

# Dispute Resolution Hotline

August 24, 2016

## ENFORCING INVESTOR RIGHTS AGAINST THE INDIAN GOVERNMENT: THE ANTRIX-DEVAS SAGA CONTINUES

### 1. INTRODUCTION

Investment treaty arbitration has become a popular method for enforcing investor rights against a government which has, vide its regulatory control, denigrated foreign investment to the extent protected under the relevant treaties. In India, this trend was spearheaded by White Industries; this investment treaty dispute concerned the Indian judiciary's reticence in enforcing a commercial arbitration award in the foreign investor's favour. This dispute also resulted in a creative interpretation of the Most Favoured Nation ("MFN") clause in the India-Australian Bilateral Investment Treaty ("BIT"), by applying it to procedural guarantees extended by the State in its BITs with other nations. More recently, Vodafone, has commenced the procedure for dispute resolution under the India-Netherlands BIT, claiming a violation of the Fair and Equitable Treatment ("FET") clause, alongside making a claim for expropriation. This dispute concerned the Parliament's reversal of the landmark tax dispute before the Supreme Court of India, which held the Indian Revenue liable to pay USD 2 Billion to Vodafone. While the proceedings are currently ongoing, there are over twenty pending dispute notices which name India as the respondent party in investment treaty disputes.

The most recent dispute against India, relates to the soured Antrix Devas deal, which came into limelight, after an award for 672 Million USD was passed against India by the Permanent Court of Arbitration ("PCA") on 26 July 2016. Apparently, this award found India in breach of the India-Mauritius Bilateral Investment Protection Agreement ("BIPA") on two major counts; a violation of the FET clause, as well as for having expropriated the investor's foreign investment. Moreover, in a brief notification dated 26<sup>th</sup> July 2016, the Department of Space ("DoS"), reiterated India's stance that, its actions were in furtherance of protecting its essential security interests.<sup>1</sup> While apparently, the limit of the award was subject to 40% of the total value of the investment, the final amount to be paid by the Indian government is not yet clear. It should be noted that the actual award is not yet in public domain and therefore, the analyses in this piece are merely based on the information available in public domain, and may vary based on actual facts.

### 2. BACKGROUND

Antrix Corporation ("Antrix") is a corporation, which is, the Indian Space Research Organisation's ("ISRO") commercial arm in India, and is subjected to the DoS's administrative control. Antrix is involved in marketing ISRO's products and services in the international sphere.<sup>2</sup> It entered into an agreement ("Agreement") with Devas Multimedia ("Devas"), a Bangalore based media company, which is owned by Deutsche Telekom and other international investors in various capacities (the precise shareholding structure is not in public domain). This Agreement concerned the license of a particular frequency of satellite spectrum to Devas Multimedia, by Antrix, for the purpose of providing high-speed internet services. This contract however, was terminated by Antrix, citing instances of force majeure. Moreover, this termination was allegedly, based on a high level ministerial decision to cancel this license. This decision, made by the Cabinet Committee on Security ("CCS"), allegedly, in the interest of India's essential security interests (it should be noted that this internal decision in itself, is not available in public domain). The value of this transaction was touted to be 300 Million USD, to be paid over a period of twelve years; while auditors approximated that this transaction, at the agreed rate would actually result in a loss of 44 Billion USD to the Indian exchequer.<sup>3</sup> The termination of this agreement by Antrix, resulted in two simultaneous disputes being initiated; an international commercial arbitration and an investment treaty arbitration. Both disputes have resulted in awards being passed against either India, or Antrix. In addition, there are investment treaty proceedings under the India-German BIT that are pending, instituted by Devas' German investors.<sup>4</sup>

#### 2.1. The International Commercial Arbitration

The International Commercial Arbitration ("ICA") was initiated by Devas, under the institutional aegis of the International Chamber of Commerce, Paris, in 2011. During its course, this arbitration ran into numerous controversies. An application was made by Antrix to the Supreme Court, requesting it to direct Devas to appoint an arbitrator. By then, however, Devas had already initiated proceedings under the ICC, and had already nominated an arbitrator. The Supreme Court considered the actions of Devas and whether or not it is allowed to direct a party to nominate an arbitrator, once institutional arbitration had already been commenced. The court reached the conclusion that, since a specific procedure had been already agreed upon by the parties, a judicial authority should not interfere.

Accordingly, the proceedings were dismissed. This judgment is available<sup>5</sup> in the public domain. From the aforementioned Supreme Court judgment, it can be further gleaned that the agreement between Antrix and Devas included "certain instances" that would give each party the right to terminate the contract, and was thus invoked by Antrix, while cancelling the license. The initiation of this dispute was subject to mandatory negotiations as per the

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tered dispute resolution clause. However, this did not result in any settlement, and therefore, the matter continued into arbitration. Ultimately, the ICA resulted in an award passed against Antrix, for a total value of USD 562 Million.<sup>6</sup>

## 2.2. The Investment Treaty Arbitration

Simultaneously, along with the international commercial arbitration, Investor State Arbitration ("ISA") was commenced against India, by Devas' Mauritian investors under the India-Mauritius BIPA. The investors primarily took the stance that they were denied fair and equitable treatment, and that their investment was unlawfully expropriated by the Indian government, upon the unlawful termination of the Agreement. The India Mauritius BIPA calls upon the Permanent Court of Arbitration ("PCA"), (seated at The Hague, Netherlands) to hear disputes, if so agreed upon by the Parties. Accordingly, the dispute was submitted before the PCA, which recently, came out with an award penalizing the Indian government.

## 3. PROBABLE BASIS OF THE AWARD

### 3.1. Violation of investor protections

Two of the major protections granted to investments under the India-Mauritius BIPA include, FET treatment and the right to compensation against expropriatory conduct of the State. The former, is worded as follows, under Article 4(1),

*"Investments and returns of investors of either Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal or investments in its territory by investors of the other Contracting Party".*

The FET clause is broadly worded, in that, the "use and enjoyment" of a foreign investor's investment should not be tampered with by the host state. The phrasing in itself, seems to suggest a subjective evaluation of an investment's "use and enjoyment". Nevertheless, the general trend in FET claims, on the bare minimum, is to ensure essential procedural guarantees by the State, as well as a right against non-discrimination. The latter is particularly relevant, because, the basis of the CCS report recommending the termination of the Agreement is not known; i.e., it is important to determine if this council had given Devas sufficient notice as well as a reasonable opportunity to be heard. Furthermore, FET standards within investment treaties, are also linked to customary international norms on the same; accordingly, the threshold of breach in each FET claim is to be determined on its own facts and circumstances. It should however be noted that, any fraudulent behaviour on behalf of the investor can be negatively construed by a tribunal, in applying an FET clause. Therefore, possible investors should be made aware of their right to due process before administrative proceedings that directly concern their investments.

The second protection, i.e., the right against expropriatory conduct under the India-Mauritius BIT is defined as follows, under Article 6(1),

*"Investments of investors of either Contracting Party in the territory of the other Contracting Party shall not be nationalised, expropriated or subjected to measures having effects equivalent to nationalisation or expropriation except for public purposes under due process of law, on a non-discriminatory basis and against fair and equitable compensation."*

This provision defines expropriation indirectly, by making a reference to it. Furthermore, the BIPA does not make a distinction between legitimate regulatory action, which is non-compensable, against compensable expropriatory acts of the State.

Nonetheless, as positive finding on expropriation, raises several questions, including, the attributability of Antrix's actions to India; the escalation of a contractual violation into a treaty claim, as well as the method by which damages were calculated, since the treaty specifies a fair market value based calculation. Furthermore, this finding raises interesting questions on how the investment was in itself, controlled by Mauritian shareholders; i.e., whether there was sufficient *rationae personae*, to proceed with the substance of the treaty claim.

### 3.2. Defenses raised: Protection of essential security interests

Article 11(3) of the India-Mauritius BIPA is an interesting clause; it reads,

*"The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests, or to the protection of public health or the prevention of diseases in pets and animals or plants."*

As per the DoS notification, India relied on this clause to defend its actions in cancelling the license granted to Devas. However, it is difficult to interpret this clause as a blanket right of the State to commit any act that offends foreign investors' rights under the India-Mauritius BIPA. The language in this clause is evocative of the general exceptions clause in Article XX of the General Agreement on Tariffs and Trade, 1947 ("GATT"), as well as the Security Interest clause in Art. XXI of the GATT.<sup>7</sup> These provisions, very clearly, create limited exceptions for a State to defend its *per se* illegal actions, if committed pursuant to specific purposes outlined in these clauses.<sup>8</sup> However, in stark contrast, the BIPA does not give clarity on the balancing process, between a State's inappropriate actions *vis-à-vis* guaranteed investor rights. Granted however, that in contrast to Article XXI of the GATT, Article 11(3) adopts an objective approach to understanding "essential security interests" i.e., it is not apparent that the respective government alone has the discretion to determine the scope of its own security interests. Moreover, it is also difficult to reconcile this provision with Article 6(1), since, it creates a legal vacuum in understanding the disconnect between compensable and legitimate, non-compensable State Action. Nevertheless, the DoS press release seems to suggest that the tribunal rejected a subjective approach to interpreting Article 11(3). Accordingly, it can be speculated that the Indian government's stance on the protection of India's security interests, is unsupported by treaty language.

## 4. CORRUPTION IN INVESTMENT TREATY DISPUTES

Another interesting aspect of the Antrix Devas dispute, however, lies within the scope of corruption in investment treaty law. Media reports<sup>9</sup> suggest that Devas officials had criminally conspired with Antrix representatives in the award of the Agreement, as well as the negotiation of the contract price.

Allegations of a corrupt government in either inducing investors, or fraudulently destroying investments are positively considered by arbitral tribunals. For instance, in the Siemens dispute an ICSID award was passed against Argentina.<sup>10</sup> Subsequently, it initiated annulment proceedings, during the course of which, it came to light that the investors had bribed the government to create favourable circumstances for them. This further resulted in Argentina requesting ICSID to “revise” its award. Ultimately, a settlement agreement was reached between Siemens and Argentina, in favour of the latter suspending the annulment proceedings. In such cases, if settlement agreements are not reached, the most probable consequence of such actions would be the institution of a counterclaims against the investors, if permitted by international law and the BIT in question. This however is fairly uncommon, since, investment treaties are famous for imposing numerous obligations on the State, and few or none, on investors.

It is difficult to theorize the nature of corrupt practices that were probably involved in the Antrix Devas treaty arbitration, as media reports also chronicle the infamous Antrix Devas scam, wherein, allegedly, the license of the spectrum was granted in an underhanded manner. In furtherance of the same, the Indian Central Bureau for Investigation (“CBI”) has filed chargesheets against senior ISRO officials implicated in this scam.

## 5. CONCLUSION

While it is reported<sup>11</sup> that the award was based on a successful claim of expropriation, nevertheless, it will be interesting to consider how corruption was analysed in an Indian context by an arbitral tribunal, as there is little literature in this regard. In the same vein, it would also be interesting to understand how the reasoning of the tribunal, if it attributed such fraudulent acts to the government of India. Moreover, the award’s stance on the attributability of Antrix’s actions to the Government of India, and heightening a contractual breach into a treaty breach would contribute towards much-needed literature in the Indian context.

On a temporal scale, this award forms part of a disturbing series of events, one successful investor claim at a time. However, as a reactionary measure, it is to be hoped that the Indian regulatory regime would automatically become more efficient, in the interest of avoiding future investment treaty claims. More importantly, such attitude towards foreign investors would incentivize the flow of foreign investment, into a comparatively, low-risk jurisdiction with the eventual aim of inducing large scale growth in the Indian economy.

In the meantime, however, it would be prudent for investors to be aware of procedural guarantees in international law, as well as those under the relevant investment treaties that supplement their substantive rights. Investors should further ensure that their actions comply with the applicable laws, so as to comply with the *rationae personae*, *rationae materiae* and *rationae temporis* requirements at the admissibility stage of an investment arbitration. This would include, compliance with the domestic laws, at the time of establishing the investment, and control over the investment in India.

– Durga Priya Manda, Niyati Gandhi & Vyapak Desai

You can direct your queries or comments to the authors

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<sup>1</sup> Press release by the DoS is available at, <http://dos.gov.in/bipa-arbitration-award>. Also see a newspaper report on the same: <http://indianexpress.com/article/business/business-others/antrix-devas-deal-hague-international-tribunal-rules-against-indian-govt/>; <http://www.thehindu.com/news/national/antrixdevas-deal-india-to-appeal-against-hague-tribunals-verdict/article8907370.ece>.

<sup>2</sup> More information about this company can be found on its website, <http://www.antrix.gov.in/about-us>.

<sup>3</sup> See <http://www.ft.com/cms/s/0/43f572f0-66ac-11e5-a155-02b6f8af6a62.html#axzz4I3LeZcOh>.

<sup>4</sup> See <http://thewire.in/54291/india-isro-arbitration-antrix-devas/>

<sup>5</sup> This decision can be accessed at <http://judis.nic.in/supremecourt/imgs1.aspx?filename=40399>

<sup>6</sup> See <http://thewire.in/53993/india-loses-big-in-arbitration-case-over-antrix-devas-controversy/> and <https://www.ft.com/content/43f572f0-66ac-11e5-a155-02b6f8af6a62>

<sup>7</sup> These instruments are available at [https://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](https://www.wto.org/english/docs_e/legal_e/legal_e.htm).

<sup>8</sup> Such provisions include, the protection of human life as well as natural resources.

<sup>9</sup> See <http://indianexpress.com/article/india/india-news-india/isro-scientists-made-scapegoats-in-antrix-devas-case-former-isro-chief-g-madhavan-nair-2969036/>

<sup>10</sup> See <https://www.iisd.org/itn/2012/10/19/investment-treaties-and-investor-corruption-an-emerging-defense-for-host-states/>

<sup>11</sup> See <http://www.hindustantimes.com/india-news/india-loses-antrix-devas-arbitration-case-may-have-to-pay-1bn-compensation/story-JzSwVq6bboXP3FYlaqBTpO.html>; <http://indianexpress.com/article/business/business-others/antrix-devas-deal-hague-international-tribunal-rules-against-indian-govt/>

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