceable in India : Does the Delhi High Court Need Course Correction' 2021 SCC OnLine Blog OpEd 68 <https://www.scconline.com/blog/?p=246875> accessed 15 Aug 2021.

[86] 2019 SCC OnLine Del 6755.

[87] 2018 SCC OnLine Del 8842.

[88] Prabhash Ranjan & Pushkar Anand,'Indian Courts and Bilateral Investment Treaty Arbitration' 2020 4(2) Indian Law Review 99, 112-113.

In this context, it is important to note that Sec. 44 of ACA enforcement of foreign awards arising out of legal relationships.

Delhi High Court's judgements have also been criticized on the ground that they overlook the fact that Sec. 44 talks about *legal relationships* but not about the nature of cause of action. Even more troubling is the Delhi High Court's finding that in order to enforce an investment arbitral award, it has certain inherent powers under Sec. 20 of CPC.[89] This means that the claimant company which has won an investment arbitral award, in order to enforce the award in its favour has to file an application under Order XXI of the Civil Procedure Code, 1973 which deals with execution. The Order XXI is (generally considered to be more cumbersome than the enforcement regime established under the ACA.[90]

[89]Ibid.
[90] Ibid.

CHAPTER 5

SUGGESTIONS AND CONCLUSION

It can be observed from the various CAG reports that in the domestic arbitrations, the governmental bodies are often prone to delay the things. often, the application to set aside the arbitral award is filed only after the statutory time is completed. The usual reply from the government's side is "administrative delays". There might be many reasons behind the administrative delays. Compulsions to project that the concerned government organization has done no wrong or is in a better financial condition may force the government official to dodge the work of complying with the arbitral awards or accepting that that there is no better alternative than complying with the adverse arbitral award.

To avoid such problems and to enhance **ease of arbitration** certain measures must be implemented. Firstly, it is of utmost importance to clearly delegate and distribute responsibilities among the officials working in the governmental body. If that can be done, those who cause delay must be held accountable. Secondly, the government should focus on the tendency of the governmental bodies to file an application for setting aside the arbitral award despite knowing that chances of losing the cause are very high. To ensure that these tendencies are curbed, government must ensure that actions taken in good faith will be protected. Government must also set out clear guidelines using an **'National Arbitration Policy'** that can guide the concerned officials as to how to use their powers and discretion. If a government official decides to comply with the arbitral award, the assessment should be done not only regarding the costs incurred in complying with the award but the assessment should also be done regarding the costs that might have been incurred if the arbitral award is not complied. An analysis taking into consideration **opportunity costs** before taking any decision must be undertaken.

In the cases pertaining to international investment arbitration proceedings also, it can be said that lack of swiftness in taking appropriate actions at appropriate times like not being able to submit the facts relating to corruption in the case of Devas Multimedia before the arbitral tribunal had cost India dearly. It has also been observed that often, even the arbitrator appointed by India decides in favour of the claimant investor. India should not be lethargic in submitting the best arguments that it can submit. At the same time, if any adverse arbitral award is passed against it, it should not unnecessarily challenge the same and create many hurdles in the

enforcement of the arbitral award in its own jurisdiction. Unless there is a grave error of law or fact perceivable in the adverse arbitral award, India should try to comply with the same. Only then India's aim of significantly improving Ease of Doing Business standards through Ease of Arbitration can be achieved.

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