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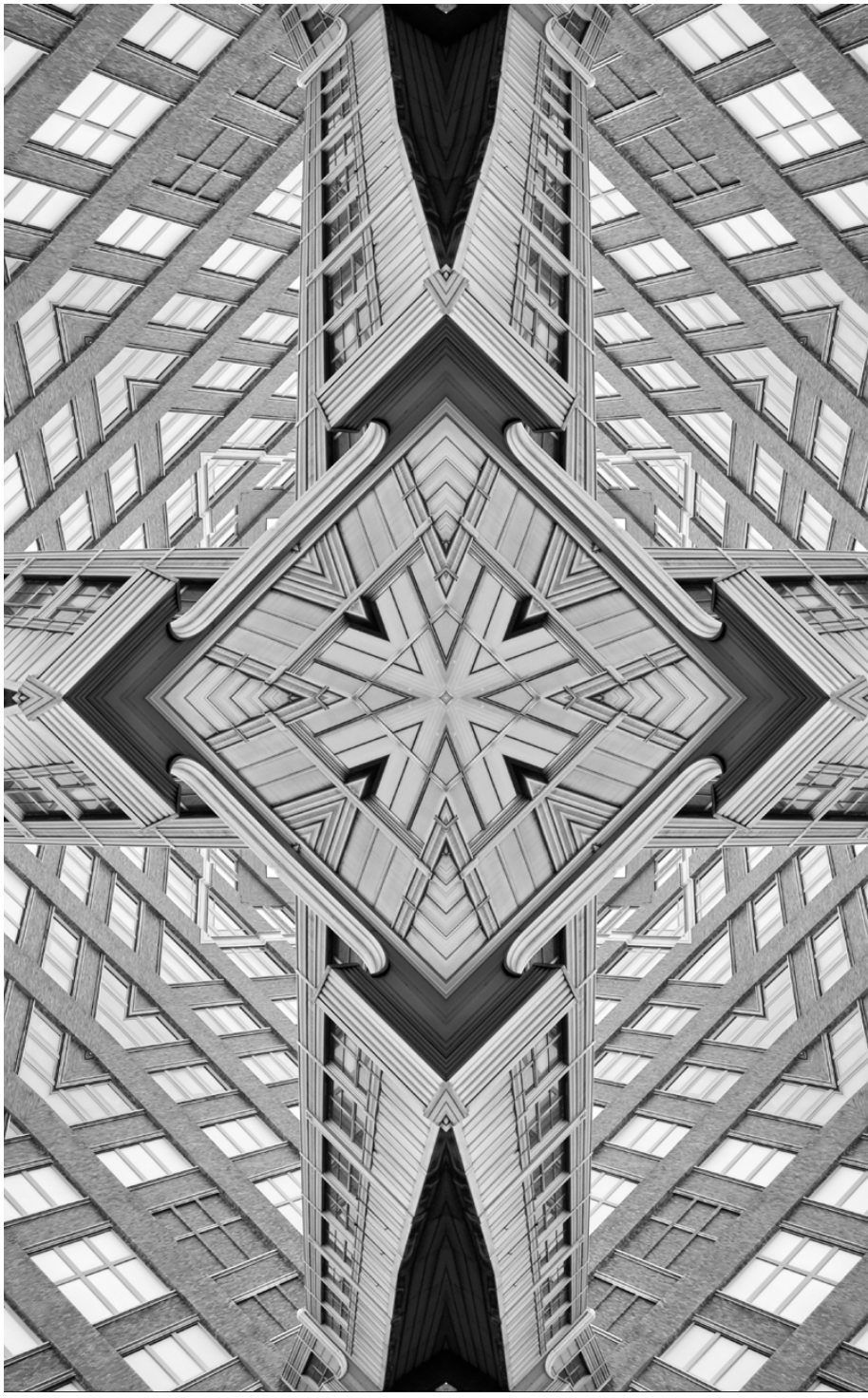

# Devas v. Antrix: Lessons for India in Navigating Bilateral Investment Treaty Disputes

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## Abstract

In *Devas Multimedia Pvt. Ltd* v. *Antrix Corporation Ltd*, the Supreme Court of India has upheld the National Company Law Appellate Tribunal (NCLAT) order winding up Devas Multimedia Ltd on the grounds of fraud. Antrix is the commercial arm of the Indian Space Research Organisation (ISRO), and Devas is a multimedia services company. The decision comes at a crucial time, as foreign investors of Devas are endeavouring to attach Indian assets abroad. This brief outlines the history of the Devas-Antrix deal, and examines the bilateral investment treaty (BIT) disputes on this matter that India lost. It analyses India's failure to raise the argument of fraud before the arbitration tribunals. The Devas case offers two important lessons for Indian policymakers: that India must exercise its regulatory power in a transparent manner and follow due process; and that the country should have a clear and rigorous litigation strategy in defending its interests before international arbitration forums.

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# Introduction

In the case of *Devas Multimedia Private Limited v. Antrix Corporation Limited*,[1] the Supreme Court of India in January 2022 upheld the decision of the National Company Law Appellate Tribunal (NCLAT) to wind up Devas Multimedia (or Devas, an Indian multimedia services provider), finding that it was incorporated fraudulently and for unlawful purposes. In 2021, the NCLAT had ordered the liquidation of Devas on the ground of fraud, under Sections 271 and 272 of the Companies Act, 2013, in response to a petition filed by Antrix, the commercial and marketing arm of the Indian Space Research Organisation (ISRO).

The Supreme Court's (SC) decision is the latest turn in the apparently interminable Devas story that started in 2005. It comes at a time when the foreign investors of Devas have successfully attached Indian assets in multiple foreign jurisdictions such as Canada[2] and France,[3] to recover the money that India has not paid to these investors under two bilateral investment treaty (BIT) awards.[a] Furthermore, after the SC's ruling, the foreign investors of Devas have initiated a fresh BIT claim against India, alleging that the country is making undue efforts to frustrate the enforcement of a commercial arbitration award that Devas had won against Antrix back in 2015 under the rules of the International Chamber of Commerce (ICC).[4]

As the Devas case continues to unfold, this brief outlines the lessons that India can learn from this experience. The first section discusses the background of the case to understand why India decided to rescind the contract. The next section focuses on the BIT claims brought against India due to the cancellation of the Devas-Antrix contract. The third section examines India's failure to raise the argument of fraud committed by Devas before the BIT arbitration tribunals. Finally, the paper discusses the way forward and concludes by listing the key lessons that India can learn from this entire episode.

## The Antrix-Devas Background

In 2005, Antrix and Devas signed an agreement wherein the latter would provide multimedia services using S-band satellite spectrum leased from Antrix. Multiple foreign investors had backed the Devas-Antrix project, including three Mauritian investors (CC/Devas, who brought the first BIT claim against India – *CC/Devas v. India*[5]) and Germany's Deutsche Telekom (DT), one of the world's leading telecommunication companies (who brought the second BIT claim against India – *DT v. India*[6]).

a A bilateral investment treaty (BIT) is a treaty signed by two countries with the twin objectives of promoting and protecting foreign investment in each other's territory.

Soon after the deal was signed, the Devas-Antrix agreement became mired in controversy, with allegations of corruption and irregularities being levelled against the deal[7]—of the S-band spectrum being offered at throwaway prices; Devas (a company set up by former ISRO officials in 2004, just one year before the contract was signed) having secret knowledge about the commercialisation of the S-band spectrum; and ISRO's serving officials colluding with Devas to facilitate a wrongful gain to the latter.

On 17 February 2011, the United Progressive Alliance (UPA) government rescinded the contract with Devas. Internally, the decision had already been made much earlier: the Department of Space had recommended the annulment of the Devas-Antrix agreement on 30 June 2010, which the Indian Space Commission accepted on 2 July 2010.[8] However, the decision was not communicated to Devas and was directly announced publicly in February 2011.

To be sure, the official reason for the annulment did not allude to concerns of corruption or indiscretions in the deal. Instead, the Cabinet Committee on Security (CCS) of the UPA government declared that the deal was being cancelled because there was "an increased demand for allocation of spectrum for national needs, including for the needs of defence, para-military forces, railways, and other public utility services as well as for societal needs."[9] Thus, Antrix notified Devas about the annulment of the contract as a *force majeure* event.[10,b]

b Unforeseen circumstances that prevent someone from fulfilling a contract.

# The Bilateral Investment Treaty Claims Against India

BITs seek to prevent unjustified meddling with the rights of the foreign investor by imposing certain restraints on the regulatory behaviour of the host state. These include restricting the host state from expropriating investments, except for public interest with adequate compensation and following due process, and imposing obligations on host states to accord fair and equitable treatment (FET)[11] to foreign investment. A BIT confers an individual investor with the right to bring cases against the host state if the investor believes that the state's regulatory measure breaches the investment protection standards of the treaty. These claims can be brought before international arbitration tribunals, such as the Permanent Court of Arbitration. In case the tribunal rules in favour of the foreign investor, the host state may be asked to pay monetary compensation to the investor to make up for the loss caused as a result of breaching international law.

In the Antrix-Devas deal, the sudden decision of the Indian government to rescind the contract left the foreign investors of Devas—the Mauritian investors and DT—in the lurch. Consequently, the three Mauritian investors, CC/Devas, and DT brought separate BIT claims against India under the India-Mauritius BIT and India-Germany BIT, respectively. In its argument before the BIT arbitration tribunals, India maintained that it cancelled the deal because it needed the S-band satellite spectrum for national security purposes.

## The CC/Devas Tribunal

The CC/Devas tribunal began its hearing on September 2014. Before the CC/Devas tribunal, India relied upon Article 11(3) of the India-Mauritius BIT, which provides: "[T]he 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." India argued that reserving the S-band satellite spectrum for the needs of defence and paramilitary was aimed at protecting its "essential security interest."

The CC/Devas tribunal, granting a wide margin of deference to India, agreed that the reservation of spectrum for the needs of defence and paramilitary forces can be classified as an action "directed to the protection of its essential security interests," coming under the exclusion covered in Article 11(3) of the Treaty.[12] However, it ruled that reacquiring the spectrum for purposes such as railways and other public utility services and societal needs does not qualify as "essential

security interests."[13] According to the tribunal, the S-band satellite spectrum that India took for non-security purposes breached India's FET obligation towards the investor under the India-Mauritius BIT,[14] since it had decided to annul the contract in July 2010 but not relayed this to the investors until seven months later, when it was publicly announced. For those seven months, the claimants were "completely left in the dark" about the decision and the alleged growing needs of the military about the spectrum.[15]

The tribunal held that India's conduct constituted a clear breach of good faith as required under international law and the FET provision of the India-Mauritius BIT, and the claimants must be compensated for the damages suffered from 2 July 2010 to 17 February 2011.[16] The tribunal ordered India to pay USD160 million plus accrued interest as damages to CC/Devas.[17]

## The DT Tribunal

The DT Tribunal commenced its work in May 2014. Here, too, India raised the national security argument, specifically, Article 12 of the India-Germany BIT, which states, "[N]othing in this Agreement shall prevent either Contracting Party from applying prohibitions or restrictions to the extent necessary for the protection of its essential security interests…." However, the DT tribunal rejected India's argument, highlighting the difference between Article 11(3) of the India-Mauritius BIT and Article 12 of the India-Germany BIT. In the former, the measure should be "directed to" the protection of essential security interests, while in the latter, the measure should be "necessary" for the same.

The DT tribunal held that for state action to be "necessary" for attaining an objective, there should be a stricter nexus between the regulatory measure (terminating the contract) and the objective (reacquiring the S-band spectrum for national security purposes).[18] On the other hand, for a state action to be "directed to" achieving an objective, the nexus between the regulatory measure and the objective may not be stricter or it may be lax. India's measure was not necessary because it referred to various needs for reacquiring the S-band spectrum that ranged from military to non-military without stating an actual purpose.[19] Indeed, after the agreement was cancelled in 2011, there were protracted debates between the different branches of the Indian government on the use of the S-band spectrum, spanning nearly four years. This further invalidated India's argument: had the S-band spectrum been critical to meeting the needs of military and paramilitary, it should have been allocated for the same immediately, which was not the case.[20] Consequently, India's action could not be deemed "necessary" for accomplishing essential security interests.

After rejecting India's national security argument, the DT tribunal, like the CC/Devas tribunal, concluded that India had breached the FET provision of the India-Germany BIT.[21] India's decision to annul the agreement was arbitrary and unjustified because "it was manifestly not based on facts, but on conclusory allegations, and was the product of a flawed process."[22] The DT tribunal, in its final award issued on 27 May 2020, ordered India to compensate the investor for damages worth USD132 million.[23]

## The International Commercial Arbitration under the ICC

In addition to the BIT disputes, a third international arbitration emerged in response to the cancellation of the Devas-Antrix contract: the international commercial arbitration that Devas initiated against Antrix under the ICC.[24] The ICC tribunal ruled that Antrix's termination of the contract was illegal. The tribunal ordered Antrix to pay USD562.5 million to Devas as damages for wrongfully repudiating the contract. Later, in 2020, an American district court dismissed all the contentions of Antrix and confirmed the 2015 commercial arbitral award in favour of Devas.[25]

## Table 1
## Timeline of the Devas-Antrix Case

| Event | Year |
|---|---|
| The signing of the Antrix-Devas contract | 2005 |
| Antrix rescinds the contract on the advice of the Indian government | 2011 |
| India launches criminal investigations in the Antrix-Devas deal | 2014 |
| ICC award against Antrix for annulling the contract | 2015 |
| CC/Devas tribunal award against India under the India-Mauritius BIT | 2016 |
| Deutsche Telekom tribunal award against India under the India-Germany BIT | 2017 |
| CC/Devas tribunal orders India to pay USD160 million plus interest as damages to CC/Devas | 2020 |
| Deutsche Telekom tribunal orders India to pay USD132 million as damages to Deutsche Telekom | 2020 |
| Foreign investors start the process of attaching Indian assets abroad | 2021 |
| NCLAT allows winding up of Devas on the request of Antrix | 2021 |
| The Supreme Court approves the NCLAT's winding up order | 2022 |

***Source**: Author's own.*

# India's Failure to Raise the Argument of Fraud

While examining the BIT arbitration tribunal cases against India, an important factor to be considered is that BITs protect only those investments that have been made following the domestic laws of the host state. For instance, Article 1(1) of the India-Mauritius BIT provides that "investment means every kind of asset established or acquired under the relevant laws and regulations of the Contracting Party in whose territory the investment is made." Similarly, Article 1(b) of the India-Germany BIT provides that "investment means every kind of asset invested in accordance with the national laws of the Contracting Party where the investment is made." These clauses are known as presenting the "legality requirement," i.e., the BIT will only protect those investments that have been made lawfully. If an investment is vitiated by fraud or corruption, it cannot be considered lawful and cannot enjoy protection under the BIT. In *Metal-Tech v. Uzbekistan*,[26] a BIT arbitration tribunal declined jurisdiction since the investor was shown to have obtained its investment through corruption, and held that a state's consent for BIT arbitration is only for lawful investments.

However, during the BIT arbitration tribunals, India did not once raise the issue of fraud or corruption as a jurisdictional objection, despite the hearings being concluded only after the National Democratic Alliance (NDA) government came to power in 2014 and launched criminal investigations into the case. In 2015, the Central Bureau of Investigation (CBI) registered a first investigation report (FIR) against Devas and its officers under the Prevention of Corruption Act, 1988. The CBI also filed a chargesheet in 2016 against several officials, including ISRO's ex-chairperson G. Madhavan Nair, accusing them of wrongfully facilitating a gain of USD 75,906,312 to Devas[27] and of committing various offences under the Indian Penal Code, such as cheating and violating various provisions of the Prevention of Corruption Act, 1998.[28] In early 2017, the Enforcement Directorate (ED) attached approximately USD 10,504,824 of Devas under the Prevention of Money Laundering Act.[29]

The CC/Devas tribunal and the DT tribunal issued their rulings indicting India in July 2016 and March 2017, respectively. It remains unclear why India did not raise the argument of fraud and corruption before the BIT arbitration tribunals. While there was no judicial ruling at that time corroborating the fraudulent incorporation of Devas, India had already launched criminal investigations into the matter and released a chargesheet for fraud and corruption. A 2012 report of the Comptroller and Auditor General (CAG) had found several anomalies in the Devas-Antrix contract, such as the agreement promoting the interest of an individual private entity at the cost of public interest.[30] Prima facie, there was adequate evidence that the incorporation of Devas was done for fraudulent purposes. Yet, India neither pleaded the ongoing criminal investigations against Devas before the two tribunals nor did it cite the CAG report.

# India's Failure to Raise the Argument of Fraud

After the CC/Devas tribunal had issued its award and initiated the process of determining damages to be paid to the investors, India, in October 2016, requested the tribunal to stay the proceedings pending the resolution by Indian judicial authorities of the charges framed by the CBI against Devas. However, the tribunal denied the request given its timing. Furthermore, the CC/Devas tribunal said that India did not request relief during the hearings based on the alleged criminal activities of Devas under Indian criminal laws.[31] India made a similar request before the DT tribunal in October 2016 after the hearing had already been concluded. The DT tribunal, too, rejected the request because it was both mistimed and lacked merit.[32]

In its 2018 decision, the Swiss Federal Supreme Court, where India had unsuccessfully challenged the DT award, said that it was difficult to understand "why [India] did not mention [the anomalies in the Devas-Antrix contract and other attendant circumstances], which were indicative, at the very least, of suspicion of commission of criminal offences in its writings in the arbitration file, then during the hearing in April 2016, or its brief after inquiries of June 10, 2016, preferring to wait until October 24, 2016, to inform the tribunal."[33]

> "Prima facie, there was adequate evidence that the incorporation of Devas was done for fraudulent purposes."

# What's Next in the Antrix-Devas Dispute?

In light of the 2022 decision by the Supreme Court of India ruling Devas as fraudulently incorporated, India can argue that since the Devas-Antrix contract was contaminated with fraud, it violates international public policy. Moreover, as the Supreme Court held in the case, "[I]f the seeds of the commercial relationship between Antrix and Devas were a product of fraud perpetrated by Devas, every part of the plant that grew out of those seeds, such as the agreement, the disputes, arbitral awards, etc., are all infected with the poison of fraud. A product of fraud is in conflict with the public policy of any country including India."[34]

The question then is whether India can leverage this decision to challenge the legal proceedings for attachment of its assets in multiple foreign jurisdictions. It is unclear if foreign courts will accept this argument, and each court's approach will vary based on jurisdiction. Particularly in jurisdictions that are considered pro-arbitration, courts prefer to refrain from dwelling into the merits of the case and tend to confine their treatment of the award to strictly procedural matters. However, in recent times, courts in some jurisdictions have softened their stand of being highly deferential towards arbitral awards. In France, for instance, specifically on matters of corruption, courts tend to set aside arbitral awards if there is proof of deceitful collusion between the host state's public officials and the investor in securing the underlying contract. In 2020, the Paris Court of Appeal, in the case of *Sorelec v. Libya*,[35] set aside two awards issued in favour of a French investor against the State of Libya because the underlying transaction was tainted by corruption and thus violated international public policy.

These precedents will be especially useful for India in tackling the unfolding events of the Devas case. In January 2022, Devas launched a fresh BIT claim relying on the India-Mauritius BIT against India, arguing that the order of winding up of the company is India's attempt at not honouring the ICC commercial arbitration award issues in its favour and against Antrix. The new BIT claim is reminiscent of the landmark case *White Industries v. India*,[36] which was brought against India for the inordinate judicial delays in Indian courts in deciding on the enforceability of a commercial arbitral award in favour of White Industries. However, the facts of the Devas case are not the same as that of White Industries, and to counter Devas's new BIT claim, India can rely on the argument of fraud.

# Learnings for India

The Antrix-Devas case offers two key learnings for India.

One, India must follow due process and exercise its regulatory power in a transparent manner. The Devas case is emblematic of bad regulation and poor governance in the country. Despite the incongruities in the Antrix-Devas deal becoming apparent within a few years after the agreement was signed, the government in power at the time did not disclose these issues to cancel the contract. Instead, it hid behind the argument of "national security" to whitewash its mistakes. The S-band spectrum was reacquired with neither due process nor full clarity regarding the purpose, and India did not anticipate that these actions would later be challenged internationally before BIT arbitration tribunals. It is imperative that India implement a transparent, clear and predictable regulatory framework based on the full internalisation of international law obligations enshrined in BITs.

Two, India must follow a clear and a rigorous litigation strategy in defending its interests before international arbitration forums. The unfolding of the BIT claims, under the charge of the NDA government, reveals that India botched its litigation strategy by not raising the issue of fraud and corruption as a jurisdictional objection before the BIT arbitration tribunals. Moreover, India should have accelerated the criminal investigation process. The failure to raise the corruption and fraud argument could partly be due to the involvement of multiple ministries and agencies. Thus, the lack of proper coordination between these agencies must be addressed.

> "The Devas case is emblematic of bad regulation and poor governance in the country."

# Conclusion

In the area of investment treaty arbitration, it is important for India to build the capacity of different government departments. Currently, the finance ministry plays a pivotal role in defending India in these claims. However, for better coordination between different ministries—including developing a robust litigation strategy and identifying the appropriate law firms to represent India in these claims and liaising with them—India must develop an institution similar to the United States (US) Office of the Assistant Legal Adviser for International Claims and Investment Disputes. The US Office represents the country in investment claims and coordinates activities within and outside the department related to all aspects of international claims and investment disputes.[37] Such an institution with in-house expertise in investment treaty arbitration can bolster India's preparedness in handling these BIT claims.

BIT arbitration is an exorbitant affair, not only in terms of the amounts that need to be paid to the investor in case the country loses, but also in terms of litigation expenses. Thus, in these disputes, there should always be a clear litigation strategy and complete coordination between the different ministries involved to avoid such costly mistakes.

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