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The Antrix-Devas Dispute: Headed for a Third BIT Arbitration?

Aarohi Chaudhuri · Tuesday, August 17th, 2021

In May 2021, India's National Company Law Tribunal ('NCLT') ordered the liquidation of Devas Multimedia ('Devas'), on grounds of it having been incorporated for fraudulent purposes. This is the latest turn in a long running dispute contested across multiple fora. In this post, I highlight that this could give rise to a third BIT claim against India on grounds of indirect expropriation. To this end, I submit tentatively that: (1) an arbitral tribunal *would* have jurisdiction over such a claim, because arbitral awards can be the subject of expropriation; and (2) the liquidation of Devas, with the alleged view to preventing enforcement of the ICC award likely amount to an indirect expropriation. Before engaging with these questions, the first section of the post provides a brief outline of the facts leading to this situation.

Background to the Dispute

In 2005, Devas entered into a lease agreement with Antrix Corp. ('Antrix'), the private sector arm of the Indian Space Research Organization (a government-owned body). The 2005 agreement was terminated by Antrix in line with government policy in 2011. This termination gave rise to 3 distinct sets of proceedings—one commercial arbitration before an ICC tribunal, and two investment arbitrations under the India-Mauritius BIT and the India-Germany BIT. Each of these proceedings resulted in an adverse award for the Indian government. While the two BIT awards are still pending confirmation, the ICC award has been upheld by a US Court as well as by the Paris Court of Appeal.

In its liquidation order, the NCLT has expressly directed the official liquidator to liquidate Devas, so as to prevent the enforcement of the ICC award in its favor [p. 38 (7)].

Can Arbitral Awards be Expropriated?

Prima facie, the actions of the NCLT as a quasi-judicial body are attributable to the Indian State. A preliminary issue then is whether arbitral awards qualify as 'investments' in the first place. The India-Mauritius BIT, under which Devas' investors may bring a claim, defines 'investments' as including "*claims to money, or any performance under a contract which has economic value*" (Art. 1(a)(iii)). This definition is sufficiently broad so as to include an arbitral award in its scope. The material question now is whether judicial interference with an arbitral award can amount to

expropriation to begin with.

It is settled in international law that immaterial rights can be the subject of expropriation (*see e.g. Philips Petroleum v. Iran* p. 75). A further qualification imposed in some cases is that the award must be final substantively—in other words, any further challenge must only be available as to procedural grounds, and not to the merits of the tribunal's decision (*see e.g. Stran Greek Refineries and Stratis Andreadis v. Greece* p. 59-61). In the instant case, the ICC award obtained by Devas was final as to its merits and binding on both parties. Any further challenge to this award at the enforcement stage may only pertain to procedural grounds and not serve as a judicial review of its substantive findings. Therefore, the nature of an arbitral award does not exclude it from being the subject of expropriation.

Schwebel (2004) argues that an arbitral award is the source of material rights to compensation for the award holder, and access to an award is extremely relevant to the conclusion of the initial contract itself. Denial of access to this award, therefore, has a confiscatory effect and constitutes a vitiation of investor rights by the interfering State. While Schwebel makes this argument in the context of an anti-suit injunction, similar concerns would arise with respect to other judicial measures that nullify an arbitral award. In my view, the liquidation of Devas, by virtue of nullifying the enforcement of the ICC award, is analogous to an anti-enforcement injunction nullifying said award. For these reasons, judicial interference with an award *can* amount to expropriation.

Did India Commit Expropriation in this Case?

Expropriation by itself is not illegal *per se*. The specific contours of what constitutes an unlawful expropriation depend on the BIT under which a claim arises. Art. 6 of the Mauritius-India BIT defines expropriation. It states that for a breach of Art. 6 to arise, (i) there must be an expropriation; and (ii) this expropriation must not be for public purposes, be discriminatory, or without fair compensation. In the instant case, no compensation was paid to Devas following the nullification of its arbitral award. Therefore, a claimant investor need only show that the liquidation order amounted to an expropriation.

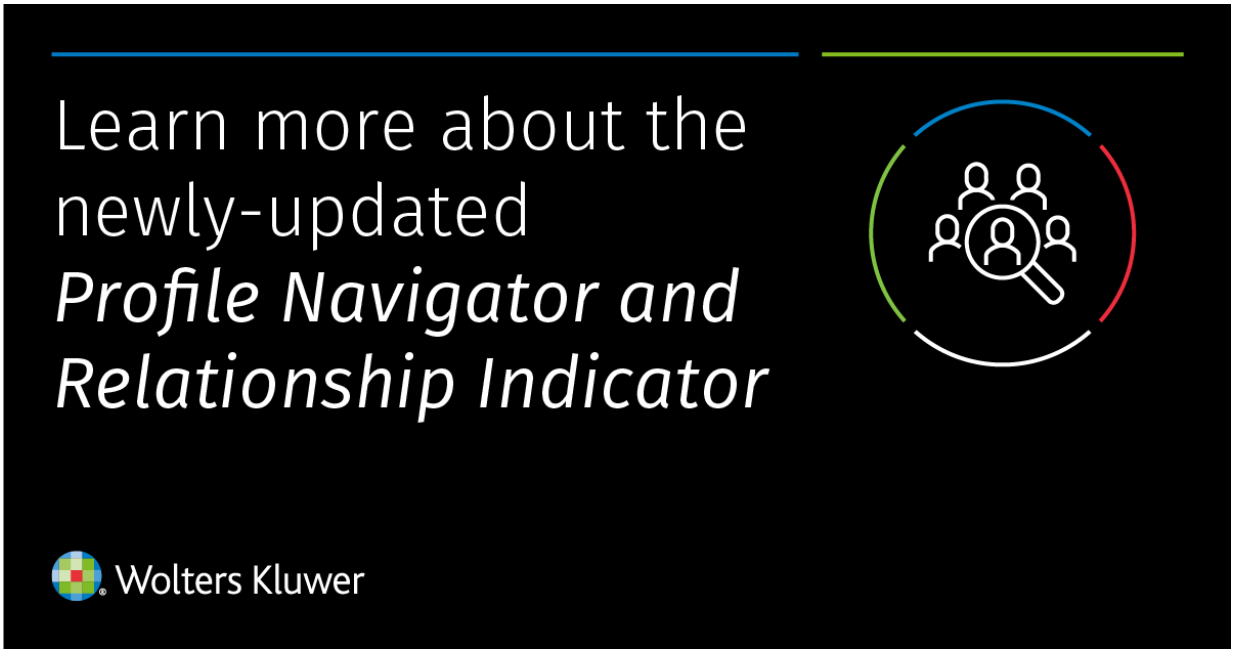
Typically, tribunals have used the "sole effects" doctrine to determine whether an indirect expropriation has occurred (*see e.g. Saipem Spa v. Bangaldesh* p. 133). This doctrine suggests that tribunals rely only on the *effect* of a State's measure on an investment, and not the reasons behind introducing that measure. In this paradigm, so long as an investor was *substantially* deprived of their rights, a claim for indirect expropriation would arise. Given that the liquidation order effectively nullifies the ICC award, Devas' investors could allege indirect expropriation. However, I submit that the standard to establish indirect expropriation must be higher in cases where judicial interference with an award is alleged as the cause of expropriation. This is because if the sole effects doctrine is applied strictly, any and all decisions rejecting foreign awards (even on valid grounds) would be considered in breach of a BIT—a perverse conclusion. Therefore, claimant investors must demonstrate that the judicial actions interfering with their rights were "illegal", or violative of international law norms (*see Saipem Spa* p. 132).

Tribunals have recognised that judicial decisions that are grossly unfair or unjust constitute a violation of international investment law (*see e.g. Salini v. Ethopia* p. 166 and *Saipem Spa* p. 149).

One possible example of such decisions would be a domestic court making an order in excess of its jurisdiction, on account of State bias. I submit that in the instant case, the NCLT's order was unlawful as it exceeded the jurisdiction of the NCLT. While the determination of fraud in the affairs of a company is indeed a matter for the NCLT to adjudicate, using fraud as ascertained by the NCLT to stymie the enforcement of an arbitral award creates an appearance of perverse motives, especially considering that the respondent in this case is essentially the Indian State, of which the NCLT is in itself an instrumentality. If nothing else, this gives rise to the appearance of bias guiding the NCLT's findings. A more appropriate route would have been for the NCLT not to interfere with the enforcement of the ICC award, and treat those proceedings as separate from those concerning liquidation. The NCLT order would have then served only as guidance to the fora hearing challenges to the award itself (i.e., the Delhi HC). Instead, by conflating two proceedings, the NCLT has acted in excess of its jurisdiction, and its actions could be seen as a denial of access to remedies for Devas' investors.

Even India's obligations under Art. III of the New York Convention create an overriding commitment towards enforceability, such that allegations of the award being contrary to public policy (such as by being borne out of fraud) must still be settled only by a "competent authority". If the formation of an agreement was indeed borne out of fraud, then the appropriate forum to settle the same is the Court hearing challenge proceedings. For the NCLT itself to direct that the liquidator ceases the enforcement of the ICC award, amounts to an adverse and unwarranted interference with the arbitral process. BIT tribunals have previously looked unfavourably upon such actions. For example, in the *Saipem* case, the tribunal held that Bangladesh had breached the NY Convention due to its judiciary ordering the revocation of appointed arbitrators on grounds of misconduct. Importantly, no instance of actual misconduct on the part of the tribunal or Devas has been established yet by the Delhi HC, where the challenge to the award is still *sub judice*. Therefore, a premature move to nullify the enforcement of the award by seizing control of the award-holder would constitute an expropriation, and breach international law.

On a concluding note, the NCLT order in the Devas case might well come as no surprise to frequent observers of India's recent dalliance with investment treaty disputes. The liquidation of Devas on account of the finding of fraud, could also imperil the enforcement of awards obtained against India by Devas' investors under BITs. This is particularly concerning in light of India's recalcitrance in complying with adverse awards arising out of its disputes with Vodafone and Cairn Energy. Taken collectively, these events are very likely to shake investor confidence in the Indian regulatory regime. Immediate compliance with each of these awards is therefore the ideal course of action that India must adopt.



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