

# A big blow to India: Canadian court's decision in Antrix-Devas matter shows the issue is far from resolved

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Multiple foreign investors backed the Devas-Antrix project, including three Mauritian investors and Germany's Deutsche Telekom. (File)

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A Canadian court recently dismissed India's sovereign immunity argument in a case where Devas and its shareholders are trying to enforce a 2020 bilateral investment treaty (BIT) award against India. This is the latest twist in the **ceaseless Devas saga** that started in 2005 with a high-profile deal between Antrix, the commercial arm of the Indian Space Research Organisation, and Devas, a Bangalore-based multimedia company, wherein the latter would provide multimedia services using S-band satellite spectrum leased from Antrix.

Multiple foreign investors backed the Devas-Antrix project, including three Mauritian investors and Germany's Deutsche Telekom. But the project ran into rough weather with accusations of corruption. In 2011, the UPA government, looking for cover, abruptly rescinded the contract invoking national security. This hasty decision triggered two BIT claims against India, with India losing both disputes. In 2020, a BIT tribunal awarded compensation of more than \$100 million to Devas' investors. Since then, Devas'

shareholders are endeavouring to enforce this award in multiple jurisdictions, including Canada, by targeting the assets of public sector entities like the Airports Authority of India to recover their compensation.

It is in this connection that the matter came up before a Canadian court. The court rejected India's argument for sovereign immunity from jurisdiction by applying Canada's Sovereign Immunity Act (SIA). Under the SIA, while a foreign state is immune from the jurisdiction of Canadian courts, this rule is subject to certain exceptions. For instance, under Section 5 of the SIA, a foreign state is not immune from the jurisdiction of a court if the proceedings relate to commercial activity. India vehemently argued that BIT disputes arise due to the sovereign actions of the state and thus, unlike commercial arbitration disputes, are not commercial disputes. This is a plausible argument because BIT disputes involve treaty breaches and have a public law character. However, the court unpersuasively concluded that India's decision to rescind the contract prevented the commercialisation of the Devas-Antrix deal, and thus the BIT dispute was essentially commercial in nature.

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The court also held that India cannot claim immunity from jurisdiction because it has signed the BIT containing an arbitration clause, participated in the arbitral proceedings with Devas, and is a party to the New York convention that regulates the recognition and enforcement of international arbitration awards. These actions, according to the court, constituted a "clear and unequivocal" waiver of jurisdictional immunity on India's part (the so-called waiver exception). Interestingly, the Canadian court, to buttress its reasoning, cited a Delhi High Court case, *KLA v. The Embassy of Islamic Republic of Afghanistan*. The Delhi High Court in this case had held that an arbitration agreement between a foreign state and a party constitutes an implied waiver by the foreign state of its sovereign immunity. In other words, the court held that since arbitration is a binding and consensual mechanism of dispute settlement, there is no need to seek the consent of the state once again at the time of the enforcement of the award against it. Although the Delhi High Court's ruling was in the context of commercial arbitration, the Canadian court held that this logic also applied to BIT arbitration.

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The Canadian court refused to set aside the waiver exception on the ground that the Devas agreement was “tainted by fraud”. Recall that the Supreme Court of India (SCI), in 2022, upheld the decision of the National Company Law Appellate Tribunal to wind up Devas Multimedia because it was incorporated fraudulently and for unlawful purposes. The Canadian court held that the SCI judgment dealt with a completely different subject matter and thus was not relevant to the extant proceedings.



India has pinned its hopes on the SCI judgment to contest Devas’s enforcement proceedings in all foreign jurisdictions, and thus the Canadian court ruling is a big blow. A glimmer of hope for India is that the court also said that the SCI decision may have some relevance in a future hearing on the merits of the enforcement. India is surely going to raise this argument again. We haven’t heard the last word on this protracted legal ordeal.



***The writer is professor and vice-dean at the Jindal Global Law School, O P Jindal Global University. Views are personal***

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