Sovereign Immunity and the Enforcement of Investor–State Arbitration Awards: Lessons from Devas V. India in Australia, The United Kingdom and India

Written by Samhith Malladi, Dual-qualified lawyer (India and England & Wales), and Senior Associate, Shardul Amarchand Mangaldas [Bombay office]; and Niyati Gandhi, Partner, Dispute Resolution, Shardul Amarchand Mangaldas [Bombay office]

The Recalibration of Enforcement Doctrine

The global campaign to enforce arbitral awards against the Republic of India arising from its long-running dispute with Devas Multimedia has witnessed a significant doctrinal shift in the treatment of sovereign immunity within the enforcement of investor–state dispute settlement (**ISDS**) awards.

To recall, the dispute arises from a contract entered in 2005 between Devas Multimedia Private Limited (**Devas**) and the Indian state-owned Antrix Corporation (**Antrix**), which was the commercial arm of the Indian Space Research Organisation. Antrix had agreed to lease S-band spectrum to Devas to broadcast its multimedia services in India. Antrix terminated this contract in 2011 citing national security concerns. In a nutshell, the dispute spawned three concluded arbitrations – a commercial ICC arbitration between Devas and Antrix and two investor-state arbitrations between Devas' shareholders and India under the India-Mauritius Bilateral Investment Treaty (**BIT**) 1998 and the India-Germany BIT 1995. In 2022, Devas' Mauritian shareholders commenced another investor-state arbitration against India under the India-Mauritius BIT in relation to India's efforts to thwart the award against Antrix in the ICC arbitration, which currently remains pending before the Permanent Court of Arbitration. An overview of the various proceedings arising from this dispute has been previously

discussed on this blog here.

Devas and its shareholders won favourable awards in all three concluded arbitrations. Since then, Devas and its shareholders have commenced enforcement proceedings in several jurisdictions across the world. Recent judgments from courts in the United Kingdom and Australia – arising from the Mauritian shareholders' attempts to enforce the favourable ISDS award in various jurisdictions – have not only reaffirmed the centrality of sovereign immunity in enforcement proceedings but have also echoed the analytical approach to assessing the enforceability of ISDS awards adopted by Indian courts. This post situates the UK and Australian judgments within the broader trajectory of Indian jurisprudence and considers the implications for the future of ISDS enforcement.

Early Presumption in Favour of Enforcement of Arbitral Awards

The early efforts by Devas' investors to enforce an ISDS award against India were successful in overcoming India's defence based on sovereign immunity. In *Deutsche Telekom v. India*, German investors in Devas won a favourable ISDS award in a Geneva-seated UNCITRAL arbitration against India for compensation in 2020. Thereafter, aside from successfully resisting India's efforts to set aside the award in the seat courts in Switzerland, the investors have been successful in having the award recognised as enforceable in the US, Singapore and Germany under the New York Convention 1958 (**NYC**).

The observations of a US Court in 2024 while enforcing the award are illustrative of a presumption in favour of the enforcement of ISDS awards. The US Court rejected India's claim to sovereign immunity under the Foreign Sovereign Immunities Act 1976 (**FSIA**) on the basis of the "*arbitration exception*" in the FSIA. The court held that India could not claim immunity given that it had agreed to arbitrate under the India-Germany BIT in accordance with the UNCITRAL Rules. Tellingly, the US Court proclaimed "*Enough is Enough!*". The approach of the US court, enforcing the award under the New York Convention, is reflective of the restrictive theory of sovereign immunity, which limits a state's immunity from lawsuits in foreign courts to acts of a private nature, such as commercial activities, while preserving immunity for acts performed in its sovereign capacity. This theory acknowledges that states often engage in commercial activities and should be held accountable like private entities in those contexts.

At the time of these enforcement efforts, there was no discussion of India's commercial reservation to the NYC and whether the dispute before an ISDS tribunal is considered "*commercial*" under Indian law. India's reservation to the NYC states: "*India will apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law.*" India is not the only state to have made such a reservation to NYC, and not the only State refused this defence. In *Zhongshan Fucheng Industrial Investment Co. Ltd v Nigeria* 112 F.4th 1054 (D.C. Cir. 2024), a Chinese investor sought to enforce an award against Nigeria under the China-Nigeria BIT before a US court. The US has adopted a commercial reservation under the NYC. Nigeria sought to resist enforcement of the award on the ground that the dispute arose out of a relationship that was not commercial in nature. The court disagreed and adopted a broad interpretation of the word "*commercial*", observing that the BIT itself was signed to promote commerce and the dispute did not need to arise from a contract in order to be commercial.

However, as discussed below, in recent enforcement attempts against India, India's arguments on the question of whether ISDS awards were "*commercial*" in nature and fell within the scope of this reservation have been assessed in new light. Courts in Australia and the UK have in recent judgments accepted the renvoi to Indian law's characterisation of enforceable "*commercial*" awards as not including ISDS awards.

Australia: Treaty Reservations and Domestic Legal Classification

As discussed here, the Full Federal Court of Australia's decision in *Republic of India v. CCDM Holdings, LLC* [2025] FCAFC 2 illustrates the growing judicial circumspection in enforcement proceedings against sovereign states. The court reversed the prior decision in the first instance by the Federal Court, where the court had enforced the award against India. The court of first instance had concluded that India was not immune under the Australian Foreign States Immunities Act 1985 (**Australian FSIA**) as it had waived its sovereign immunity by ratifying the NYC. The court had not been convinced of the impact of India's commercial reservation to the NYC, noting that enforcement was sought in Australia and Australia had not made any such commercial reservation.

The Full Federal Court disagreed with the reasoning of the court of first instance. Applying the Vienna Convention on the Law of Treaties, 1969, the court noted

that the commercial reservation had modified the relationship between India and other NYC contracting states as regards the obligation to enforce foreign awards in Article III of the NYC. Given that it applied, the court concluded that the arbitral award related to a dispute as to rights under public international law – which was different from a "*commercial*" dispute. This was reinforced by the fact that the termination of the contract with Devas had arisen from "*public policy*" concerns, which were again not commercial in nature.

The Australian court's willingness to defer to India's own legal characterisation of the transaction underscores the significance of domestic law in the enforcement calculus. The decision demonstrates that, even in the presence of an otherwise valid arbitral award, the classification of the underlying relationship and the scope of the respondent state's reservations can decisively shape the outcome of enforcement proceedings under the NYC.

United Kingdom: Consent to Arbitrate Is Not Consent to Enforce

The English Commercial Court's decision in *CC/Devas et al. v Republic of India* [2025] EWHC 964 (Comm) continued the trend of upholding sovereign immunity as a bar to enforcement of ISDS awards against a country that has made a commercial reservation under the NYC. Devas argued that India's ratification of the NYC constituted a waiver of sovereign immunity under the UK's State Immunity Act 1978 (**SIA**). India took the position that there was no such waiver because of the limited scope of the NYC and the commercial reservation that India made when ratifying the NYC.

The court was not convinced that India's ratification of the NYC was sufficient evidence of a "*prior written agreement*" under Section 2(2) of the SIA. The court observed that the drafters of the NYC had not intended to preclude the ability of states to assert their sovereign immunity in enforcement proceedings. A crucial cog in his analysis was that Article III of the NYC directs contracting states to recognise foreign arbitral awards as binding and "*enforce them in accordance in accordance with the rules of procedure of the territory where the award is relied upon …*", which preserved states' sovereign immunity "*in its own terms*". He concluded that the ratification of the NYC was in and of itself insufficient to constitute waiver in accordance with English law. Finally, on India's commercial reservation to the NYC, the court accepted that while under English law the dispute could be termed "*commercial*", it could not be assumed that this was

necessarily the case under Indian law. The court did not go much further except for noting that the claimants had not advanced a case under Indian law on what constituted a "*commercial*" dispute. The court simply concluded that "*on appeal, the Full Federal Court of Australia has decided this issue in favour of India, which must carry considerable weight in this jurisdiction*" (para 98).

At the end of the judgment, the court clarified that its conclusion was "*not intended to contradict in any way the enforcement friendly aspect of the NYC, which is its purpose, and the reason for its success, and which has been consistently upheld in the English courts … It simply recognises that international jurisprudence, which holds that '… state immunity occupies an important place in international law and international relations', also has to be taken into account in deciding the narrow, but important, issue of whether a state has by treaty given its consent to waive that immunity*" (para 108). The Court's closing remark suggests that while the enforcement of foreign arbitral awards continued to be the guiding principle of the NYC, it must co-exist with the domestic procedural law of the enforcing state, particularly on an issue as fundamental as sovereign immunity.

This judgment reinforces the principle that sovereign immunity is not a mere procedural hurdle but a fundamental organising principle of enforcement. The NYC, while facilitating recognition of arbitral awards, does not itself override the statutory requirements for waiver of immunity under domestic law. The English court's insistence on explicit and unambiguous consent places the burden squarely on investors to secure such waivers at the outset.

Comparative Analysis: Convergence and Doctrinal Resonance

The recent UK and Australian judgments represent a deference to domestic law treatment of awards and the fundamental nature of sovereign immunity as a boundary as central pillars of judicial reasoning. The judgments have the potential to be the inflection points towards a global trend in which the enforceability of investor–state awards is increasingly contingent upon the precise contours of state consent, both at the treaty-drafting stage and in domestic statutory frameworks.

Historical Approach of Indian Courts

The analytical approach now being adopted in the UK and Australia seems to

mirror the jurisprudence of Indian courts, which have not treated ISDS awards as enforceable under the New York Convention, and thus the Indian Arbitration and Conciliation Act, 1996.

Section 44 of the Indian Arbitration and Conciliation Act, 1996 is a unique statutory expression of India's emphasis on sovereign choice when enforcing arbitral awards. Section 44 enforces only those awards that are considered as "*commercial under the law in force in India*", rendered pursuant to the NYC and are made in a territory notified by the Central Government. Indian courts have scrutinized when an international arbitration award can be considered "*commercial*" in nature. In *Union of India v. Khaitan Holdings (Mauritius) Limited & Ors.* [CS (OS) 46/2019 I.As. 1235/2019 & 1238/2019 dated January 29, 2019] (**Khaitan Holdings**), India requested the Delhi High Court to issue an anti-arbitration injunction against a BIT arbitration commenced against India by Khaitan Holdings under the India-Mauritius BIT 1998. The court observed that the Arbitration and Conciliation Act (Part II of which incorporates the New York Convention and the Model Law) did not apply to BIT arbitrations, which were different in nature from "*commercial*" arbitrations given they also involved questions of public international law. The Delhi High Court's decision in Khaitan Holdings echoed its previous decision along similar lines in *Union of India v. Vodafone Group Plc* [AIR Online 2018 Del 1656].

To be clear, neither the US nor the Australian courts have considered or relied on these decisions.

India's Recent Treaty Practice

Recognising the limitations of the existing enforcement paradigm, India has begun to address these concerns proactively in its treaty practice. The India–UAE Bilateral Investment Treaty (2023) includes an express waiver of immunity from both jurisdiction and execution in respect of disputes submitted to arbitration under the treaty. In a chapter aptly titled "Finality and enforcement of awards", the India-UAE BIT's Article 28.4 states that: "*Each Party shall provide for the enforcement of an award in its Territory in accordance with its Law. For the avoidance of doubt, this Article 28.4 shall not prevent the enforcement of an award in accordance with* [the] *New York Convention.*" Following Article 27.5 of the India's Model BIT (2016), Article 28.5 clarifies that: "*A claim that is submitted to arbitration … shall be considered to arise out of a commercial relationship or*

transaction for purposes of Article I of the New York Convention." Similar language inspired by the Model BIT has been incorporated into Article 29.5 of the recently ratified India-Uzbekistan BIT 2024.

As such, if an ISDS dispute were to arise from an investment made pursuant to these BITs, India has committed to not resist an eventual award's enforcement as it has done in the various Devas award enforcement actions around the world. This development marks a significant departure from India's historical approach and signals an emerging consensus that enforcement concerns must be resolved at the outset, rather than left to the uncertainties of enforcement litigation.

Conclusion: Sovereignty as the Organising Principle of Enforcement

The Devas enforcement saga has brought into sharp relief the centrality of sovereign immunity in the enforcement of investor–state arbitral awards. The doctrinal evolution witnessed in the UK and Australia is not a departure from established principles but a reaffirmation of the analytical approach long adopted by Indian courts. As the global legal community grapples with the challenges of ISDS enforcement, the future effectiveness of arbitral awards will depend less on the reasoning of arbitral tribunals and more on the clarity with which states define—and limit—their consent to enforcement, both in domestic law and in treaty practice. It will be important to watch this trend closely as courts interpret the interplay between sovereignty and the enforcement of international arbitral awards.