

Swiss court upholds treaty award against India

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A Deutsche Telekom building (Credit: istockphoto)

The Swiss Federal Supreme Court has rejected India's challenge to an UNCITRAL award in favour of Deutsche Telekom – marking the second time it has publicly deliberated over an investment treaty case in as many months.

A three-to-two majority of the court in Lausanne ruled today that the 1995 Germany-India bilateral investment treaty protected both direct and indirect investments and therefore did not preclude a claim by Deutsche Telekom in respect of an investment in India routed through a Singaporean subsidiary.

Pestalozzi acted for India in the challenge, while Bär & Karrer represented Deutsche Telekom.

The five female justices of the court's first civil chamber, which deals with international arbitration matters, cast their votes this morning following two hours of deliberations before an audience of around 30 people. The parties did not make oral pleadings.

It is extremely rare for the court to deliberate publicly on international arbitration cases. It is thought to have happened only twice before since Switzerland enacted its current international arbitration law in 1989. The last time was only two months ago – when the court publicly considered Russia's challenge to a pair of BIT awards favouring Ukrainian investors in Crimea. The court upheld those awards by a four-to-one majority.

Cases before the court are normally not considered publicly unless the three judges initially assigned to the case disagree, in which circumstances the matter is referred to the full chamber of five judges for deliberation. This can also happen if the case raises questions of public importance or political sensitivity.

While the court's reasons for considering the two BIT cases in public have not been stated, it potentially reflects an awareness of the public interest in the investor-state arbitration system, as well as what appear to be serious disagreements among the judges on certain questions of investment treaty interpretation.

By coincidence, the same three arbitrators that rendered the awards in the Crimea case also appear on the UNCITRAL tribunal in the dispute between Deutsche Telekom and India – Swiss chair **Gabrielle Kauffman-Kohler**, **Daniel Price** of the US and **Brigitte Stern** of France.

The dispute relates to Deutsche Telekom's indirect 20% interest in Indian telecoms company Devas Multimedia, which entered into a contract with Indian state-owned satellite company Antrix in 2005. The contract provided for Antrix to build, launch and operate two satellites and provide S-band spectrum to allow Devas to offer wireless audio-visual, mobile phone and broadband services across India.

Antrix cancelled the contract in 2011, citing the Indian government's decision to reserve the space segment of S-band capacity for non-commercial, strategic purposes. Deutsche Telekom launched its BIT claim two years later.

The Geneva-seated UNCITRAL tribunal issued the interim award in December 2017, rejecting a number of jurisdictional objections raised by India and declaring that the repudiation of Devas' contract had violated the BIT's fair and equitable treatment standard. The arbitration has since progressed to the quantum phase.

India applied to the Swiss court in January this year to set aside the award, invoking the same jurisdictional arguments that were rejected by the tribunal. It also alleged the tribunal had violated its right to be heard.

The main issue in the deliberations today was whether Deutsche Telekom's indirect participation in Devas through a Singaporean subsidiary entitled it to the protection of the Germany-India BIT, which refers to "investments" without expressly stating whether these can be indirect as well as direct.

Justice Fabienne Hohl, the reporting justice, formed the majority with **Justice Marie-Chantal May Canellas** and the chamber's presiding justice **Christina Kiss** in concluding that Deutsche Telekom's investment was covered by the treaty.

The majority focused on the purpose of the BIT to encourage foreign parties to invest in a host state. They said one should not easily allow a state that encourages foreign investment to then interpret a BIT narrowly to escape its obligations.

The three judges were satisfied that Deutsche Telekom was a German investor that had made an investment in India and that this was precisely what India had wanted to encourage when it entered into the BIT. The fact that the investment was routed through a Singaporean subsidiary made no difference, they said.

The majority also noted that the arbitral tribunal had found in the award that indirect investments via special vehicles were common practice and that the BIT had to be interpreted as allowing direct and indirect investments.

The dissenting justices were **Kathrin Klett** (the judge who sided with Russia in the Crimea case) and **Martha Niquille**. They emphasised that Deutsche Telekom did not invest in India but in Singapore and that it was the Singaporean subsidiary that had invested in India. Niquille said that what was relevant was not today's treaty practice but that of two decades ago when the BIT was drafted. The fact that the contemporaneous Germany-Kuwait and India-Netherlands BITs did expressly use the term "indirect investments" suggested the absence of such language from the Germany-India BIT meant it was not intended to cover indirect investments, she argued.

The majority's consolidated reasoning is expected to be published soon. Under the Swiss system, the dissenting opinions will not be recorded in the final judgment.

Counsel to India, Pestalozzi partner **Thomas Legler** tells GAR: "Although we regret having lost this case, we have been satisfied that the final vote resulted in a 2:3 decision where two justices expressed in a very engaged debate their dissenting opinions."

Pestalozzi partner **Michael Kramer** adds: "Today's close decision shows that we brought forward strong arguments that indirect investments do not fall under the relevant treaty." Deutsche Telekom's counsel **Daniel Hochstrasser** of Bär & Karrer says, "I am satisfied that the Supreme Court recognises that the overriding goal of any BIT is to attract and encourage investment, and that the majority was not impressed by the attempt made here to escape the obligations imposed by the BIT on the state with formalistic arguments."

In the arbitration, Deutsche Telekom is represented by Freshfields Bruckhaus Deringer and **Samuel Wordsworth QC** of Essex Court Chambers in London along with Platinum Partners in New Delhi. India is relying on Curtis Mallet Prevost Colte & Mosle.

The Devas-Antrix contract has given rise to two other arbitrations. Devas obtained an ICC award against Antrix in 2015 worth US\$562.5 million plus interest for the unlawful repudiation of the agreement. The Indian company recently applied to a court in Seattle to enforce the award, in what appears to have been a move to preserve its rights before the

expiry of the three-year deadline for enforcement of awards under the US Federal Arbitration Act.

Three other shareholders in Devas are also pursuing a claim against India under the Mauritius-India BIT, which is being heard by a tribunal including **Marc Lalonde QC** (chair) and **David Haigh QC** of Canada and Indian former judge **Anil Dev Singh**.

That tribunal issued an award on jurisdiction and liability in July 2016, finding that the annulment of Devas' contract put India in breach of the BIT. However, a majority of the tribunal upheld India's objection that part of the expropriation claim fell within an exception in the BIT for measures to protect "essential security interests".

A hearing on quantum in that case took place in July 2018 and a final award is pending. Meanwhile, India is pursuing a challenge to the 2016 award in the Dutch courts.

India v Deutsche Telekom

Before the Swiss Federal Tribunal

First Civil Chamber

- **Christina Kiss** (presiding justice)
- **Fabienne Hohl** (reporting justice)
- **Kathrin Klett** (dissented)
- **Martha Niquille** (dissented)
- **Marie-Chantal May Canellas**

Counsel to India

- Pestalozzi

Partners **Thomas Legler** in Geneva and **Michael Kramer** in Zurich; and associates **Nicolas Pellaton** in Geneva and **Andreas Lienhard** and **Lukas Rusch** in Zurich

Counsel to Deutsche Telekom

- Bär & Karrer

Partner **Daniel Hochstrasser** and associates **Simone Burlet-Fuchs** and **Sarah Affolter** in Zurich

In the UNCITRAL arbitration

Tribunal

- **Gabrielle Kaufmann-Kohler** (Switzerland) (Chair)
- **Daniel M Price** (US) (nominated by Deutsche Telekom)

- **Brigitte Stern** (France) (nominated by India)

Counsel to Deutsche Telekom

- **Samuel Wordsworth QC** of Essex Court Chambers in London
- Freshfields Bruckhaus Deringer

Partner **Sylvia Noury** in London

- Platinum Partners

Partner **Karam Daulet Singh** in New Delhi

Counsel to India

- Curtis Mallet-Prevost Colt & Mosle

Partners **George Kahale** and **Benard Preziosi** in New York