Chapter 9
Corruption and Investment Treaty Arbitration in India

Prabhash Ranjan

Abstract There has been a stupendous expansion of investor–state dispute settlement (ISDS) cases involving foreign investors challenging sovereign state action as breaches of the investment treaty. This expansion has resulted in a wide range of non-investment concerns being brought before ISDS tribunals. One such non-investment concern is corruption. ISDS tribunals are increasingly required to deal with the allegation that the foreign investor was involved in corrupt activities in the host state while making or working on the investment. Against this global backdrop, this chapter looks at this issue in the Indian context. The chapter studies India's new investment treaty practice, which has developed in the last few years as a response to a large number of ISDS claims brought against India. India's new investment treaty practice has provisions aimed at dealing with foreign investors' corrupt practices, which is a step forward considering that India's old investment treaties didn't deal with corruption. However, there's a need to strengthen these provisions in a manner that would allow the host state to bring counter-claims against foreign investors. The chapter also discusses the case of *Devas v. India*, where India (mis)handled the issue of the alleged involvement of the investor in corruption.

9.1 Introduction

In recent times, there have been numerous instances where corruption has been an important issue in disputes between foreign investors and states in front of numerous investor–state dispute settlement (ISDS) tribunals.[1] ISDS tribunals have permitted host states to raise corruption as a ground for the denial of benefits to the foreign investor. For instance, in *Metal Tech v. Uzbekistan*, the tribunal held that since the investment was made through corrupt means, it has not been 'implemented in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made' as required by Article 1(1) of the bilateral investment treaty

P. Ranjan (✉)
Jindal Global Law School, O P Jindal Global University (JGU), Sonipat, India
e-mail: pranjan@jgu.edu.in
URL: https://jgu.edu.in/jgls/prof-dr-prabhash-ranjan/

N. Teramura et al. (eds.), *Corruption and Illegality in Asian Investment Arbitration*,
Asia in Transition 22, https://doi.org/10.1007/978-981-99-9303-1_9

(BIT).[2] The tribunal ruled that since the investment has not been made in compliance with the domestic laws of Uzbekistan, the tribunal has no jurisdiction over the dispute.[3] Additionally, questions have often arisen about whether investors can be held liable if they are involved in corrupt activities during the making or operation of their investments.[4]

Against this backdrop, this chapter examines the issue of corruption in India's international investment agreements, especially BITs where India has been trying to forge a new path since 2015, including a discussion of one key ISDS case where corruption has been an issue. Combating corruption is a major issue in India as the malaise of corruption has long affected the country. Transparency International ranks India 85 out of 180 countries in its Corruption Perception Index.[5] To fight against corruption, India has enacted several laws including the Prevention of Corruption Act,[6] the Prevention of Money Laundering Act,[7] the Black Money (Undisclosed Foreign Income and Assets) and the Imposition of Tax Act.[8]

The discussion in the chapter is organised as follows. Section 9.2 gives a brief overview of India's BIT programme. Section 9.3 discusses India's new investment treaty practice that includes issues related to fighting corruption under its ambit. Section 9.4 details the high-profile *Devas v. India* case, where corruption has been a major issue. Finally, Sect. 9.5 concludes by emphasising that India needs to ensure stronger corruption-related provisions in its investment treaty practice.

9.2 India's BIT Programme: Towards a Backlash[9]

India's BIT programme started in 1994 with the country signing the first BIT with the United Kingdom (UK). From 1994 until the end of 2010, India signed close to 80 BITs and some free trade agreements (FTAs) containing investment chapters.[10] BITs did not occupy a prominent place in India's economic narrative until the first publicly known BIT arbitral award was issued against India in a case known as *White Industries v. India*[11] where an ISDS tribunal found that India violated its obligations under the (then applicable) India–Australia BIT.[12] Subsequent to the White Industries award, several other foreign investors in 2012 and later brought BIT cases against India, challenging a wide range of measures such as the imposition of retroactive taxes,[13] revocation of spectrum licences,[14] actions of sub-national governments pertaining to withdrawing assurances offered to foreign investors,[15] and denial of refund of taxes.[16]

Due to the cumulative effect of these adverse BIT decisions and ISDS arbitration notices, India began the process of reviewing BITs and debating various aspects of them, which had not been deliberated upon earlier. These aspects included whether BITs have led to higher foreign investment inflows to India;[17] whether BITs encroach upon India's right to regulate in the public interest; whether BITs should contain ISDS provisions;[18] whether the treaty provisions in BITs are too vague and thus susceptible to overly broad interpretations by ISDS arbitral tribunals; and whether the ISDS system works in a transparent way.

The review of BITs led to three tangible outcomes. First, India adopted a new Model BIT in 2016.[19] Second, in the same year, India issued notices of BIT termination to 58 countries, including Australia.[20] After the expiry of the one-year notice period, these BITs ceased to exist from 2017. Since 2016, India has issued notices of termination to another 10 countries, making a total of 68 terminations.[21] Third, India has issued joint interpretative statements with some countries like Bangladesh, Colombia and Mauritius (often used as a conduit for investment into India), as discussed further below, to clarify the meaning of certain provisions in the BIT.[22]

In other words, the BIT claims against India did not trigger the exit of India from the BIT system. India is still a part of the system as evidenced by the fact that India has developed a new Model BIT, which even retains ISDS (albeit subject to many procedural limitations, as well as restricted substantive commitments).[23] Moreover, India wishes to renegotiate BITs with its former BIT partner countries based on the new Model BIT. India claims to be negotiating BITs with as many as 37 countries or blocs such as Switzerland, Argentina, Israel, Russia, Canada and Qatar.[24] However, since the adoption of the Model BIT, India has managed to sign only a few BITs based on the 2016 Model BIT, with countries like Belarus,[25] Taiwan[26] and the Kyrgyz Republic.[27] India has also entered a BIT with Brazil,[28] although this treaty is closer to the Brazilian Model BIT.[29] India, in 2021, decided to launch negotiations with the European Union for an investment protection agreement.[30] India is also negotiating an FTA with the EU.[31] India has kickstarted negotiations with the UK as well for an FTA that would include within its ambit provisions on investment protection.[32] In the last couple of years, India has signed FTAs with Mauritius, the United Arab Emirates and Australia, although these FTAs do not contain investment protection chapters.

The fact that India is negotiating BITs with 37 countries or blocs, but has only managed to sign treaties with just a handful, is significant. It reveals a limited engagement with BITs.[33] It also points to the fact that India's state-centric approach towards BITs is not acceptable to most of the country's negotiating partner countries. For instance, the EU is sceptical towards certain aspects of India's new BIT practice,[34] such as requiring foreign investors to exhaust local remedies for a minimum period of five years before approaching an ISDS tribunal.[35] Arguably, the approach that India is following on BITs can be called what Anthea Roberts and others refer to as 'de-legalisation of international economic law'—a process where countries redirect the decision-making process from 'international' to 'national' at two levels: rules and adjudication.[36] Thus, countries prefer to bind themselves to domestic rules and subject themselves to domestic adjudication in matters of foreign investment, at the cost of international law. Having briefly discussed India's BIT programme, let us now turn our attention to its investment treaty practice and its incorporation of corruption-related provisions.

9.3 India's Investment Treaty Practice

The BITs that India signed before the adoption of the Model BIT in 2016 contained nothing specifically on the issue of corruption. However, several Indian BITs contain a clause stating that investment has to be made in accordance with domestic law. This provision can be employed to argue that if an investment has been made using corrupt means, such investment will not enjoy treaty protection. A similar provision (Article 83.2) excludes ISDS protections for investments not made in compliance with host state laws under the 2011 FTA with Japan, which included, also in many of its treaties from around 2007 (including in that FTA, namely in Article 7), an obligation on host states to take measures against corruption.[37]

India's new investment treaty practice emerged from 2016 onward with a categorical mention of corruption. Before examining the Indian Model BIT and the subsequent Indian BITs, it will be useful to examine the draft Model BIT that India released for comments in early 2015.[38] This draft Model BIT was the precursor to the final Model BIT released in early 2016. Therefore, before understanding how the final Model BIT and the subsequent BITs that India signed deal with the issue of corruption, it will be apposite to look at the provisions in the draft Model BIT on corruption. Examining the draft Model BIT provision is also important because the final Model BIT differed from the draft, as will be explained in the chapter later.

In the draft Model BIT, provisions on corruption are included as part of Chap. III, which contains investor and home state obligations. Chapter III imposes various obligations on the investor with one of them being on corruption enshrined in Article 9 of the draft Model BIT provided as follows.

Article 9: Obligation against Corruption

9.1 Investors and their Investments in the Host State shall not, either prior to or after the establishment of an Investment, offer, promise, or give any undue pecuniary advantage, gratification or gift whatsoever, whether directly or indirectly, to a public servant or official of the Host State as an inducement or reward for doing or forbearing to do any official act or obtain or maintain other improper advantage.

9.2 Except as otherwise allowed under the Law of the Host State, Investors and their Investments shall not engage any individual or firm to intercede, facilitate or in any way recommend to any public servant or official of the Host State, whether officially or unofficially, the award of a contract or a particular right under the Law of the Host State to such Investors and their Investments by mechanisms such as payment of any amount or promise of payment of any amount to any such individual or firm in respect of any such intercession, facilitation or recommendation.

9.3 Investors and their Investments shall not make illegal contributions to candidates for public office or to political parties or to other political organisations. Any political contributions and disclosures of those contributions must fully comply with the Host State's Law.

9.4 Investors and their Investments shall not be complicit in any act described in this Article, including inciting, aiding, abetting, conspiring to commit, or authorizing such acts.

Thus, Article 9 imposes several obligations on foreign investors to ensure that they do not indulge in acts of corruption. Article 9.1 obligates the foreign investor not to offer, promise or give any undue pecuniary advantage, gratification or gift whatsoever, either directly or indirectly, to a public servant or to the officials of the host state as an inducement or reward for doing or forbearing to do any official act or obtain or maintain other improper advantages. This obligation extends to foreign investors both prior to and after making the investment. As the Law Commission of India (LCI) stated, in its 260th report where it studied the draft Model BIT,[39] these obligations on the investor are derived from India's domestic law contained in the Prevention of Corruption Act and from India's obligations under international law, such as those enshrined in the 2003 United Nations Convention Against Corruption.[40]

Article 9.2 bars foreign investors from engaging middlemen (individuals or firms) to intervene or negotiate on their behalf for some benefit in lieu of money or any other inducement. Thus, it is not just the investor who is specifically forbidden from paying bribes but any other person or firm endeavouring to intercede on behalf of the investor.

Article 9.3 bars foreign investors from making 'illegal' contributions to political parties or to candidates contesting for public office. 'Illegal' here means a contribution that is not consistent with the host state's laws. It is important to note that foreign investors are not barred from funding political parties or candidates in India.[41]

The obligation of the investor not to indulge in corruption can also be read as part of Article 12 of the draft Model BIT, which mandates the investor to comply with the laws of the host state.[42] Article 12 indicates the areas where the investor is required to comply with domestic laws, which includes taxation, labour, environmental and human rights law. Although there is no mention of anti-corruption laws in this list, the list is inclusive, and the foreign investor must comply with all domestic laws. Thus, a foreign investor in India will have to comply with Indian laws to combat corruption like the Prevention of Corruption Act and the Prevention of Money Laundering Act.

Article 9, along with other investor obligations, occurs in many places in the draft Model BIT as a condition precedent for the foreign investor to avail the rights guaranteed to foreign investors under the investment treaty. For example, Article 8.3 provides that compliance with Article 9, along with other investor obligations, is compulsory and fundamental to the operation of the treaty. Furthermore, Article 8.3 states that investors must comply with obligations imposed by Article 9, and other provisions given in Chap. III of the treaty, to benefit from the provisions of the BIT. Thus, if the investor is involved in acts of corruption, he or she will lose all the protection available under the BIT.

Likewise, Article 14.3(iii) of the draft Model BIT provides that in case the foreign investor wishes to submit a notice of the dispute to the state for an ISDS proceeding, in the notice, the investor, *inter alia*, will have to demonstrate compliance with Article 9 and other investor obligations.[43] It is not clear how the investor will show compliance with the obligation not to indulge in acts of corruption. Maybe the investor will have to file an affidavit or make a sworn declaration that he or she has not indulged in acts of corruption and that no corruption-related claims are pending against him or her in the host state. It is equally relevant to bear in mind that just because a foreign investor

is accused of corruption does not mean that the investor is involved in corruption and thus has breached Article 9 obligations. The allegations need to be proven in a court of law of the host state to conclusively determine whether the investor is involved in corruption or not.

Another place where Article 9 finds mention is Article 14.10(ii).[44] This article provides that a breach of Article 9 will also be considered by an ISDS tribunal while awarding any compensation to the foreign investor. However, this provision appears to contradict Article 8.3, which, as mentioned earlier, states that the failure of a foreign investor to comply with investor obligations including the ones enshrined in Article 9 will make him or her ineligible to avail of the benefits of the BIT. On this logic, if it is found that the foreign investor has indulged in acts of corruption, then he or she should not be entitled to any compensation because that is a benefit under the treaty. One way to resolve this apparent conflict is by interpreting Article 14.10(ii) to mean that the tribunal will take into account the fact that the investor has indulged in corrupt activities and accordingly grant no compensation. An alternative interpretation that could be offered to synchronise this apparent contradiction is that if the investor is involved in *de minimus* or minor corruption (especially during the performance rather than establishment phase) that will not take away all treaty rights of the investor but only reduce compensation or relief awarded.

A very interesting feature of the draft Model BIT was that it allowed the state to initiate a counterclaim against the foreign investor in case of breach of investor obligations contained in Chapter III including the obligation of not indulging in corruption.[45] In this regard, the state can seek a remedy such as suitable declaratory relief, enforcement action or monetary compensation.

Having discussed the draft Model BIT, let us turn our attention to the final Model BIT to understand whether the final version, on the issue of corruption, differs from the draft—and, if so, how.

9.3.1 Final Model BIT 2016

The final Model BIT that India adopted in 2016 scaled down several of the investor obligations in the sense that the obligations that the final Model BIT imposes are not as onerous as the ones that the draft Model BIT imposed. Chapter III of the 2016 Model BIT contains only two provisions on investor obligations (Article 11, which requires investors to comply with the laws of the host state, and Article 12, which imposes the obligation of corporate social responsibility or CSR) as against the many that the draft Model BIT contained including on the issue of corruption. In this section, we discuss the obligations imposed on the investor related to corruption, which has now become part of India's BITs signed with countries like Belarus, Kyrgyzstan, Taiwan and Brazil. It is interesting to note that the investor obligations on corruption in the final Model BIT are different from those in the draft Model BIT. Unlike the latter, which contained a separate provision imposing an obligation on the investor not to indulge in corruption, in the final Model BIT the same obligation is part of Article

11, which requires the investor to comply with domestic law. Specifically, Article 11(ii) of the Model BIT provides:

> Investors and their investments shall not, either prior to or after the establishment of an investment, offer, promise, or give any undue pecuniary advantage, gratification or gift whatsoever, whether directly or indirectly, to a public servant or official of a Party as an inducement or reward for doing or forbearing to do any official act or obtain or maintain other improper advantage nor shall be complicit in inciting, aiding, abetting, or conspiring to commit such acts.

An almost carbon copy of Article 11(ii) of the 2016 Indian Model BIT exists in India's BITs with Belarus [Article 11(ii)], Kyrgyzstan [Article 11(ii)], Taiwan [Article 11(b)] and Brazil [Article 11(b)]. Article 11(ii) of the Model BIT subsumes Articles 9 and 12 of the draft Model BIT. It mandates the investor not to pay bribes or indulge in others' acts of corruption.

Additionally, Article 12 of the Model BIT also talks about anti-corruption. Article 12 refers to CSR as:

> Investors and their enterprises operating within its territory of each Party shall endeavour to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles may address issues such as labour, the environment, human rights, community relations and anti-corruption.

A similar provision exists in India's BITs with Belarus,[46] Kyrgyzstan,[47] Taiwan[48] and Brazil.[49]

Thus, Article 12 of the Model BIT states that investors shall endeavour to voluntarily incorporate those standards of CSR that are internationally recognised in their internal policies. One of the issues that these principles may address is anti-corruption. The defining characteristic of Article 12 is that it is voluntary in nature and not binding. If an investor fails to incorporate or address principles related to anti-corruption as part of its internal policies and practices, that will not be a breach of Article 12. An important provision on anti-corruption present in the India–Brazil BIT—absent in India's BITs with Belarus, Kyrgyzstan and Taiwan—is that the former imposes an obligation on states as well to adopting measures to fight corruption and money laundering.[50]

The Model BIT also differs from the draft Model BIT on the issue of dealing with corruption in the following ways. First, the Model BIT has done away with the requirement imposed in Article 14.3(iii) of the draft Model BIT that required foreign investors to furnish a self-certified statement that they have complied with all the investor obligations such as having not indulged in acts of corruption while bringing an ISDS claim against the host state. Second, as against Article 14.11 of the draft Model BIT that allowed the host state to bring counterclaims against the investor, there is no provision in the final Model BIT to bring counterclaims against the investor.[51] The LCI had not recommended doing away with counterclaims. This might raise the question of how the investor obligations given in Articles 11 and 12 can be enforced.

In answering this question it would be pertinent to carefully look at footnote 4 to Article 26.3 of the final Model BIT. Article 26.3 provides: 'for the calculation of monetary damages, the tribunal shall also reduce the damages to take into account any restitution of property or repeal or modification of the measure, or other mitigating factors'. Then, it provides a footnote, which states that: mitigating factors can include, current and past use of the investment, the history of its acquisition and purpose, compensation received by the investor from other sources, any unremedied harm or damage that the investor has caused to the environment or local community or other relevant considerations regarding the need to balance public interest and the interests of the investor. A similar provision is present in India's BITs with Belarus,[52] Taiwan[53] and the Kyrgyz Republic.[54]

Scholars argue that the mitigating factors mentioned in the footnote would allow for the reintroduction of counterclaims through the back door.[55] As per footnote 4, the tribunal will have to consider mitigating factors while calculating monetary damages to be paid to foreign investors. Furthermore, footnote 4 gives wide discretion to the ISDS tribunal to determine mitigating factors.[56] Given the breadth of these factors, it would give opportunities to the host state to make submissions about any harm, say environmental harm, that the investor may have caused. Although involvement in corruption is not mentioned in footnote 4 as a mitigating factor, the broad nature of the factors would allow the state to bring counterclaims if the investor is involved in acts of corruption. This argument can be made since the investor has breached domestic laws or other obligations. Thus, in these Indian BITs, the host state could bring counterclaims against the foreign investor indirectly, not directly, for involvement in corruption.

9.3.2 Joint Interpretative Statement (JIS) on the India–Mauritius BIT

A very interesting development in India's investment treaty practice, as mentioned before, is the decision to sign JISs with countries to clarify the meaning of vague and indeterminate provisions in the BIT. In this regard, India signed a JIS with Bangladesh, Colombia and Mauritius. The JIS with Bangladesh and Colombia aims to spell out the meaning of terms like investment, investor, fair and equitable treatment provision and expropriation. Interestingly, India's JIS with Mauritius regarding the India–Mauritius BIT[57] is quite different from the one signed with Bangladesh and Colombia in two ways. First, as the article will show, the JIS with Mauritius only clarifies a handful of provisions in the India–Mauritius BIT, like the definition of investor, and thus is narrower in scope. Second, the JIS with Mauritius clarifies the terms of a treaty (India–Mauritius BIT), which entered into force on 20 June 2000 and had already been unilaterally terminated by India on 22 March 2017. In other words, the JIS with Mauritius is for an agreement that has ceased to exist. On the

other hand, India's JIS with Bangladesh and Colombia is for BITs that continue to exist.

It is important to recall that the India–Mauritius BIT has a sunset clause in Article 13(3),[58] which states that in the case of BIT termination the investments approved or made prior to the date of termination will enjoy the treaty protection for a period of ten years. Presumably, the JIS has been signed for investments that were already made before the date of termination of the BIT. Another related question (discussed further below) is whether the JIS will be valid for BIT disputes already raised, that is whether the JIS will have a retroactive effect or will only apply to new disputes with respect to old investments.

The JIS makes it clear that it shall be read with the agreement and shall form an integral part of the treaty. The JIS reaffirms the right of the host states to regulate investments in their territory in accordance with their domestic laws. The JIS also provides that an arbitration tribunal under the India–Mauritius BIT shall not have the jurisdiction to review the merits of a decision made by a domestic court of the host state.

Importantly, for the purposes of this chapter, the JIS is also aimed at combating corruption. Interestingly, India's JIS with Bangladesh and Colombia does not mention anything about corruption. Specifically, the JIS with Mauritius 'acknowledges that the protection under this agreement shall not be extended to investors or investments that have, concluded or pending, judicial or administrative proceedings against them at any stage, where fraud, money laundering, round-tipping or corruption or similar illegal mechanism have been alleged or being investigated into'.

The following points are important here. First, India and Mauritius, who did not say anything about corruption in the BIT signed in 1998, recognise that corruption is an important matter in investment treaty arbitration and that those investors who indulge in acts of corruption should not benefit from the BIT. Second, the treaty benefits can be denied to an investor in case of corruption. Third, to deny treaty benefits, it is not necessary that the charge of corruption against the investor or their investment be proven. A mere allegation of fraud or corruption is sufficient to rob the investor of the BIT's protective framework. This language is unduly harsh for foreign investors. It can be abused by the host state, which could merely allege corruption to ensure that the foreign investor is not able to bring an ISDS claim even in those situations where no corruption has been proven or established.

The JIS also states that an investor under the India–Mauritius BIT does not include persons or entities that are directly or indirectly, owned or controlled, by persons of a non-contracting party, that have been alleged to have indulged in fraud, money laundering, or corruption. Again, to deny treaty benefits what is needed is a mere allegation of corruption, not conclusive proof, or conviction by a court of law.

An important question that arises here is whether state parties can impede the effectiveness of a foreign investor's right to bring an ISDS claim against the host state.[59] An agreement like this means that after the treaty has come into force the home and the host state decide to impose certain limitations on the investor's right to bring claims against the host state. Since it is the states that create investors' rights, they are justified to curb these rights for reasons they collectively deem fit.

After having discussed India's new and emerging investment treaty practice on dealing with the issue of investors' involvement in acts of corruption, let us now turn our attention to a dispute involving a foreign investor and India where the investor purportedly was involved in acts of corruption.

9.4 The Devas Saga: An Act of Corruption?[60]

Corruption has been an issue in two BIT claims brought against India: *CC/Devas v. India*[61] and Germany's Deutsche Telekom (DT), one of the world's leading telecommunication companies which brought the second BIT claim against India due to the cancellation of the spectrum licences—*DT v. India*.[62] However, the interesting part is that the ISDS tribunal in these two cases did not deal with the issue of corruption because India did not raise it sufficiently. To comprehend this better, it is important to closely look at the key facts of the case.

9.4.1 Key Facts

In 2005, Antrix, the marketing arm of the government entity Indian Space Research Organisation (ISRO), signed an agreement with Devas, an Indian multimedia services provider. As per this agreement, Antrix leased to Devas the portion of the electromagnetic spectrum found at 2500–2690 MHz, also known as the S-band, on two satellites that were to be launched by ISRO.[63] The lease was for 12 years. The total amount of S-band capacity leased to Devas was 70 MHz.[64] Out of this 70 MHz of leased capacity, 60 MHz was the broadcast satellite services part and 10 MHz was the mobile satellite services part. The purpose behind leasing the S-band spectrum to Devas was to allow it to provide multimedia services to mobile users across India.[65]

Multiple foreign investors invested in the Devas-Antrix project. This included the three Mauritian investors who brought the *CC/Devas* claim[66] and the Germany-based Deutsche Telekom, one of the world's leading telecommunication companies, who brought the other ISDS claim. In 2006 and 2007, Mauritian investors made a combined investment of about USD30 million.[67] Likewise, in 2008 and 2009, Deutsche Telekom made an equity investment in Devas of USD75 million and USD22.5 million respectively.[68] Indian governmental bodies like the Foreign Investment Promotion Board gave due approval to these foreign investments.[69]

Soon Devas also secured the licences and necessary government approvals to deliver internet services throughout India.[70] As per the agreement between Devas and Antrix, the satellites were to be launched by June 2009. However, Antrix failed to meet the deadline but promised that the launch would happen by the end of 2009 or early 2010.[71] Notwithstanding these delays, the claimants continued meeting their financial obligations and other requirements like injecting fresh capital into the project.[72]

Two other developments took place in parallel. First, from 2005 to 2007, several public officials including senior military officers recommended reserving the S-band spectrum for military and strategic purposes.[73] Second, allegations of corruption against Indian space officials related to the leasing of the S-band to Devas started surfacing in the media.[74] The allegations made included giving the S-band spectrum at throwaway prices; Devas (a company that was 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 allegations that ISRO's serving officials colluded with Devas to facilitate a wrongful gain to the latter.

A committee was constituted to investigate the alleged irregularities in the deal. This committee submitted its report in 2010. It found the Devas system to be technically sound. Yet, the committee recommended that the agreement be revisited considering the limitations on the availability of the spectrum for essential future demands.[75] It is critical to underline that this committee recommended revisiting the agreement, not annulling it.

Meanwhile, allegations of corruption in the deal continued to appear in the media.[76] Subsequently, on 30 June 2010, the Indian Department of Space recommended the annulment of the Antrix–Devas agreement, which was accepted by the Indian Space Commission on 2 July 2010.[77] This decision to annul the contract was made public by the Indian government on 8 February 2011,[78] more than seven months after the decision for annulment was made. Finally, on 17 February 2011, the Cabinet Committee on Security[79] (CCS) annulled the Antrix–Devas agreement.[80] The reason offered was:

> taking note of the fact that Government policies with regard to allocation of the spectrum have undergone a change in the last few years and there has been 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, and having regard to the needs of the country's strategic requirements, the Government will not be able to provide orbit slot in S-band to Antrix for commercial activities, including for those which are the subject matter of existing contractual obligations for S-band. In the light of this policy of not providing orbit slot in S-Band to Antrix for commercial activities, the 'Agreement for the lease of space segment capacity on ISRO/Antrix S-Band spacecraft by Devas Multimedia Pvt. Ltd.' entered into between Antrix Corporation and Devas Multimedia Pvt. Ltd. on 28th January, 2005 shall be annulled forthwith.[81]

On 25 February 2011, Antrix notified Devas about the annulment of the contract due to a *force majeure* event.[82] Following the annulment of the agreement, Devas commenced arbitration against Antrix alleging that the sudden repudiation of the contract by Antrix breached Devas's rights. This arbitration was brought under the International Chamber of Commerce (ICC).[83] The ICC tribunal ruled in favour of Devas ordering Antrix to pay USD562.5 million as damages for wrongfully repudiating the contract.[84] A US district court, in late 2020, dismissing all the contentions of Antrix, confirmed the 2015 commercial arbitral award in favour of Devas.[85]

9.4.2 The BIT Claims Against India

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 two separate BIT claims against India under the India–Mauritius BIT and India–Germany BIT respectively for compensation for the balance of the lost investment, given that Devas would have obtained the benefit of the ICC award against Antrix.

India argued before the two BIT arbitration tribunals that it cancelled the deal because it needed the S-band satellite spectrum for national security purposes. Specifically, before the *CC/Devas* tribunal, India relied upon Article 11(3) of the India–Mauritius BIT, which provides: the 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. (Emphasis added) India argued that reserving the S-band satellite spectrum for the needs of defence and the para-military was aimed at protecting its 'essential security interest'. India also argued that the ISDS tribunal should not 'sit as a supranational regulatory or policy-making body to review the policy decisions of the Cabinet Committee on Security as national authorities are uniquely positioned to determine what constitutes a State's essential security interests in any particular circumstance and what measures should be adopted to safeguard those interests'.[86]

The ISDS tribunal did not agree with this argument that the determination of security interests was self-judging.[87] Nonetheless, the tribunal granted a wide margin of deference to India and agreed that the reservation of spectrum for the needs of defence and para-military 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.[88] However, the tribunal said that reacquiring spectrum for purposes like railways and other public utility services and societal needs does not qualify as essential security interests.[89]

The S-band satellite spectrum that India took for non-security purposes, that is to satisfy various societal needs, according to the *CC/Devas* tribunal, breached India's FET obligation towards the investor under the India–Mauritius BIT. The tribunal held that although India decided to annul the contract in July 2010, this decision was not relayed to the investors. The claimants learned about the abrogation of the agreement seven months later in February 2011 when it was publicly announced. For these seven months, the claimants were 'completely left in the dark' about the decision and the alleged growing needs of the military about the spectrum.[90] Consequently, the tribunal held that India's conduct constituted a clear breach of the simple good faith required under international law and the FET provision of the India–Mauritius BIT.[91] Thus, India had to compensate the claimants for damages suffered from 2 July 2010 to 17 February 2011, the date of the CCS decision.[92] Accordingly, the tribunal ordered India to pay USD160 million plus accrued interest as damages to *CC/Devas*.[93]

India raised the national security argument before the DT tribunal as well. It relied on Article 12 of the India–Germany BIT, which states that 'nothing 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*' (emphasis added). However, the DT tribunal, contrary to the *CC/Devas* tribunal, rejected India's argument. The DT tribunal distinguished 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, 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).[94] 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 clearly spelling out the actual purpose.[95] This reflected a lack of clarity and purpose behind reacquiring the S-band spectrum and thus the action was not necessary to accomplish essential security interests.

Moreover, 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 for almost four years, which, in turn, reinforces the point about a lack of clarity regarding the usage of the spectrum. Such a protracted debate corroborates the absence of any necessity because if the S-band spectrum had indeed been taken to meet the needs of the military and paramilitary, it should have been allocated for the same immediately, which was not the case.[96] After rejecting India's national security argument, the DT tribunal, like the *CC/Devas* tribunal, concluded that India breached the FET provision of the India–Germany BIT.[97] 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'.[98] The DT tribunal in its final award issued on 27 May 2020, ordered India to pay the investor damages of USD132 million.[99]

9.4.3 Failure to Raise the Argument of Fraud

In this entire episode, it is curious as to whether India raised the issue of Devas's fraudulent and corrupt practices before the two BIT arbitration tribunals. This contention is very important because the relevant BITs protect only those investments that have been made following the domestic laws of the host state. 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'. Likewise, 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 an express 'legality requirement', that is the BIT would only protect those investments that have been made in accordance with the laws of the host state or have been made lawfully. If an investment is vitiated by fraud or corruption, it would not be lawful and thus would not enjoy protection under such a BIT.[100]

What is perplexing is that India never raised the issue of fraud or corruption as a jurisdictional objection before the two BIT arbitration tribunals, despite the hearings of the two cases being conducted after the National Democratic Alliance (NDA) government came to power in 2014. The NDA government, on assuming office in 2014, launched criminal investigations into this case. In 2015, the Central Bureau of Investigation (CBI) registered the first investigation report against Devas and its officers under the Prevention of Corruption Act 1988. By then (in August 2014) the hearing on jurisdiction and merits in the *CC/Devas* case had commenced. CBI also filed a charge sheet in 2016 against several officials including ISRO's ex-chairman G. Madhavan Nair accusing them of wrongfully facilitating a gain of around USD67 million to Devas.[101] These officials were accused of committing various offences under the Indian Penal Code such as cheating and violating various provisions of the Prevention of Corruption Act 1998.[102] In early 2017, the Enforcement Directorate (ED) attached nearly USD9.7 million of Devas under the Prevention of Money Laundering Act.[103]

The award against India, as already discussed, was issued in July 2016. Likewise, the hearing and submissions on jurisdiction and liability in the DT case started in late 2014 going up to early 2016. The DT tribunal issued its award in March 2017.

One is unsure why India did not raise the argument of fraud and corruption before the BIT arbitration tribunals. Although there was no judicial ruling at that time corroborating the fraudulent incorporation of Devas, India had launched criminal investigations into the matter including a charge sheet that claimed fraud and corruption. A 2012 report by the Comptroller and Auditor General (CAG) 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.[104] Prima facie, there was adequate evidence that the incorporation of Devas was done for fraudulent purposes. Yet India did not plead the ongoing criminal investigations against Devas before the two tribunals; nor did it cite the CAG report. There could be several reasons for not raising the corruption argument. For example, it is possible that India might have thought that the evidence they have would not meet the standard of proof that the ISDS tribunal required. The lack of coordination between different government departments involved in the said ISDS claim could also be the reason.

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 since it was untimely. 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.[105] India made a similar request before the DT

tribunal in October 2016 after the hearing was over. The DT tribunal too rejected India's request because it was both mistimed and lacked merit.[106]

The Swiss Federal Supreme Court, where India unsuccessfully challenged the DT award, also said in its 2018 decision 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.[107]

Meanwhile, in 2021, the National Company Law Tribunal (NCLT), on a petition filed by Antrix, ordered the winding up of Devas because it held that the latter was incorporated in a fraudulent manner to carry out unlawful purposes. Thus, the NCLT held that Devas should be wound up on the ground of fraud under Sects. 271 and 272 of the Companies Act 2013. This decision of the NCLT was upheld by the National Company Law Appellate Tribunal (NCLAT). Finally, in January 2022, the Supreme Court of India upheld the NCLAT decision of winding up Devas.[108] The Supreme Court held that if 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.

9.4.4 Devas's Second BIT Arbitration

After the Supreme Court order, Devas issued a fresh notice of arbitration to India under the India–Mauritius BIT.[109] As already pointed out, India unilaterally terminated the BIT on 22 March 2017. However, as per Article 13(3) of BIT, in case of unilateral termination, the investment that was made before the termination will continue to enjoy treaty protection for the next ten years.

The new BIT claim essentially attempts to implicate India for its undue efforts to frustrate the enforcement of a commercial arbitration award that Devas had won against Antrix in 2015. Devas's principal claim then was that India had unlawfully expropriated its investment through the liquidation of Devas and its takeover by the liquidator, which, in turn, had not allowed the enforcement of the ICC award, which is Devas's largest asset. In another interesting development in August 2022, the Delhi High Court set aside the ICC award[110] in favour of Devas.[111] Since the Supreme Court of India had held that Devas was created for fraudulent purposes and that all the agreements, awards and so on were infected with the poison of fraud, the Delhi High Court ruled that the ICC award was against public policy and should be set aside.

Another interesting question is whether the new BIT arbitration will be affected by the July 2022 India–Mauritius JIS. The JIS is silent on whether it will be applied retroactively. In other words, will the JIS be applicable to BIT disputes that have

already been initiated? While countries have the sovereign right to adopt such JIS, a retroactive application of the same will be unfair as it will curtail the investor's right to bring ISDS claims without serving sufficient notice.[112] In this regard, the India–Mauritius BIT is different from other treaties that talk of joint interpretation. For instance, Article 24(2) of the Dutch Model BIT provides:

> A joint interpretative declaration adopted as result of consultations by the Contracting Parties shall be binding on a Tribunal established under Section 5 of this Agreement. Such joint interpretative declaration is not applicable in cases where a claim has been submitted by an investor under Section 5 of this Agreement.

Thus, the above language makes it clear that the joint interpretation of the treaty by its parties shall not be applicable to ongoing disputes. This proposition is fair because it respects the principle of 'equality of arms' by ensuring a fair balance between the opportunities available to both the investor and the host state to defend their positions in arbitration. Since the host state is a party to the dispute, it would be disingenuous to allow the host state to abuse its position as a party to the treaty to change the treaty once a claim has been brought.[113]

9.5 Conclusion

In the BITs that India signed in the 1990s and 2000s, corruption-related provisions did not feature prominently. This started to change with India's new investment treaty practice that was inaugurated by the 2016 Model BIT. Given the manner in which the issue of corruption has acquired prominence in international investment law debates in general and in ISDS in particular, this is a welcome development. As India endeavours to negotiate new investment treaties, there should be a strengthening of corruption-related provisions. Imposing obligations on the foreign investor not to indulge in corrupt acts should be strengthened by making it possible for the state to bring counterclaims against the foreign investor.

At the same time, it is important that India's investment treaty practice on corruption-related provisions should not be aimed at targeting a particular investor. The India–Mauritius JIS seems to be doing that by impeding the ability of Devas to bring a fresh BIT claim against India. Moreover, corruption-related provisions should not be abused by states to deny legitimate treaty protection to foreign investors. Thus, provisions that would curb the efficacy of investors' right to bring an ISDS claim just because there is an allegation of corruption will amount to an abuse of state power. This is especially so because often corruption allegations are levelled for political purposes such as fixing the politicians or political parties not in office.

The state should press the argument of corruption against the investor if the accusation has been proven or at least realistically alleged in a court of law or before a competent authority. This will at least give a certain degree of credibility to the corruption charge made against the investor. In the absence of a judicial decision or credible prosecution, it is quite possible that states might use 'corruption' as a

smokescreen to deflect from investors' allegations. It is also important to bear in mind that the Indian judiciary is too slow and getting a final decision on a corruption claim might be a time consuming process. Moreover, ISDS tribunals should apply higher standards of proof to corruption allegations—not just for procedural fairness reasons but also to give the corruption agency and courts the maximum opportunity to consider the evidence and merits of allegations. This is particularly important in developing countries where there is excessive pressure on such agencies and courts.[114]

Notes

1. Caprasse and Tecqmenne 2022, pp. 519–548 who observe that 'no less than thirty awards involving allegations of corruption have been rendered since 2010'.
2. ICSID 2013, para. 372.
3. ICSID 2013, para. 373.
4. Vijayvergia and Belmannu 2020, and Ishikawa 2022 reviewed at https://japaneselaw.sydney.edu.au/2023/01/corporate-environmental-responsibility-in-investor-state-dispute-settlement-by-tomoko-ishikawa/. See also Yan 2022 and Chap. 5 in this volume.
5. Transparency International 2023.
6. The Prevention of Corruption Act, 2008: https://legislative.gov.in/sites/default/files/A1988-49.pdf
7. The Prevention of Money Laundering Act, 2002: https://dea.gov.in/sites/default/files/moneylaunderingact.pdf
8. The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015: https://legislative.gov.in/sites/default/files/A2015-22.pdf.
9. See also Ranjan 2022a, b, pp. 112–125.
10. For a detailed study of India's BITs, see Ranjan 2019.
11. UNCTAD n.d.-k.
12. UNCTAD n.d.-k, para. 16.1.1 (a). See further Claxton et al. 2021.
13. UNCTAD n.d.-j; UNCTAD (n.d.-e). In 2021, partly in response to the loss in the ISDS cases challenging retroactive taxation, India amended its tax law to put an end to the imposition of retroactive taxes.
14. UNCTAD n.d.-f, Award on Jurisdiction and Merits, 25 July 2016; UNCTAD n.d.-g, Interim Award, 13 December 2017.
15. UNCTAD n.d.-i.
16. UNCTAD n.d.-h. See also Ranjan 2024. REFERENCE - Ranjan P (2024). *India and Investor-State Dispute Settlement: Affronting Sovereignty or Indicting Capriciousness. Routledge, London.*
17. Bhasin and Manocha 2016, p. 275; Singh 2021, pp. 287–313.
18. Bhattacharjee 2012.
19. Ministry of Finance 2016a. Also see Ranjan and Anand 2017, p. 1.
20. Department of Industrial Policy & Promotion 2016.
21. Ministry of External Affairs 2023.
22. See Department of Economic Affairs 2017.
23. Ranjan and Anand in Chaisse and Nottage 2018.
24. Committee on External Affairs 2021, pp. 8–9.
25. UNCTAD n.d.-a.
26. Bilateral Investment Agreement between the India Taipei Association in Taipei and the Taipei Economic and Cultural Center in India (India–Taiwan BIT) (adopted and entered into force 18 December 2018).

27. UNCTAD n.d.-c.
28. UNCTAD n.d.-b.
29. Moraes and Cavalcante 2021, pp. 304–318.
30. European Commission 2021.
31. European Commission 2021.
32. Department for International Trade 2022.
33. Kumar and Anchayil 2022.
34. See Chakraborty 2021.
35. See Ministry of Finance 2016a, Article 15.1.
36. Roberts et al. 2019, pp. 671–73.
37. See Chap. 11 in this volume.
38. Government of India, Ministry of Finance 2016b (hereinafter draft Model Indian BIT).
39. Law Commission of India 2015.
40. UNGA 2003.
41. The issue of foreign corporations funding political parties in India has been a major bone of contention. See Vaishnav 2019.
42. 'Article 12.1—Investors and their Investments shall be subject to and comply with the Law of the Host State. This includes, but is not limited to, the following:

    (i) Law concerning payment of wages and minimum wages, employment of contract labour, prohibition on child labour, special conditions of work, social security and benefit and insurance schemes applicable to employees;

    (ii) information sharing requirements of the Host State concerning the Investment in question and the corporate history and practices of the Investment or Investor, for purposes of decision making in relation to that Investment or for other purposes;

    (iii) environmental Law applicable to the Investment and its business operations;

    (iv) Law relating to conservation of natural resources;

    (v) Law relating to human rights;

    (vi) Law of consumer protection and fair competition; and

    (vii) relevant national and internationally accepted standards of corporate governance and accounting practices'.
43. 'Article 14.3(iii)—The Notice of Dispute shall:

    a. contain a self-certified statement (1) providing the name and address of the Investor and the Investment; (2) setting forth the legal and factual bases of the claim and the provisions of the Treaty alleged to have been violated; (3) demonstrating compliance with Article 14.3(i) and (ii); (4) demonstrating compliance with Articles 9, 10, 11 and 12 of this Treaty …'.
44. 'Article 14.10 (ii)—Subject to Article 14.11, a tribunal can only award monetary compensation for a breach of the obligations under Chapter II of the Treaty. In awarding any compensation under this Treaty, a tribunal constituted under this Article shall take into account any breach of the obligations contained in Articles 9, 10, 11 and 12 of Chapter III of this Treaty by the Investor and its Investment'.
45. 'Article 14.11(i)—A Party may initiate a counterclaim against the Investor or Investment for a breach of the obligations set out under Articles 9, 10, 11 and 12 of Chapter III of this Treaty before a tribunal established under this Article and seek as a remedy suitable declaratory relief, enforcement action or monetary compensation'.
46. India-Belarus BIT, Article 12.
47. India-Kyrgyz Republic BIT, Article 12.
48. India-Taiwan BIT, Article 12.
49. India-Brazil BIT, Article 12.2(f).
50. See Article 10.1 of the India-Brazil BIT—'Each Party shall adopt measures and make efforts to prevent and fight corruption, money laundering and terrorism financing with regard to matters covered by this Treaty, in accordance with its laws and regulations'.
51. Footnote 4 of the final model BIT arguably would allow counterclaims. This point is discussed later in the chapter.
52. See Article 26.3 of India-Belarus BIT, 2018.

53. See footnote 1 of Article 25.3 of the Bilateral Investment Agreement between the Indian Taipei Association in Taipei and The Taipei Economic and Cultural Center in India, 2018.
54. Footnote 4 to Article 26.3 of the India-Kyrgyzstan BIT.
55. Hepburn and Kabra 2017, pp. 98–99.
56. Hepburn and Kabra 2017, p. 99.
57. UNCTAD (n.d.-d).
58. Article 13(3) of the India-Mauritius BIT: 'In respect of investments approved and/or made prior to the date the notice of termination of this Agreement becomes effective, the provisions of the proceeding articles shall remain in force with respect to such investments for a further period of ten years from that date or for any longer period as provided for or agreed upon in the relevant contract or approval granted to the investor'.
59. Burch et al. 2012, p. 1035.
60. This part draws from Ranjan 2022a, b.
61. UNCTAD (n.d.-f).
62. UNCTAD (n.d.-g).
63. UNCTAD (n.d.-g), para. 59.
64. Ibid.
65. UNCTAD (n.d.-f).
66. These three Mauritius investors are CC/Devas (Mauritius) Ltd. (CC/Devas), Devas Employees Mauritius Private Limited (DEMPL) and Telcom Devas Mauritius Limited (Telcom Devas).
67. UNCTAD (n.d.-f), paras. 107 and 108.
68. UNCTAD (n.d.-g), paras. 69 and 70.
69. UNCTAD (n.d.-f), para. 200; UNCTAD (n.d.-g), para. 178.
70. UNCTAD (n.d.-f), para. 109.
71. UNCTAD (n.d.-f), para. 110.
72. Ibid., para. 111.
73. UNCTAD n.d.-g, para. 72.
74. Ibid., paras. 71, 76.
75. Ibid., para. 77.
76. Ibid., para. 78.
77. UNCTAD n.d.-g, para. 82; UNCTAD n.d.-f, para. 468.
78. UNCTAD n.d.-f, para. 142; UNCTAD n.d.-g, para. 86.
79. CCS is a select cabinet committee that, among other matters, deals with all defence-related issues and comprises the Prime Minister, the Minister of Home Affairs, the Minister of External Affairs, the Minister of Finance and the Minister of Defence of the Indian government.
80. Press Information Bureau 2011.
81. Ibid.
82. UNCTAD n.d.-g, para. 92.
83. *Devas Multimedia Private Limited v. Antrix Corporation Limited*, ICC Case No. 18051/CYK, Final Award—14 September 2015. https://jusmundi.com/en/document/decision/en-devas-multimedia-private-limited-v-antrix-corporation-limited-award-monday-14th-september-2015, accessed 17 June 2023.
84. Ibid.
85. *Devas Multimedia Private Limited v. Antrix Corporation Limited*, ICC Case No. 18051/CYK, Judgment of the United States District Court for the Western District of Washington at Seattle—4 November 2020. https://jusmundi.com/en/document/decision/en-devas-multimedia-private-limited-v-antrix-corporation-limited-judgment-of-the-united-states-district-court-for-the-western-district-of-washington-at-seattle-wednesday-4th-november-2020#decision_14552, accessed 17 June 2023. See also Ranjan 2024
86. UNCTAD n.d.-f, para. 214.
87. Ibid., para. 219.
88. Ibid., para. 354.

89. UNCTAD n.d.-f.
90. UNCTAD n.d.-f, para. 468. Also see UNCTAD n.d.-g, para. 388.
91. UNCTAD n.d.-f, para. 470.
92. UNCTAD n.d.-f.
93. UNCTAD n.d.-f, Award on Quantum, 13 October 2020.
94. Ibid., para. 288.
95. UNCTAD n.d.-g, para. 286.
96. Ibid., para. 288.
97. Ibid., para. 390.
98. Ibid., para. 363.
99. UNCTAD n.d.-g, Petition to Recognize and Confirm Foreign Arbitral Award, United States District Court, District of Columbia, 19 April 2021, para. 5. https://jusmundi.com/en/document/other/en-deutsche-telekom-ag-v-the-republic-of-india-petition-to-recognize-and-confirm-foreign-arbitral-award-monday-19th-april-2021, accessed 17 June 2023.
100. The situation is less clear without an express legality provision. (See, with comparative analysis of the pervasiveness of explicit provisions in treaties of some Asian states, the concluding Chap. 16 in this volume).
101. PTI 2016. See also Ranjan 2024.
102. PTI 2016.
103. Ians 2017.
104. Comptroller and Auditor General of India 2012.
105. UNCTAD n.d.-f, Procedural Order No. 7, December 21, 2016, https://jusmundi.com/fr/document/other/en-cc-devas-mauritius-ltd-devas-employees-mauritius-private-limited-and-telcom-devas-mauritius-limited-v-republic-of-india-procedural-order-no-7-wednesday-21st-december-2016#other_document_7440, accessed 17 June 2023.
106. UNCTAD n.d.-g, paras. 115–119.
107. Judgement of Swiss Federal Court, 11 December 2018 https://www.italaw.com/sites/default/files/case-documents/italaw10304_0.pdf. See also Anand 2021.
108. UNCTAD n.d.-f, Judgment of the Supreme Court of India, 17 January 2022. https://main.sci.gov.in/supremecourt/2021/22244/22244_2021_41_1501_32547_Judgement_17-Jan-2022.pdf
109. Sanderson 2022. See also Ranjan 2024
110. Fali S. Nariman, India's most distinguished jurist, argues that 'Indian courts' traditional attitude towards arbitration had been indulgent and paternalistic'. See Nariman 2009, p. 367.
111. UNCTAD n.d.-f, Judgement of the Delhi High Court, 29 August 2022. https://www.livelaw.in/pdf_upload/antrix-vs-dewas-delhi-hc-432713.pdf.
112. For more on this see Burch et al. 2012, p. 1013.
113. See also Titi 2020.
114. See further Chap. 15 in this volume.

References

Anand, P. (2021) Antrix-Devas, BIT Arbitrations, and India's Quixotic Approach. The Wire, 31 May 2021. https://thewire.in/business/antrix-devas-bit-arbitrations-isro-india-nclt

Bhasin, N. and R. Manocha (2016) Do Bilateral Investment Treaties Promote FDI Inflows? Evidence from India. *Vikalpa: The Journal for Decision Makers* 41 (4): 275–287

Bhattacharjee, S. (2012) India Seeks Treaty Revision to Deal with Corporate Suits. The Indian Express, 4 April 2012. http://archive.indianexpress.com/news/india-seeks-treaty-revisions-to-deal-with-corporate-suits/932195/

Burch, M. et al. (2012) Appropriate Treaty-Based Dispute Resolution for Asia-Pacific Commerce in the 21st Century. *UNSW Journal* 35 (3): 1013–1043

Caprasse, O. and M. Tecqmenne (2022) The Evidence of Corruption in Investment Arbitration. *Journal of International Arbitration* 39 (4): 519–548

Chakraborty, S. (2021) The EU May Finally Be Ready for an Independent Investment Deal with India. Money Control, 20 October 2021. https://www.moneycontrol.com/news/business/economy/the-eu-may-finally-be-ready-for-an-independent-investment-deal-with-india-7602681.html

Claxton, J. et al. (2021) Mandatory Investor-State Conciliation Before Arbitration in Asia-Pacific Treaties: New Developments and Implications for India and Australia. *Indian Journal of International Economic Law* 13: 209–217 (via https://ijiel.in/)

Committee on External Affairs (2021) India and Bilateral Investment Treaties Tenth Report. Government of India, Ministry of External Affairs. http://164.100.47.193/lsscommittee/External%20Affairs/17_External_Affairs_10.pdf

Comptroller and Auditor General of India (2012) Report of the Comptroller and Auditor General of India on Hybrid Satellite Digital Multimedia Broadcasting Service Agreement with Devas, Union Government. https://cag.gov.in/webroot/uploads/download_audit_report/2012/Union_Compliance_Scientic_Department_Multimedia_Broadcasting_Service_4_2012.pdf

Department for International Trade (2022) UK-India Free Trade Agreement: The UK's Strategic Approach. Government of United Kingdom, January 2022. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1046839/uk-india-free-trade-agreement-the-uks-strategic-approach.pdf

Department of Economic Affairs (2017) Joint Interpretative Notes on the Agreement between the Government of the Republic of India and the Government of the People's Republic of Bangladesh for the Promotion and Protection of Investments. Government of India, Ministry of Finance, 4 October 2017. https://dea.gov.in/sites/default/files/JIN%20with%20Bangladesh.pdf

Department of Industrial Policy & Promotion (2016) Lok Sabha Unstarred Question No. 1290. Government of India, Ministry of Commerce & Industry, 25 July 2016. http://164.100.47.190/loksabhaquestions/annex/9/AU1290.pdf

European Commission (2021) Countries and Regions: India. 10 September 2021. https://ec.europa.eu/trade/policy/countries-and-regions/countries/india/

Hepburn, J. and R. Kabra (2017) India's New Model Investment Treaty: Fit for Purpose? *Indian Law Review* 1 (2): 95–114

Ians (2017) ED Attaches Rs 80 Crore of Devas in Antrix Deal. The Business Standard, 28 February 2017. https://www.business-standard.com/article/news-ians/ed-attaches-rs-80-crore-of-devas-in-antrix-deal-117022801000_1.html

ICSID (2013) Case Details: Metal-Tech Ltd. v. Republic of Uzbekistan (ICSID Case No. ARB/10/3). https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/10/3. Accessed 17 June 2023

Ishikawa, T. (2022) *Corporate Environmental Responsibility in Investor-State Dispute Settlement: The Unexhausted Potential of Current Mechanisms.* Cambridge University Press, Cambridge

Kumar, A. and A. Anchayil (2022) Keeping a Distance: India's Approach towards Investment Treaties, 20 October 2022. https://arbitrationblog.kluwerarbitration.com/2022/10/20/keeping-a-distance-indias-approach-towards-investment-treaties/

Law Commission of India (2015) Report No. 260, Analysis of the 2015 Draft Model Indian Bilateral Investment Treaty. https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081624.pdf

Ministry of External Affairs (2023) Rajya Sabha Unstarred Question No. 1837. Government of India, 16 March 2023. https://pqars.nic.in/annex/259/AU1837.pdf

Ministry of Finance (2016a) Model Text for the Indian Bilateral Investment Treaty. Government of India. https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf

Ministry of Finance (2016b) Draft Model Text for the Indian Bilateral Investment Treaty. Government of India. https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf

Moraes, H.C. and P.M. Cavalcante (2021) The Brazil-India Investment Co-operation and Facilitation Treaty: Giving Concrete Meaning to the 'Right to Regulate in Investment Treaty Making'. *ICSID Review - Foreign Investment Law Journal* 36 (2): 304–318

Nariman, F.S. (2009) India and International Arbitration. *George Washington International Law Review* 41 (2): 367–379

Press Information Bureau (2011) CCS Decides to Annul Antrix-Devas Deal. Government of India, 17 February 2011. http://pib.nic.in/newsite/PrintRelease.aspx?relid=69856

PTI (2016) CBI Files Chargesheet in Antrix-Devas Deal, Names Ex-ISRO Chief Madhavan Nair. The Deccan Herald, 11 August 2016 https://www.deccanherald.com/content/563784/cbi-files-chargesheet-antrix-devas.html

Ranjan, P. (2019) *India and Bilateral Investment Treaties*. Oxford University Press, Oxford

Ranjan, P. (2022a) Devas v. Antrix: Lessons for India in Navigating Bilateral Investment Treaty Disputes. ORF Issue Brief No. 537 Observer Research Foundation. https://www.orfonline.org/research/devas-v-antrix/

Ranjan, P. (2022b) The Future of India's Investment Treaty Practice: An Important Parliamentary Intervention. *Manchester Journal of International Economic Law* 19 (1): 112–125

Ranjan, P. and P. Anand (2017) The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction. *Northwestern Journal of International Law and Business* 38 (1): 1–54

Ranjan, P. and P. Anand (2018) Investor State Dispute Settlement in the 2016 Indian Model Bilateral Investment Treaty: Does It Go Too Far? In: Chaisse J, Nottage L (eds) *International Investment Treaties and Arbitration Across Asia.* Brill, Leiden, pp 579–611. https://doi.org/10.1163/9789004360105_020

Roberts, A. et al. (2019) Toward a Geoeconomic Order in International Trade and Investment. *Journal of International Economic Law* 22 (4): 655–676

Sanderson, C. (2022) Devas Investors Launch New Claim Against India, Global Arbitration Review, 3 February 2022. https://globalarbitrationreview.com/devas-investors-launch-new-claim-against-india

Singh, J. (2021) 'Indian Investment Treaty and Arbitration Practice: Qualitatively and Quantitatively Assessing Recent Developments'. In: L. Nottage et al. (eds) *New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution.* Wolters Kluwer, Alphen aan den Rijn, pp 287–313

Titi, C. (2020) The Timing of Treaty Party Interpretations. EJIL: Talk!, 18 August 2020. https://www.ejiltalk.org/the-timing-of-treaty-party-interpretations/

Transparency International (2023) Corruption Perception Index 2022. https://www.transparency.org/en/countries/india

UNCTAD (n.d.-a) International Investment Agreements Navigator: Belarus - India BIT 2018. https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3839/belarus---india-bit-2018. Accessed 17 June 2023

UNCTAD (n.d.-b) International Investment Agreements Navigator: Brazil - India Investment Cooperation and Facilitation Treaty 2020. https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/4910/brazil---india-bit-2020. Accessed 17 June 2023

UNCTAD (n.d.-c) International Investment Agreements Navigator: India - Kyrgyzstan BIT 2019. https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/4909/india---kyrgyzstan-bit-2019. Accessed 17 June 2023

UNCTAD (n.d.-d) International Investment Agreements Navigator: India- Mauritius BIT 1998. https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/1932/india---mauritius-bit-1998. Accessed 17 June 2023

UNCTAD (n.d.-e) Investment Dispute Settlement Navigator: Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Government of India, PCA Case No. 2016–7, Award, 21 December 2020. https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/691/cairn-v-india. Accessed 17 June 2023

UNCTAD (n.d.-f) Investment Dispute Settlement Navigator: CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telecom Devas Mauritius Limited v. Republic of India, PCA Case No 2013–09, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/484/devas-v-india-i. Accessed 17 June 2023

UNCTAD (n.d.-g) Investment Dispute Settlement Navigator: Deutsche Telekom AG v. Republic of India, PCA Case No. 2014–10. https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/550/deutsche-telekom-v-india. Accessed 17 June 2023

UNCTAD (n.d.-h) Investment Dispute Settlement Navigator: Nissan Motor Company Ltd. (Japan) v. The Republic of India, PCA Case No. 2017–37, Decision on Jurisdiction, 29 April 2019. https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/828/nissan-v-india. Accessed 17 June 2023

UNCTAD (n.d.-i) Investment Dispute Settlement Navigator: Ras-AI-Khaimah Investment Authority (RAKIA) v. India, Award dated 11 May 2022. http://investmentpolicyhub.unctad.org/ISDS/Details/767. Accessed 17 June 2023

UNCTAD (n.d.-j) Investment Dispute Settlement Navigator: Vodafone International Holdings BV v. Government of India [I], PCA Case No. 2016–35. https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/581/vodafone-v-india-i-. Accessed 17 June 2023

UNCTAD (n.d.-k) Investment Dispute Settlement Navigator: White Industries Australia Limited v. Republic of India, UNCITRAL, Final Award, 30 November 2011. https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/378/white-industries-v-india. Accessed 17 June 2023

UNGA (2003) United Nations Convention Against Corruption (2003) 31 October 2003, A/58/422

Vaishnav, M. (2019) Political Finance in India: Déjà Vu All Over Again. Carnegie Endowment for International Peace, 31 January 2019. https://carnegieendowment.org/2019/01/31/political-finance-in-india-d-j-vu-all-over-again-pub-78280

Vijayvergia, C. and P. Belmannu (2020) Exploring the Prospects of Host-State Counterclaims in Corruption Disputes. *Arbitration International* 36 (4): 583–600. https://doi.org/10.1093/arbint/aiaa041

Yan, Y. (2022) The Inclusion of Anti-Corruption Clauses in International Investment Agreements and Its Possible Systemic Implications. *Asian Journal of WTO and International Health Law and Policy* 17 (1): 141–173

Prabhash Ranjan is a Professor and Vice Dean at the Jindal Global Law School, O P Jindal Global University (JGU). He holds a PhD in law from King's College London and is a recipient of the British Chevening Scholarship. Prabhash teaches and publishes in the area of international investment law and international trade law. He has been a Visiting Scholar at Brookings India and a Visiting Fellow at the Lauterpacht Centre for International Law, Cambridge University. He was a member of the team that drafted the 260th report of the Law Commission of India on the 2015 draft model Indian bilateral investment treaty.