The Indian Satellite Saga and Retaliation: Recognizing the Supreme Court of India's Judgment Abroad?

Introduction

As one of the most complex and fiercely contested recent investment disputes, the Indian Satellite Saga originated from India's annulment of an agreement for leasing S-band electromagnetic spectrum on two satellites (Satellite Agreement) to Devas Multimedia Private Ltd. (Devas). The Saga involved multiple international arbitrations and domestic litigations. In 2022, the Supreme Court of India made a judgment (SCI Judgment) to wind up Devas. Devas and its foreign investors allege the SCI Judgment is a retaliatory measure against them for enforcing arbitration awards.

Since 2023, courts worldwide, including those in Australia, Canada, Germany, Mauritius, the Netherlands, Singapore, Switzerland, and the US, rendered decisions regarding whether to recognize the SCI Judgment and to allow it as a defence against the enforcement of arbitration awards.[1] This Insight analyzes these courts' judgments and reflects on the decentralized judgment/award recognition and enforcement system for addressing alleged state retaliation measures.

Investment Disputes and Alleged Retaliatory Measures

Devas was an Indian telecommunications company with investors from Germany and Mauritius. Antrix Corporation Ltd. (Antrix) was under the direct control of the Department of Space of India. In 2005, Antrix concluded the Satellite Agreement with Devas but unilaterally terminated it in 2011 on the ground of force majeure because the Government of India decided not to provide orbital slots in S-band for commercial activities.[2]

Consequently, Devas initiated a commercial arbitration seated in India before an International Chamber of Commerce (ICC) Tribunal against Antrix.[3] The ICC Tribunal rejected Antrix's force majeure argument and awarded damages to Devas, reasoning that the Chairman of Antrix failed to do everything in his power to ensure that the Satellite Agreement would remain on track.[4] Devas's investors from Mauritius and Germany also brought UNCITRAL investment arbitrations against India separately in the *CC/Devas (1)*[5] and *DT*[6] arbitrations. Both tribunals rejected, at least in part, India's defense that it had annulled the Satellite Agreement to protect essential security interests.[7]

The three arbitration tribunals rendered billion-dollar awards in favor of Devas and its investors.[8] Devas and its investors have started to enforce these awards against Indian assets abroad. Devas also entrusted its related US company, Devas Multimedia America Inc., with collecting debts arising from the ICC award.

Meanwhile, the Indian Central Bureau of Investigation filed a First Information Report against Devas and the officers of Devas and Antrix for corruption in 2015.[9] Antrix initiated proceedings to wind up Devas in 2021 at India's National Company Law Tribunal (NCLT). Devas appealed to the National Company Law Appellate Tribunal (NCLAT) and the Supreme Court of India. The Supreme Court upheld the judgments of NCLT and NCLAT to liquidate Devas due to fraudulent activities, including Devas improperly enticing Antrix into the Satellite Agreement.[10] The fraud also involved collusion between Devas, Antrix, and Indian government officials.[11]

The shareholders of Devas were found to be fully aware of the fraud.[12] Notably, Devas and one of its shareholders, namely Devas Employees Mauritius Private Limited, were fully represented in the SCI proceedings. Devas's other shareholders did not participate in the SCI proceedings.

As a consequence of the SCI Judgment, under its authority at the seat of the ICC arbitration, the High Court of Delhi set aside the ICC award.[13] Devas and its investors initiated the *CC/Devas (2)* investment arbitration against India alleging the latter's retaliation for the enforcement of the ICC award.[14] Upon India's request, the Supreme Court of Mauritius issued an interim anti-arbitration injunction.[15] India also sought to set aside the *DT* and *CC/Devas (1)* awards in their respective seats in Switzerland and the Netherlands.

Devas or its investors have sought to enforce the ICC, *DT*, and *CC/Devas (1)* awards in approximately 6 different countries.[16]

Recognize or not?

In the award-setting-aside proceedings and the award-enforcement proceedings, a critically important defense for India is the finding of fraud in the SCI Judgment.

To determine whether to recognize the SCI Judgment, the focal points are: whether foreign enforcement courts can exercise jurisdiction over India and whether the SCI Judgment should create *res judicata* effects in these courts. The varying approaches taken show how enforcement jurisdictions can independently decide whether retaliation existed and how to address it based on their laws.

Sovereign Immunity of India

When deciding whether to enforce the *CC/Devas (1)* award, both the Australian Federal Court and the Superior Court of the Province of Quebec in Canada held that India waived its sovereign immunity by ratifying the 1958 New York Convention because of the "clear and unequivocal submission" in Article 3 of the Convention.[17]

When enforcing the *DT* award, the Higher Regional Court of Berlin held that India did not enjoy sovereign immunity because according to the German Code of Civil Procedure, India's liability came from Antrix's commercial activities, and it was thus irrelevant that the Satellite Agreement was revoked partially due to national security concerns.[18] Taking another path, the US District Court for the District of Columbia held that it had jurisdiction over India based on the arbitration exception to sovereign immunity, which requires "the existence of an arbitration agreement, an arbitration award, and a treaty governing the award."[19] In discussing the last requirement, the court mentioned the membership of the US and Switzerland (the seat of arbitration), rather than India's membership in the 1958 New York Convention[20] as the Australian Federal Court and the Superior Court of the Province of Quebec had. When rejecting the enforcement of the ICC award, the US Court of Appeals for the Ninth Circuit held that a minimum

contacts analysis should be satisfied.[21]

Notably, the Australian Federal Court did not consider the legality of investment under the applicable bilateral investment treaty and the validity of the arbitration agreement because, when determining sovereign immunity, Devas needed only to provide prima facie evidence that a valid arbitration agreement existed.[22] The US District Court for the District of Columbia reached the same conclusion for a different reason: because the legality of investment was an arbitrability issue falling under the merits, not a jurisdictional matter.

Res Judicata

This issue can be analyzed from four aspects:

Preclusion effects of other tribunals' decisions: India was not successful in setting aside the *CC/Devas (1)* Award on Merits at the Hague Court of Appeal, which found that India did not sufficiently substantiate the accusations of fraud.[23] After the SCI Judgment was rendered, India asked the Hague District Court to set aside the Award on Quantum.[24] An important factor for the District Court in rejecting India's request was that the Hague Court of Appeal had already rejected India's assertions of fraud in the setting aside proceedings concerning the Award on Merits, and despite some new evidence, the fraud allegations in the request to set aside the Award on Quantum were virtually identical.[25] Therefore, the Hague District Court found that the SCI Judgment should not be recognized because of the *res judicata* effect of the earlier judgment of the Hague Court of Appeal.[26] In an action to enforce the *DT* arbitration, the Court of Appeal in Singapore similarly declined to consider the SCI Judgment's fraud findings because the Swiss Federal Supreme Court at the seat of the arbitration had dismissed the setting-aside application and affirmed the *DT* arbitration tribunal's jurisdiction and the validity of the award.[27] Further, based on the competence-competence doctrine, the US District Court for the District of Columbia considered itself precluded from second-guessing the *DT* arbitrators' findings about arbitrability.[28]

Timing: In rejecting the revision proceedings against the *DT* final award, the Swiss Federal Supreme Court found that India's fraud allegation based on the SCI Judgment was time-barred.[29] This was because the 90-day limitation period to

request the revision of the *DT* final award started to run when India obtained "sufficiently certain knowledge" of fraud even before the SCI Judgment was issued.[30] Like the Hague District Court, the Swiss Federal Supreme Court held that the SCI Judgment did not provide new evidence of fraud because the Supreme Court of India did not conduct its own fact-finding investigation.

The *(un)due process of* the Supreme Court of India is also hotly debated. In 2023, the Hague District Court declared the request of Devas Multimedia America Inc. to enforce the ICC award on behalf of Devas inadmissible, after a liquidator appointed under the SCI Judgment instructed the company not to act as an agent of Devas in enforcement efforts.[32] The Hague District Court found no evidence showing that the SCI failed to act independently and impartially.[33] In contrast, when deciding to enforce the *DT* award, the Singapore International Commercial Court expressed reservations about the proceedings at the SCI, finding that they had been carried out based on summary evidence without oral evidence or the cross-examination of witness;[34] and the same view was shared by the Higher Regional Court of Berlin.[35]

Divergence of parties is a significant barrier to extending the *res judicata* effects of the SCI Judgment against Devas to its investors. At the Superior Court of the Province of Quebec, India relied on the SCI Judgment arguing that its consent to arbitration was induced by fraud. The Court held that the SCI Judgment could prove only that Devas was liquidated and addressed a different question from that in the enforcement proceeding, because it did not rule on the validity of the *CC/Devas (1)* arbitration agreement, and the Devas investors were precluded from participating in the liquidation proceeding.[36] Similarly, the Singapore International Commercial Court held that the fraud finding in the SCI Judgment should not be binding on Devas's investor, Deutsche Telekom, because it was not a party to the proceedings at the Supreme Court of India.[37]

Decentralized System to Address States' Retaliatory Measures

As the Indian Satellite Saga demonstrates, private international law and international investment law use a decentralized judgment/award recognition and enforcement system to address alleged states' retaliatory measures against foreign investors.

In terms of practical lessons, one is that fraud allegations should be argued as early as possible in the award-rendering proceedings, rather than waiting for the enforcement proceedings. Notably, India raised fraud late without reasonable justifications, so the claim was rejected by the arbitration tribunals.[38] Although some enforcement courts may allow parties to re-argue a fraud claim that has been fully litigated by a judgment/award-rendering tribunals, the Saga shows that saving these claims for the enforcement proceedings is risky because not every court will allow this practice.

More broadly, although the decentralized system produces inconsistent results, it also has an overlooked benefit of resilience when addressing state retaliatory measures, as it has no choke points and can function regardless of political tensions. This system, although sacrificing consensus and consistency, promotes democracy because each state has its voice. In contrast, some international systems to resolve alleged state retaliatory measures are centralized based on consensus. The centralized systems are supposed to bring authority, consistency, and certainty. However, the malfunction of one choke point can effectively dismantle the whole system. For example, although the WTO can authorize its members to retaliate against another member that continuously adopts non-compliance measures, the "WTO consensus" system enables one member to dismantle the WTO Appellate Body.[39] Another example is the United Nations Security Council, where the "veto privilege" and political tensions among its standing members have impeded international efforts to resolve the Gaza war.[40] The inconsistent outcomes reached over the course of the Indian Satellite Saga should thus be understood in light of the benefits of decentralization and resilience.

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[1] *Devas Multimedia Private Ltd., v. Antrix Corporation Ltd. & Anr.*, Civil Appeal No. 5906 of 2021 (India) [hereinafter SCI Judgment].

[2] *Id.*, ¶ 3.11.

[3] *Devas Multimedia Private Limited v. Antrix Corporation Limited* (Final Award) ICC Case No. 18051/CYK (Sept. 14, 2015).

[4] ICC Case No. 18051/CYK, ¶¶ 230-236, 312.

[5] *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. the Republic of India*, Case No. 2013-09, UNCITRAL, Award on Quantum (Perm. Ct. Arb. 2020) ("*CC/Devas (1)*").

[6] *Deutsche Telekom AG v. India*, Case No. 2014-10, UNCITRAL, Final Award (Perm. Ct. Arb. 2020) ("*DT Arbitration*").

[7] *CC/Devas (1)* Award on Jurisdiction and Merits (July 25, 2016), ¶¶ 354-361, 371-73; *DT* Interim Award (Dec. 13, 2017), ¶¶ 280-286.

[8] Approximately USD 562.5 million (ICC), USD 93.3 million (*DT*), USD 111 million (*CC/Devas (1)*), plus interest and costs.

[9] SCI Judgment, ¶ 3.13.

[10] SCI Judgment, ¶ 12.8 (vi).

[11] *Id.* ¶ 12.8 (xii).

[12] *Id.* ¶ 12.8 (xv).

[13] *Devas Employees Mauritius Pvt. Ltd. v. Antrix*, High Court of Delhi at New Delhi, 2023: DHC: 1933-DB.

[14] *CC/Devas v. India (2)*, Case No. 2022-34 (Perm. Ct. Arb. 2022) ("*CC/Devas (2)*").

[15] *India v. CC/Devas (Mauritius) Ltd.,* SC/COM/WRT/000010/2023, Sup. Ct. Mauritius.

[16] *See CC/Devas v. India (I)* on Jus Mundi at https://jusmundi.com/en/document/decision/fr-cc-devas-mauritius-ltd-devas-employees-mauritius-private-limited-and-telcom-devas-mauritius-limited-v-republic-of-india-arret-de-la-cour-dappel-de-paris-22-11819-tuesday-13th-february-2024.

[17] *CC/Devas (Mauritius) Ltd. v. India*, 2022 QCCS 4786, ¶¶ 161 & 167; *CCDM Holdings, LLC v. India (No. 3)* [2023] FCA 1266, ¶¶ 35, 38, 45, and 51.

[18] Lisa Bohmer, *German Court Grants Application for Partial Enforcement of*

Deutsche Telekom v India *Award, as Neither Fraud Allegations Nor BIT's Unique Wording on Enforcement Sway the Judges*, Investment Arb. Rep. (Feb. 9, 2023), https://www.iareporter.com/articles/german-court-grants-application-for-partial-enforcement-of-deutsche-telekom-v-india-award-as-neither-fraud-allegations-nor-bits-unique-wording-on-enforcement-sway-the-judges/.

[19] *Deutsche Telekom AG v. India*, Civil Case No. 21-1070 (RJL), Memorandum Opinion (Mar. 27, 2024), at 6.

[20] *Id.*

[21] *Devas Multimedia Private Ltd v Antrix Corp. Ltd.,* No. 20-36024 (9th Cir. 2023), ¶ 1.

[22] *CCDM Holdings, supra* note 17, ¶ 44.

[23] India's set-aside application against the *CC/Devas (1)* Award on Merits was rejected by the District Court of the Hague on November 14, 2018 (ECLI:NL:RBDHA:2018:15532), the Hague Court of Appeal on February 16, 2021 (ECLI:NL:GHDHA:2021:180), and the Dutch Supreme Court on February 3, 2023 (ECLI:NL:HR:2023:139).

[24] *India v. CC/Devas (Mauritius) Ltd*. (C/09/615682/HA ZA 21-674), October 25, 2023 issued by the District Court of the Hague.

[25] *Id.* ¶¶ 4.16, 4.19, and 4.20.

[26] *Id*. ¶ 4.09.

[27] *India v. Deutsche Telekom AG,* [2023] SGCA(I) 10, ¶¶ 142-178; 2023 SGHC(I) 7, ¶¶ 136-155.

[28] *Deutsche Telekom AG v. India*, Civil Case No. 21-1070 (RJL), Memorandum Opinion (Mar. 27, 2024).

[29] Swiss Bundesgericht Tribunal Fédéral (4A_184/2022), Urteil vom 8. März 2023.S.

[30] Lisa Bohmer, *Swiss Federal Tribunal Decides that Revision Proceedings Are not Available against Interim Award that Withstood Set-aside Request, while*

Finding that Request for Revision on Final Award is Time-Barred and Not Based on New Evidence, Investment Arb. Rep. https://www.iareporter.com/articles/analysis-swiss-federal-tribunal-decides-that-revision-proceedings-are-not-available-against-interim-award-that-withstood-set-aside-request-while-finding-that-request-for-revision-of-final-award-is-t/.

[31] *Id. India v. CC/Devas (Mauritius) Ltd.*, *supra* note 24, ¶ 4.20.

[32] Order issued by Judge H.J. Vetter at the Hague District Court (July 18, 2023), https://www.iareporter.com/articles/dutch-court-declares-request-for-enforcement-of-devas-antrix-icc-award-inadmissible/.

[33] *Id*.

[34] *India v. Deutsche Telekom,* [2023] SGHC(I) 7, paras¶¶ 126-134.

[35] Bohmer, *supra* note 18.

[36] *CC/Devas (Mauritius) Ltd. v. India*, *supra* note 17, ¶¶ 210-215.

[37] Deutsche Telekom, "would be the victim, rather than a perpetrator" in the alleged fraud, *Deutsche Telekom AG v The Republic of India*, [2023] SGHC(I) 7, ¶¶ 87 and 123.

[38] Prabhash Ranjan, *Corruption and Investment Treaty Arbitration in India*, *in* Corruption and Illegality in Asian Investment Arbitration 235, 248 (Nobumichi Teramura, et al. eds., 2024).

[39] Chad Bown & Joost Pauwelyn, The Law, Economics and Politics of Retaliation in WTO Dispute Settlement 21-86 (2010).

[40] Press Release, United Nations, Security Council passes resolution demanding "an immediate ceasefire" during Ramadan, https://news.un.org/en/story/2024/03/1147931?_gl=1*1y7ggfh*_ga*MTYxNDY2ODE4Ni4xNzA5NzczMDA4*_ga_TK9BQL5X7Z*MTcxMTQxMzkxNS4xLjAuMTcxMTQxMzkxNS4wLjAuMA.