IN-DEPTH ANALYSIS OF ANTRIX VS DEVAS CASE

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INTRODUCTION

The National Company Law Tribunal (NCLT) Bengaluru Bench in the matter of Antrix Corporation Ltd. v. Devas Multimedia Pvt. Ltd. and Anr recently granted an order for the winding up of Devas Multimedia Pvt. Ltd. and Anr (Devas). The National Company Law Tribunal (NCLT), while making an order under “Section 273 of the Companies Act, 2013”, found that Devas had been acting fraudulently from the time of its inception. This decision of the NCLT was upheld by the NCLAT in September 2021.

The Supreme Court in January 2022 rejected the appeal filed by Devas Multimedia against the orders of NCLT and NCLAT allowing the winding up of Devas Multimedia.¹

FACTS

Antrix Corporation Ltd. (Antrix) is an Indian government-owned corporation that is overseen by the Department of Space. Antrix is headquartered in Bangalore, India. “It is the Indian Space Research Organization's (ISRO) commercial branch, which provides a variety of products and services to the public. Devas, i.e., the first respondent in the current action, is a company that claims to have been established in order to provide digital multimedia services.” Antrix and Devas signed a formal agreement on January 28, 2005, which became effective immediately (Agreement). To fulfill its obligations, Antrix agreed to create and operate two satellites, launch them, and lease spectrum capacity from those satellites to Devas, in accordance with the conditions of the Agreement.²

According to the company Devas, such satellites and airwaves would be used to deliver multimedia broadband broadcasting services across India. A number of issues and changed policy choices by the Central Government led to Antrix terminating the Agreement on February 25, 2011. Devas, who was unsatisfied with the termination, used the arbitration clause of the Agreement. At long last, Devas was granted USD 562.5 million in damages with interest by the International Chamber of Commerce (ICC) on September 14, 2015, for the loss caused by Antrix’s illegal revocation of the Agreement.³

The event was probed by the (CBI) and the Enforcement Directorate (ED)” because it had the potential to have widespread ramifications and because Devas was suspected of engaging in a number of fraudulent activities. Devas was found to be involved in a number of illegal enterprises, which led to his arrest. The nature of the crimes committed by Devas was being examined at the time, and other litigation was still pending, therefore Antrix moved the

² Id.
³ Id.
NCLT and requested that Devas be wound up for fraud in violation of S. 271(e) of the Companies Act, 2013.  

First, Antrix said that Devas was an impersonation of a legitimate business that never qualified to be a party to the Agreement with the federal government. It was emphasised that in order to achieve the Agreement's pledges, large financial resources in the millions of dollars, as well as the appropriate technology and know-how, were need to be in place. Devas, on the other hand, was awarded such a major contract unilaterally and without following due process. 

Antrix discovered a number of errors and procedural abnormalities throughout the contract awarding process, which was infected with fraud and corruption, according to the company. It was claimed that no attempt was made to elicit tenders/bids or to publish technical qualifications, and that this was the case. 

For his part, Devas maintained that the instant petition could not be supported because it did not conform with the second proviso to Section 272(3) of the Companies Act, which required that a firm be given a reasonable opportunity to make recommendations before it was wound up. Continuing, Devas said that the present matter could only be properly addressed if the existing investigations and proceedings before either the CBI Court, or the PMLA Court, or both were completed.” Furthermore, Devas said that the Antrix became a debtor of Devas as a consequence of the ICC judgement for USD 562.5 million plus interest against the company. The debtor, according to Devas, was irrational in seeking the winding up of a creditor since it was outside the rules of the law. 

**ISSUES**

In BIT arbitration, the issue of whether the foreign investment was undertaken in conformity with the legislations of the host nation is a critical one. This is referred regarded as the legality criterion in certain circles. A BIT cannot be used to safeguard an investment that has not been made in accordance with the laws of the host country. An investment that was made as a result of corruption and fraud would be classed as a corrupt or fraudulent investment. In several bilateral investment treaty arbitration cases, this argument has been used by the host state as a means of contesting the jurisdiction of the arbitral tribunal.

**OBSERVATION/JUDGEMENT**

Despite the fact that India did not file a jurisdictional challenge in the CC/Devas arbitration until the tribunal published its verdict on July 25, 2016, the panel found Devas to have committed corruption and fraud, as well as investing in illegally, and upheld the ruling. Only in December 2016 did India request a postponement of the compensation arbitral proceedings on the grounds that the CBI had filed charge-sheets against a large number of Devas officials as well as the management for violations of the

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4. Companies Act, 2013  
5. Supra Note 1.  
6. Id.  
7. Id.  
Indian Penal Code and the Prevention of Corruption Act, among other things.  

When the Indian government submitted a similar request with the Deutsche Telekom tribunal in October 2016, the panel granted it, allowing the arbitral procedures to be suspended until the hearing phase was finished. In its decision, the panel said that the motion had been filed too late and that it had broken procedural regulations.

Essentially, the main contention in both of these requests was that if the charges were upheld in court, then the Antrix-Devas agreement will have no legal effect under the law of India, and the tribunal's decision that the "Devas agreement" was a legally binding agreement and a "investment" under the BIT could not be upheld. Even though the CBI and Enforcement Directorate (ED) investigations were still ongoing and the charge sheet was not yet been filed, this must have been offered as an initial objection to the tribunal's jurisdiction.

Even if the practise and philosophy of dealing with corruption in international arbitration are not yet well-established, they are constantly changing, with differing viewpoints, some of which may have helped India. As Lucinda Low points out, “because of the proliferation of international instruments and the consolidation of obligations related to prevention, detection, and remediation in both the public and private sectors, corruption has come to be accepted as an international and transnational public policy issue, and both BIT arbitration tribunals and commercial arbitration tribunals must address jurisdiction, admissibility, and other issues arising from allegations of corruption.” According to Lucinda Low, An appealing decision by the Indian government to have the BIT arbitration procedures postponed until the investigation was completed would have been a strong possibility. It would have unquestionably put the Indian government in a stronger negotiating position.

According to the Swiss Federal Supreme Court, in its decision on the set-aside proceedings relating to Deutsche Telekom in December 2018, “it was difficult to understand why the appellant did not mention these circumstances, which appeared to be indicative, at the very least, of criminal activity in its writings in the arbitration file and then during the hearing”. Aside from that, the Hague District Court rejected India's argument that the BIT arbitral tribunal lacked jurisdiction since the Antix-Devas agreement was polluted by an evil act and was thus null and void from the outset in the set-aside process related to the CC/Devas decision.

This is because "the simple filing of a criminal complaint at this time has no legal consequences," according to the court. Because the Devas Contract is contaminated with criminal offences, there is no prospect of a null and invalid Devas Contract as long as

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10 Id.
11 Supra Note 8.
12 Id.
no (irrevocable) court judgement on the criminal complaint has been given.\textsuperscript{14}

Ultimately, the NCLT found that the evidence established indisputably that Devas was created with the dishonest objective of procuring a reputable contract in collaboration with a small number of corrupt Antrix employees. Devas was established on December 17, 2004, and the Agreement was signed on January 28, 2005, less than 45 days after the company's inception. A sophisticated contract such as this one, according to the NCLT, should be granted to a company with the appropriate technical understanding and a proven track record, rather than to an individual based on common sense, the court said. Specifically, the NCLT held that there was no dispute that Devas lacked the necessary skills to engage in the process of issuing the Agreement, much alone to ensure that the Agreement was granted.\textsuperscript{15}

There is a well-established legal view that the wrongdoings and criminal acts carried out by Antrix's corrupt officials will not bind the State, and that such actions will be void from the beginning, which means that they will have no legal or civil consequences. Devas is accused of drafting the Agreement in order to entice foreign funds into India and then syphon them out via the use of shady accounts. As a result, the NCLT determined that the Agreement did not confer any legal rights, much less civil rights, on Devas, despite the ongoing arbitral judgement challenge and measures initiated by the CBI and ED. Therefore, the NCLT was sure that the requisite conditions set out in S. 271(e) of the Companies Act had been met, and so ordered Devas's winding up on the basis of that confidence.\textsuperscript{16}

**LATEST DEVELOPMENTS**

Despite being the recipient of multibillion-dollar arbitration verdicts from both the International Chamber of Commerce and the Bilateral Investment Treaty, the Indian government has gone to considerable measures to prevent the award from being enforced. Following the ruling of the NCLT, it is quite doubtful that Devas would be able to collect the whole amount awarded by the International Court of Justice. Once again, if this occurs, India would find itself in a scenario similar to that of the White Industries under the British Raj.\textsuperscript{17}

The award from the International Chamber of Commerce that Devas earned readily qualifies as an investment under the broad definition of investment granted by the India-Mauritius Bilateral Investment Treaty, which was signed in 2007. (BIT).\textsuperscript{18} The Indian government, via its investigative agencies and other regulatory bodies, may accuse Devas of running a retaliation campaign against it in order to prevent it from executing the judgement of the International Criminal Court.\textsuperscript{19}

One can notice the NCLT's dissatisfaction with Devas' use of ICC arbitration throughout the 99-page judgement, which can be seen interspersed throughout the 99-page record. Additional measures were enacted by the National Company Law Tribunal (NLCT) in the operative part of its decision, acting within the broad authority conferred by

\textsuperscript{14} Id.
\textsuperscript{15} Id.
\textsuperscript{16} Supra Note 4
\textsuperscript{17} Antrix Corporation Ltd. v. Devas Multimedia Pvt. Ltd., 2022 LiveLaw (SC) 57.
\textsuperscript{18} India-Mauritius Bilateral Investment Treaty, 2007
\textsuperscript{19} Supra Note 25
Indian law and ordering the official liquidator to "take expeditious steps to liquidate the Company in order to prevent it from perpetuating its fraudulent activities and abusing the process of law in the enforcement of the ICC award."  

The liquidator will be unable to proceed with the execution of the judgement in the first instance unless and until this precise directive is overturned in an appeal to the NCLT (National Commercial Law Tribunal). Using this explicit instruction, Mauritian investors may be able to claim indirect seizure of their investments, which in this instance would be the ICC award in this specific case.

On the same day in November 2020, “the Indian government amended the Arbitration and Conciliation Act, 1996, making it mandatory for courts to grant an unconditional stay on the enforcement of arbitration awards from arbitrations held in India when there is a prima facie case that an arbitration agreement or an underlying contract upon which the award is based, or even the making of the award, was induced by fraud or corruption.” The revision has retroactive effect, and it applies to the ICC arbitration that was initiated as a consequence of the change and has been ongoing since 2013.

This may also be brought up by Devas as a way of drawing attention to the government's aim to avoid execution of the ICC judgement. In Devas' opinion, all of these incidents constitute proof that the Government of India created a confusing administrative environment, treated it unjustly and inequitably, and violated the FET requirements by creating a muddled regulatory environment. It is also possible that Devas will benefit from the presence of a most favoured country treatment clause (MFTC), which will allow it to import more advantageous provisions from other bilateral investment treaties (BITs), such as the requirement to provide 'effective methods of litigating claims...' as stipulated in the India-Kuwait BIT.

**CONCLUSION/ANALYSIS**

According to the NCLAT and the Apex Court, if the NCLT's judgement is upheld on appeal, it might influence the implementation of Bilateral Investment Treaty (BIT) arbitration rulings in the CC/Devas and Deutsche Telekom cases, among other things. Both CC/Devas and Deutsche Telekom are now embroiled in court proceedings in the United States, where they are attempting to have BIT arbitration judgements recognised and implemented.

Considering that the NCLT has ordered Devas's dissolution, the BJP government may object the order's implementation on the grounds that the Antrix-Devas arrangement was unlawful from the start owing to fraud and corruption. India may assert that acceptance and execution of the judgement would be contrary to US national policy, as described in Article V(2)(b) of the 1958 New York Convention, and hence should be rejected.

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20 Id.

21 Id.

22 Id.

23 Id.

24 New York Convention, 1958
Despite widespread consensus in the legal profession, the public interest defence against foreign award enforcement must be construed narrowly in the United States, according to the Supreme Court. It will be possible to defend public policy against corruption if this is done. However, the US court is likely to reject this claim, most likely because the NCLT has simply concluded that the company's operations are misleading, rather than for any other reason.

As stated in its ruling, the National Labor Relations Commission (NLCT) asserted that the Antrix-Devas agreement was fraudulent, but it did not have the jurisdiction to investigate and verify the agreement's authenticity. However, there has been no conclusive proof of the agreement's legality presented thus far.

In November 2020, the Supreme Court ordered that the dispute be transferred to the Delhi High Court. A petition for reversal of the International Chamber of Commerce arbitral decision is now pending, and the ICC award has been placed on hold until the appeal is determined. Due to accusations of corruption and fraud against Antrix and Devas, the Delhi High Court will conduct an investigation into the integrity of the Antrix-Devas business deal. According to expectations, the Indian government would urge a temporary halt to enforcement actions in the United States until the situation is rectified.

With a single goal in mind, the Indian government seems to be trying to prevent the International Court of Justice verdict and the BIT arbitration judgements that have not yet been confirmed by US courts from being effective. Due to its failure to attract attention to the issue of corruption in a timely way, the Indian government has paid a heavy price.

For the time being, the only viable alternative is to facilitate criminal proceedings and demonstrate conclusively that the persons involved were corrupt and bribed. To summarise the Indian government's whole approach, the BIT-based arbitration proceedings may be described as "windmills," and the Indian government can be described as "Don Quixote," respectively.

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