HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

CCDM Holdings, LLC
First Appellant

Devas Employees Fund US, LLC
Second Appellant

Telcom Devas, LLC
Third Appellant

and

The Republic of India
Respondent

APPELLANTS' SUBMISSIONS

Part I: Certification

1. This submission is in a form suitable for publication on the Internet.

Part II: Statement of Issues

2. **Issue One**: Whether the Respondent (Republic of **India**) as a Contracting State to the 1958 *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (**Convention**)[1] has consented to the exercise of jurisdiction by an Australian court for the purposes of s 10 *Foreign States Immunities Act 1985* (Cth) (**FSIA**) in proceedings under Art III Convention and s 8 *International Arbitration Act 1974* (Cth) (**IAA**) to enforce a foreign award against India, being a State which has made a declaration under Art I(3) Convention that 'it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under its national law' ('**commercial reservation**')?

Part III: Section 78B Notices

3. No notices under s 78B *Judiciary Act 1903* (Cth) are required.

[1] 330 UNTS 3 (entered into force 7 June 1959).

Part IV: **Reasons for Judgment Below**

4. The reasons of the **Full Court** of the Federal Court of Australia (S Derrington, Stewart and Feutrill JJ) are *Republic of India v CCDM Holdings, LLC* [2025] FCAFC 2 (**FC**).

5. The reasons of the primary judge (Jackman J) are *CCDM Holdings, LLC v Republic of India (No 3)* [2023] FCA 1266 (**PJ**).

Part V: **Facts**

6. On 4 September 1998, India and the Republic of **Mauritius** concluded a bilateral investment treaty (**the BIT**): PJ[3]; ABFM 7–16. Under the BIT, a Mauritian investor is entitled to have any claim that India has violated the treaty determined by international arbitration: PJ[6], CAB 12.

7. CC/Devas (Mauritius) Ltd, Devas Employees Mauritius Pte Ltd, and Telecom Devas Mauritius Ltd (**Original Investors**), all Mauritian companies, held shares in a company, Devas Multimedia Pvt Ltd (**Devas India**), incorporated in India and, through that shareholding, an interest in an agreement made between Devas India and **Antrix** Corporation Ltd, a corporation wholly owned by India under the administrative control of the Department of Space (**Devas-Antrix Agreement**): PJ[10] CAB 14. At first instance, the Appellants were substituted for the Original Investors following an assignment of rights: FC[5] CAB 122; PJ[16] CAB 16.

8. In July 2012, the Original Investors commenced arbitral proceedings (**the Arbitration**) against India pursuant to Art 8 of the BIT: PJ[12] CAB 15; ABFM 72. As India is not a party to the 1965 *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (**ICSID Convention**),[2] the BIT provides for *ad hoc* arbitration under the 1976 UNCITRAL Arbitration Rules subject to certain modifications (**1976 Rules**): PJ[6] CAB 12.

9. On 15 May 2013, the parties signed the terms of appointment of arbitrators: ABFM 114-122. This agreement went well beyond regulating the appointment of arbitrators. The parties agreed that the Arbitration be seated at The Hague, Kingdom of the **Netherlands** and conducted under the 1976 Rules: PJ[12] CAB 15. Any award being made under Dutch law, international enforcement of the Award depended on the Convention. India participated in the Arbitration, raising objections and defences: ABFM 131-263, 265-383.

[2] 575 UNTS 159 (entered into force 14 October 1966).

By an award dated 25 July 2016, the Tribunal dismissed India's objections to jurisdiction, found the Original Investors had made a qualifying investment under the BIT, and held that India had breached the BIT by, *inter alia*, unlawfully expropriating the Original Investors' investment and failing to afford the investment fair and equitable treatment (**Merits Award**) ABFM 391-591: PJ[9], [13] CAB 15. The Tribunal subsequently issued an award on the quantum of India's liability to the Original Investors on 13 July 2020 (**Quantum Award**) ABFM 594-819: PJ[13] CAB 15.

10. After the Quantum Award was issued, Antrix initiated Indian National Company Law Tribunal (**NCLT**) proceedings in India to wind up Devas India, alleging fraud and unlawful conduct of its affairs: PJ[14] CAB 15.

11. India, Mauritius, the Netherlands and Australia were at all relevant times parties to the Convention. In acceding to the Convention, India made a declaration under Art I(3) Convention of the commercial reservation: ABFM 906. None of Mauritius, the Netherlands or Australia has made the commercial reservation under Art I(3) Convention.[3]

12. On 21 April 2021, the Original Investors commenced proceedings in the Federal Court by originating application pursuant to s 8(3) IAA seeking recognition and enforcement of the Quantum Award: PJ[16] CAB 16. The originating application was subsequently amended on 13 August 2021: ABFM 820-827.

13. On 12 April 2022, India made an interlocutory application to set aside the originating application on the grounds that India had immunity under s 9 FSIA: ABFM 828-830.

14. On 24 October 2023, the primary judge dismissed the interlocutory application, finding that India had submitted to jurisdiction within the meaning of s 10(2) FSIA: PJ[16] CAB 16. On 31 January 2025, the Full Court upheld India's appeal finding that there had been no such submission and India was therefore immune, and set aside the originating application: CAB 120.

15. The Quantum Award has not been set aside by the Courts of the Netherlands.

Part VI: Argument

16. The Convention is '"the single most important pillar on which the edifice of international arbitration rests"' and '"perhaps…the most effective instance of international

[3] 1927 UNTS 494, Annex A (Mauritius); 2921 UNTS 261, Annex A (Mauritius (partial withdrawal of declaration)); 494 UNTS 321, Annex A (Netherlands); 962 UNTS 364, Annex A (Australia).

legislation in the entire history of commercial law"'.[4] Part II IAA gives effect to Australia's rights and obligations under the Convention,[5] including Art III which 'is the essence of the Convention and its purpose'.[6]

17. Article I(1) Convention defines the scope of application of the Convention, being all 'awards either' made outside the territory of the enforcing State or considered not to be domestic in that State. If the award has that place of origin or characterisation in the State where enforcement is sought, the Convention will apply, the only additional requirement being that the party to the underlying dispute is a 'physical or legal' person. Article I(3) permits two reservations that a Contracting State may declare when ratifying, signing or acceding to the Convention as to how 'it will apply' the Convention: (i) only to awards from other Contracting States and (ii) the commercial reservation, that is applying the Convention 'only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration'.

18. Article III Convention provides, *inter alia*, that '[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon'.

19. The terms of Art III Convention must be read in their context and in light of the object and purpose of the treaty, and having regard to ***travaux*** *préparatoires* to confirm their meaning.[7] This methodology is consistent with the rules of customary international law embodied in Arts 31-32 *Vienna Convention on the Law of Treaties* (**VCLT**)[8] and the principles of interpretation set out by this Court in *Kingdom of Spain v Infrastructure Services Sarl* (2023) 275 CLR 292 (***Spain HCA***).

20. Applying this orthodox approach, Art III Convention contains the express, clear and unmistakable consent of a Contracting State to the exercise of jurisdiction by other Contracting States to enforce awards to which the Convention applies, including awards to which the first State is a party. Article III is thus a submission by agreement within the meaning of s 10(2) FSIA by a Contracting State to the Convention.

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[4] *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2021] 2 All ER 1, [126] (Lords Hamblen and Leggatt JJSC, Lord Kerr JSC agreeing).
[5] IAA s 2D(d); *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533, [7] (French CJ and Gageler J).
[6] Marike Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International, 2016) 97.
[7] ***Evans*** *v Air Canada* (2025) 99 ALJR 941, [6], [8] (Gageler CJ, Edelman, Steward, Gleeson and Beech-Jones JJ).
[8] 1155 UNTS 331 (entered into force 27 January 1980).

21. By the ordinary process of treaty interpretation under international law (Arts 31-32 VCLT), it is plain that a commercial reservation made by a Contracting State does not affect its consent to the exercise of jurisdiction by another Contracting State to give recognition and enforcement to an award to which the former is party. Further, Contracting States have agreed that in implementing the Convention only the permitted reservations made by the implementing State are relevant, not those of a State party to the award or of the State where the award was made. The Full Court's finding that customary international law gives reciprocal force in State B to the commercial reservation made by State A, such that Art III is not a waiver of immunity by State A before the courts of State B, is heterodox, contrary to ordinary rules of interpretation, and contrary to the agreement of States as evidenced by the practice of States.

22. **Part VI(1)** of these submissions briefly outlines the approach of the primary judge, and then of the Full Court which reached a different conclusion on grounds India did not advance at first instance or in the appeal. **Part VI(2)** identifies the Full Court's errors of methodology and law in determining the appeal on issues not advanced by the parties and therefore without the benefit of submissions or argument. **Part VI(3)** demonstrates that, absent those errors, the reasoning of the primary judge supports a finding of submission in this Court – with which the Full Court otherwise did not disagree and appeared inclined to accept. The Notice of Contention will be dealt with in reply.

Part VI(1): Reasoning of the Courts below

23. ***Decision of the primary judge***: After identifying the relevant provisions, the applicable rules of treaty interpretation (including the primacy of the text while also considering context, objects and purpose as part of the more liberal interpretation of treaties) (PJ[17]-[29] CAB 16-24), and the main issues (PJ[30]-[33] CAB 24-26), the primary judge considered the proper approach for recognising waiver of foreign state immunity which this Court articulated in *Spain HCA*: PJ[34]-[40] CAB 26-30. The primary judge concluded at PJ[36] saying, 'the standard of conduct required for submission by agreement pursuant to s 10(2) requires either express words or an implication arising clearly and unmistakably by necessity from the express words used': CAB 27.

24. Turning to the text of the Convention, the primary judge correctly understood Art III to be a 'promise[] made by each Contracting State to all other Contracting States' by which India, like all other Contracting States, 'requir[es] Australia to recognise and enforce that award': PJ[43] CAB 30-31. Australia could not fulfill its promise if India was 'at liberty to

oppose…recognition and enforcement' based on foreign state immunity: PJ[43] CAB 30-31.

25. The primary judge construed Art IV Convention as requiring only *prima facie* evidence of the award and agreement to arbitrate. The issue of whether the agreement to arbitrate was binding was for a later hearing under Art V in which India could not be required to participate until its claim to sovereign immunity was determined: PJ[44] CAB 31-32.

26. As a further step in considering the textual issues, the primary judge considered case law from the United States of America (**US**) which had construed the Convention in the context of claims to sovereign immunity: PJ[45]-[47] CAB 32-34. The primary judge correctly identified support in that case law for the propositions that: (i) ratification of the Convention is sufficient to be a waiver of immunity; and (ii) moreover, tender of an arbitration agreement is *prima facie* and sufficient proof at the jurisdictional stage.

27. Consistent with the proper approach to the interpretation of a treaty, the primary judge then considered the object and purpose, and context of the Convention, finding that it did not lead to a different conclusion: PJ[103] CAB 59-60. Relevantly for matters that will arise in this appeal, the primary judge held that:

(a) India's commercial reservation 'was not [a] directly relevant' consideration as Australia has not made a corresponding declaration, but it *was relevant* that the Convention deals expressly with 'commercial' differences only in the specific context of the commercial reservation: PJ[58] CAB 38-39;

(b) the language used in Arts I-III is 'broad and general'. It, therefore, did not permit a construction whereby the Convention applies to States as parties to awards only when the awards involve a commercial or private law dispute: PJ[86] CAB 51-52;

(c) the *travaux* (reviewed at PJ[62]-[85] CAB 40-52) confirmed the meaning 'in evidencing a clear rejection of any limitation to awards involving a commercial dispute': PJ[86] CAB 51-52. The preparatory materials could be relied upon to confirm such meaning, but not 'to create ambiguity where none appears from the text of the Convention when construed in accordance with the principles set out in Art 31': PJ[86] CAB 51-52;

(d) the commentaries on the Convention did not support India's contention that the Convention did not apply to States as parties to awards or States as parties to awards outside private law disputes: PJ[87]-[92] CAB 52-54; and

(e) it was unnecessary to answer the question of whether consent by Contracting States to Art III Convention is subject to local 'rules of procedure', including the forum's laws of foreign State immunity: PJ[94]-[96] CAB 55-56.[9]

28. ***Decision of the Full Court:*** The Full Court upheld India's appeal on two grounds noted together at FC[72] CAB 136. *First*, by reason of India's commercial reservation, and the application of customary international law, Australia had no obligation to India to enforce the Convention in respect of differences arising from legal relationships that are not commercial under Indian law (for reasons given at FC[62]-[70] CAB 133-136). *Second*, therefore, India (at least) did not clearly and recognisably waive immunity in proceedings enforcing the Convention in respect of such disputes (as further explained at FC[73]-[74] CAB 136-137).

29. As to the first ground, the Full Court assumed, without deciding, that the scope of the Convention is not limited to awards which involve a commercial or private law dispute (FC[53] CAB 131), as the primary judge had found. It also said, without deciding, that but for India's commercial reservation there was 'much to be said in support of a conclusion that by ratifying the Convention India waived immunity in respect of awards' and 'essentially for the reasons that the primary judge gave in respect of awards within the scope of the Convention as a whole (ie without regard to any reservation)': FC[72] CAB 136.

30. However, at FC[62]-[70] CAB 133-136, the Full Court found that:

(a) Art 21 VCLT, being reflective of customary international law (FC[25] CAB 125),[10] was engaged with regard to the effect of India's commercial reservation: FC[62] CAB 133;

(b) it should apply the International Law Commission's (**ILC**) ***Guide*** *to Practice on Reservations to Treaties*[11] **Guideline 4.2.4** (FC[63]-[68] CAB 133-135), on the implicit basis that Guideline 4.2.4 and its commentary accurately and sufficiently explained the application of customary international law to the facts;

(c) the primary judge erred (PJ[43], [103] CAB 30-31, 59-60) in finding that Art III 'requires' Australia to enforce an award outside India's commercial reservation (FC[70] CAB 136) because, based on Guideline 4.2.4, India's commercial reservation operated '*vice versa'* in respect of Australia's obligation to enforce

[9] *cf* Notice of Contention filed by the Appellants in the Full Court Appeal on this issue ABFM 907-910.
[10] The Full Court cited *Spain HCA*, [38] (Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ) which refers only to Arts 31-33 VCLT.
[11] With commentaries, in *Report of the International Law Commission*, UN Doc A/66/10/Add.1(2011) 1.

awards that do not arise from commercial relationships under Indian law, and India's right to require Australia do so: FC[68] CAB 135; and

(d) Art XIV Convention (and the material cited at FC[69] CAB 135) did not affect *the Court's* analysis based on Art 21 VCLT.

31. As to the second ground, so far as submission under s 10 FSIA was concerned, the Full Court found that India 'made it plain' by its commercial reservation that 'it did not and would not treat [non-commercial disputes] as being subject to the Convention' and, therefore, 'other Contracting States [not just Australia] have no obligation to India in respect of such disputes': FC[72] CAB 136. The effect of India's commercial reservation qualifying its obligation under Art III thus distinguished India's agreement from the 'logic' of the ICSID Convention: FC[73]-[74] CAB 136-137. Absent evidence of Indian law, the Full Court then considered whether the commercial reservation under *Australian* law would have included the relationship between the parties, a point not argued below or on appeal: FC[76]-[82] CAB 137-139.

32. The Full Court's judgment makes no reference in FC[62]-[75] CAB 133-137 to any submission of the parties in respect of Art 21 VCLT or the Guide, their application to the commercial reservation, or their consequences. This is for a reason. The propositions at [30] above had no place in the issues joined by the parties, were inconsistent with concessions India made at first instance, were not articulated directly or indirectly by the grounds of appeal (cf. FC[46]-[47] CAB 130), and were not raised by the Full Court with the parties prior to judgment (see Part V(2), Appeal Ground 5 below).

Part V(2): Grounds of Appeal – errors made by the Full Court

Appeal Ground 1

33. Article I(3) Convention provides that a State may make a declaration that 'it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under its national law'. The Full Court erred either in assuming or implicitly supposing that this commercial reservation could operate reciprocally on the rights and obligations of other Contracting States in light of customary international law: FC[62] CAB 133. Having taken up the issue, *proprio motu* and while reserved, the Full Court failed to first consider: (i) that customary law rules,

unless *ius cogens*, can readily be excluded or modified by the terms of a treaty;[12] and (ii) whether on a proper interpretation of Art I(3), by its text, context, objects and purposes, and with reference to any *travaux*, Contracting States intended that the commercial reservation would not be reciprocal.[13] It also failed to identify State practice, the views of publicists and international case law interpreting the Convention that runs contrary to its supposition.

34. When the proper methodology of interpretation is applied it is clear that a declaration of the commercial reservation made under Art I(3) Convention does not operate reciprocally.

35. ***Text***: *First*, the plain words of Art I(3) allow a declaration only as to what India, as an enforcing State, will or will not do to an award to which the Convention applies ('it will apply the Convention only to', *not* 'that the Convention only applies to'). The choice of words contrasts with Art I(1). It is thus directed solely at what will be done within India's territory. It is *not* a reservation as to the application *of the Convention* to India or to awards within the scope of Art I *per se*. It is expressed as a limit on what *India* must do in applying the Convention to an award from outside its territory, and not as a limit on what other States can or must do to the same award.

36. *Second*, the reservation is in respect of an obligation (Art III) to enforce an award (a *res*) to which Art I(1) applies (whether or not made in the territory of a Contracting State). Arts I and III are not conditional on the nationality of the parties. Contracting States expressly rejected that nationality-based approach, which had been used in Art I of the predecessor Geneva Protocol and Convention (Art VII(2)).[14] The reservation thus does not travel with the parties, even if they are nationals of the reserving State, into third States.

37. *Third*, within the same sentence Contracting States explicitly grounded the *other* reservation in Art I(3) as being 'on the basis of reciprocity'. That they did not extend this to the commercial reservation is a clear textual and contextual indicator of their intent that the commercial reservation would not operate reciprocally.[15] The absence of language of

[12] Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (BRILL, 2009) 18 [38]; VCLT, Art 53.
[13] VCLT, Arts 31-32; *Spain HCA*, [38]-[39] (Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ).
[14] Albert Jan van den Berg, *New York Convention of 1958 – **Annotated List of Topics*** (2013) [103]; *Protocol on Arbitration Clauses*, 27 LNTS 157 (entered into force 28 July 1924) Art 1; *Convention on the Execution of Foreign Arbitral Awards*, 92 LNTS 301 (entered into force 25 July 1929) Art 1.
[15] ***Fertilizer*** *Corp of India v IDI Management Inc*, 517 F Supp 948 (SD Ohio, 1981) (Spiegel J) and [46] below.

reciprocity in the relevant clause of Art 1(3) is yet *another* textual indicator that supports the Appellants' interpretation.

38. *Fourth*, the commercial reservation operates by reference to the domestic law of the reserving State (here, Indian law). Only the legislature or courts of the reserving State can authoritatively determine (or alter) the content of that law. Other States may well fail to give effect to a reservation in attempting to apply unfamiliar or unknown foreign law and concepts, opening them up to international claims. Further, reservations limited to local territory and law would not necessarily have been considered reciprocal under customary law at the time. See Appeal Ground 2 at [51] below.

39. ***Context***: *Fifth*, and related to the *first* point above, Art I defines the scope of application of the Convention – 'the Convention shall apply'. The contrast between the agreement in Art I(1) as to when and why the Convention (a law making treaty regime) applies, on the one hand, and what a particular State may limit its obligation to do in consequence of that application per Art I(3) on the other hand, is instructive. Since, as the primary judge found, Art I(1) applies the Convention to awards beyond those arising in commercial or private law disputes, the Contracting States could have expressed Art I(3) in different terms so as to limit the scope of application of the Convention and the circumstances in which that scope is narrowed (e.g., where the award emanates from a certain State or to its nationals if the State has made an appropriate reservation affecting awards arising from disputes of a non-commercial kind). They did not. This is connected closely with the *ninth* point below (at [43]).

40. *Sixth*, the Full Court's concern only with obligations owed *to India* meant it failed to consider the multilateral nature of the Convention. Since the obligation under Art III is to enforce an award regardless of the nationality of the parties, the Contracting State where the award was made (the Netherlands) and the award creditors' home Contracting States (Mauritius and the US) (at least) have a sufficient interest to *enforce* Australia's Art III obligation.[16] No reservation can limit the obligations owed to other non-reserving States *inter se* (Art 21(2) VCLT). As a contracting State, India would have appreciated and intended that just as the awards of tribunals seated in India would enjoy recognition and enforcement in other States subject to the reservations made by those other States, so too

[16] *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, UN Doc A/56/10 (2001) Art 42 and commentary, 117-119; VCLT, Art 60.

any award made in another Contracting State may enjoy recognition and enforcement in a third Contracting State.

41. *Seventh*, when the Contracting States turned their minds in Art XIV Convention to the principle of reciprocity in the relations *between Contracting States themselves*, they qualified any reciprocal rights. Art XIV 'is not a reciprocity clause as commonly used in international law' as it is not tied to any person.[17] Art XIV prevents a Contracting State invoking the Convention *against* other Contracting States to the extent it has assumed obligations. It does not limit what the other Contracting States can or must do within the terms of the Convention. Thus (*cf.* FC[69] CAB 135), Art XIV is a textual indicator in favour of *the Appellants'* interpretation and *against* the Full Court's finding. See further at [46] below.

42. ***Objects and Purposes***: *Eighth*, the Full Court failed to consider the objects and purposes of the Convention: Art 31 VCLT; PJ[51] CAB 35. An interpretation requiring the enforcing State to apply the national law of another State (as party, or national, or place the award is made) raises barriers to enforcement beyond those accorded to domestic awards in the enforcing State,[18] which is at odds with the objects and purposes of the Convention to facilitate the enforcement of foreign awards in domestic Courts and with minimal curial intervention.

43. ***Travaux****: Ninth*, the Full Court failed to investigate the *travaux* (Art 32 VCLT) to resolve any ambiguity in the text of Art I(3) and avoid unreasonable interpretations. The *travaux* confirm that the Contracting Parties considered – and expressly rejected – proposals to narrow the *scope* of the Convention to private or even commercial matters. Indeed, as some States did not recognise any clear distinction between 'commercial' and other private law matters (PJ[62]-[85] CAB 40-51), this refusal to so constrain the Convention's ambit encouraged such States to become parties. It would be at odds with that purpose to require Contracting States to identify and apply another State's definition of a 'commercial legal relationship'. Consequently, there was explicit discussion and clear understanding that the commercial reservation would *not* apply reciprocally.[19] If anything, the *travaux* confirm the interpretation that arises from the application of Art 31 VCLT.

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[17] *Annotated List of Topics*, [914].
[18] Patricia **Nacimiento**, 'Article XIV' in Herbert Kronke et al (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International, 2010) 547.
[19] United Nations Economic and Social Council, *United Nations Conference on International Commercial Arbitration, Summary Record of the Twenty-Third Meeting*, E/CONF.26/SR.23 (9 June 1958) 11-12.

44. It would also be a misreading of the significance of the *travaux* and the textual implications of the wholesale removal of a proposed 'commercial' restriction from Art I(1) Convention, to interpret Art I(3) as requiring States other than the reserving State to import a distinction based on commerciality (which may be alien to its own law) without making its own reservation. The fact that Art V(1)(d)-(e) Convention may lead to the application of foreign law does not weaken reliance on the *travaux* or the objects and purposes of the Convention. Those provisions are concerned with the necessarily domestic (national law) foundation of a foreign award's validity.

45. ***Subsequent Agreement***: *Tenth*, the Full Court failed to have regard to evidence of subsequent practice in the application of the Convention which establishes the agreement of the parties regarding its interpretation: Art 31(3) VCLT. Contracting States implementing the Convention through domestic legislation, including India, Australia, Canada, the United Kingdom and the US, or merely giving effect to the Convention including by gazettal or some other official act, as in France and China, provide only for the application in their Courts of reservations (if any) made by the implementing State.[20]

46. ***Authority***: *Eleventh*, the Full Court failed to consider international case law.[21] It was 'essential' for the Full Court to have paid 'due regard' to the reasoned decisions of US (and other) courts interpreting and applying Art I(3), since it 'is of the first importance to attempt to create or maintain' international harmony and concordance of interpretation of the Convention.[22] At FC[69] CAB 135 the Full Court cited the UNCITRAL Secretariat's Guide, which notes the decision of the US District Court in ***Fertilizer*** *Corporation of India v IDI Management Inc*, 517 F Supp 948 (SD Ohio, 1981). However, in addition to holding

[20] See, e.g., **India** (reciprocity and commercial reservations): *Foreign Awards (Recognition and Enforcement) Act 1961*, s 2 (repealed); *Arbitration and Conciliation Act 1996*, s 44. See also *RM Investments & Trading Co Pvt Ltd v Boeing Co* (1994) SCC (4) 541 (10 February 1994) (Supreme Court of India) (American Arbitration Association award made in the United States); **Australia** (no reservations): IAA, s 8; **Canada** (commercial reservation): *United Nations Foreign Arbitral Awards Convention Act* RSC 1985, c 16 (2nd Supp) s 4(1); **China** (reciprocity and commercial reservations): Circular of Supreme People's Court on Implementing Convention on the Recognition and Enforcement of Foreign Arbitral Awards Entered by China, Arts 1 and 2; **France** (reciprocity reservation): Decree No 59-1039 of 1 September 1959 (JORF, 6 Sep 1959) 8726; **Netherlands** (reciprocity reservation): Code of Civil Procedure, Book 4: Arbitration, Arts 1075-1076; **UK** (reciprocity reservation): *Arbitration Act 1996* (UK), ss 100-101; **US** (reciprocity and commercial reservations): *Federal Arbitration Act*, 9 USC §§201-208. See also [46]. See the survey of national legislation collected by UNCITRAL at https://newyorkconvention1958.org/ (page 'Jurisdictions'), and by Prof van den Berg, at https://www.newyorkconvention.org/contracting-states/information-per-jurisdiction.

[21] VCLT, Art 31(3)(b).

[22] *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, [75] (Allsop CJ, Middleton and Foster JJ). See also *Povey v Qantas Airways Ltd* (2005) 223 CLR 189, [25], [32] (Gleeson CJ, Gummow, Hayne, and Heydon JJ); *Evans*, [6] (Gageler CJ, Edelman, Steward, Gleeson and Beech-Jones JJ).

that Art XIV operates only 'defensively', supporting *non*-reciprocity of reservations, the US District Court *also* held that the commercial reservation was *not* reciprocal because of the language of reciprocity present in the other reservation permitted under Art I(3) but absent in the commercial reservation. Thus, only the commercial reservation of the US had to be considered.[23] More recent US Federal Circuit Court cases which hold that being a Contracting State to the Convention is a waiver of immunity (PJ[45]-[46] CAB 32-33), proceed accordingly, ignoring the defendant State's commercial reservation.[24] (US courts have consistently held that investor-State claims fall within the US' commercial reservation.[25])

10 47. ***Publicists***: Finally, the Full Court failed to consider and properly apply the work of publicists, including those cited at FC[69] CAB 135. *The Appellants* cited these publicists at first instance to submit that inter-State reciprocity was dealt with in Art XIV Convention and did *not* alter the non-reciprocal effect of the commercial reservation or constrain Australia's application of the Convention to India, and India did not respond to the material on this basis.

(a) Prof van den Berg's point at 14-15,[26] applied here, is that reciprocity *may* protect Australia from a claim by *the Netherlands* as the place where the Award was made *if* the Netherlands had made the commercial reservation[27] and the Award was not within the scope of that reservation (applying the law of the Netherlands).

20 (b) Dr Nacimiento at 545-9,[28] notes that the issue arises in respect of reservations made by the country *where the award was made* vis-à-vis the country where it is to be enforced, but also notes the inconsistency of this interpretation with the objects and purposes of the Convention (see [42] above). She further notes (at 547-8) the view that Art I(3) permits *non-uniform application* of the Convention by Contracting States is inconsistent with a reciprocal operation of the commercial reservation.

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[23] *Fertilizer*, 952-953 (Spiegel J).
[24] See decisions of the United States in PJ, Appendix: Argentina (*Argentine Republic v BG Group Plc*; *Argentine Republic v National Grid Plc*) CAB 84-86 and Venezuela (*Gold Reserve Inc v Bolivarian Republic of Venezuela*; *Crystallex International Corporation v Bolivarian Republic of Venezuela*; *Rusoro Mining Limited v Bolivarian Republic of Venezuela*) CAB 87-89.
[25] ***Zhongshan Fucheng*** *Industrial Investment Co Ltd v Federal Republic of Nigeria*, 112 F 4th 1054, 1065 (DC Cir, 2024) (Millett and Childs JJ).
[26] Albert Jan van den Berg, *The New York Convention of 1958* (Kluwer Law International, 1981) 14-15.
[27] It has not: 494 UNTS 321, Annex A (Netherlands). See also https://www.newyorkconvention.org/contracting-states.
[28] Nacimiento, 545-549. See especially 547.

(c) Prof Kölbl's analysis at 556-7[29] is that an enforcing State such as Australia that has not made a reservation, by reason of implicit waiver, 'may not rely on the reciprocity clause under Article XIV in order to limit its obligations to recognize and enforce foreign awards…issued in Contracting States that made reservations'.

(d) Similarly, the UNCITRAL Secretariat in the *UNCITRAL Guide* accepts commentators' views (citing both Prof Kölbl and Dr Nacimiento at 329) that Art XIV (emphasis added) '*does not allow* a Contracting State which has not made any reservation, to deny enforcement of an award rendered in another Contracting State which has made reservations'.[30]

10 48. Ultimately, the Full Court identified no State practice, national case law or any commentator that supports its assumption or implicit finding that the commercial reservation provided for in Art I(3) Convention can and does operate reciprocally, pursuant to the customary law of treaties.

Appeal Ground 2

49. Even assuming that: (i) Art 21 VCLT embodies customary international law; (ii) is not excluded by the proper interpretation of the Convention, and (iii) Guideline 4.2.4 is an authoritative record or source of that custom, the Full Court erred in applying customary international law and the Guide, given the *nature* of the obligations in Art III Convention and the *content* of the commercial reservation insofar as the Quantum Award is concerned.
20 This arises from the Full Court's failure to consider Guideline 4.2.5 and the associated commentary.

50. *First,* Art 21 VCLT does not apply 'insofar as the obligations under the provisions to which the reservation relates are not subject to reciprocal application in view of the nature of the obligations or the object and purpose of the treaty'.[31] As per Ground 1, the obligations of India and Australia under Art III Convention in respect of the Quantum Award (made in the Netherlands) are at most *mutual*, but not *reciprocal,* in respect of a Dutch award. Any loss of 'rights' of Australia by reason of India's reservation (per Guideline 4.2.4) in respect

[29] Angela Kölbl, 'Article XIV' in Reinmar Wolff (ed), *New York Convention* (CH Beck, 2nd ed, 2019) 555.
[30] *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (United Nations, 2016) 329 [6]. Giorgio Gaja, *International Commercial Arbitration: New York Convention* (Oceana Publications Inc, 1978) I.A.4. See also International Council for Commercial Arbitration, *Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (2011), 4 (**ICCA Guide**) and ICCA Guide (2nd ed, 2025) 3-4 (explaining that a court applies the 'commercial reservation' if the *forum State* has made it).
[31] Guideline 4.2.5 especially Commentary (7).

of a foreign award was at most the lost right to require India to enforce *in India* an award made in Australia (or involving Australian parties) which was 'non-commercial' (per Indian law). In any event, if by Art III India agrees to Australia having a right to exercise jurisdiction to fulfil obligations to other States, consent is clear. Australia *also* has an obligation to India, e.g. to exercise jurisdiction to recognise and enforce awards *in favour of* India or its nationals.

51. *Second,* 'the content of the obligations of [Australia and India] likewise remains unaffected when reciprocal application is not possible because of the content of the reservation'.[32] The commercial reservation only applies in respect of Indian law and territory. Territorially limited reservations are not reciprocal, each territory being unique.[33] Similarly, reservations founded on the interpretation of local law are not reciprocal.

Appeal Ground 3

52. For the reasons given in Grounds 1-2, Australia owes an obligation even to India to enforce the Quantum Award subject only to *Australia's* reservations to the Convention. The Court's ultimate concern is with Australia's *right* to enforce the Quantum Award by reason of India's consent. The Appellants' argument did not depend on an *obligation owed to India* under Art III (which India might waive any time it finds itself an award-debtor), but on the right to exercise jurisdiction. Submission requires consent to the exercise of jurisdiction,[34] not an *obligation* that jurisdiction be exercised. The Full Court appears to have appreciated the Appellants' argument as being one of the 'right' to exercise jurisdiction (FC[61] CAB 133), but failed to consider it. Thus, at FC[73] CAB 136, the Full Court looked at the qualified *obligation* of India under Art III where it should have considered the unqualified *right* of Australia.

53. A reservation limits what would otherwise be the scope of the obligation of the State declaring it. A surprising result of the Full Court's decision is that it goes beyond releasing India from certain obligations as an enforcing State, and extends to prevent Australia – as an enforcing State that has not chosen not to make the same reservation – from enforcing an award made in a third State that also has chosen not to make the reservation. This denies

[32] Guideline 4.2.5.
[33] Guideline 4.2.5, Commentary (11); Oliver Dörr and Kristen Schmalenbach, 'Article 21' in Oliver Dörr and Kristen Schmalenbach (eds), *Vienna Convention on the Law of Treaties* (Springer, 2nd ed, 2018) at 345-346 [21]-[23].
[34] International Law Commission, *Report of the International Law Commission on the Work of its Thirty-Fourth Session*, UN Doc A/37/10 (1982) 238-243 (**1982 Report**).

Australia its sovereign right to choose for itself whether to: (i) make a commercial reservation (or to confine that reservation to commercial relationships as so considered under *Australian* law); and (ii) implement only that reservation into national law. Moreover, it denies to third States the expectation and benefit of Australia's unreserved participation in the Convention as a Contracting State.

Appeal Ground 4

54. Whether submission by a State is sufficiently clear for s 10 FSIA purposes depends first on engaging in a proper interpretation of the Convention, as this Court did in *Spain HCA* in respect of the ICSID Convention. For the reasons set out in Grounds 1-3 above, India's commercial reservation has no effect on its submission by reason of its agreement to the Convention and the primary judge was correct in finding India had so submitted. At FC[74] CAB 137, the Full Court misinterprets the decision in *Spain HCA* and the ICSID Convention.

55. *First*, s 10 FSIA depends on an agreement to submit; it is not limited to the text, structure or logic of the ICSID Convention. Indeed, s 10 FSIA reflects an international norm built on State practice identified by the ILC whereby States expressed 'in no uncertain terms' that they had submitted, including both the ICSID Convention *and* the New York Convention.[35] That work was in turn relied upon by the Australian Law Reform Commission in formulating s 10.[36]

56. *Second*, the ICSID Convention cannot be used to *interpret* the effect or meaning of the earlier Convention. In short, Art III Convention must be *independently* assessed against s 10(2) FSIA.

57. *Third*, as to the Court's comparison of the Conventions: (i) Art 53 ICSID Convention makes an award binding on *award* parties, it does not deal with enforcement. Article III Convention is concerned *only* with enforcement; (ii) both Art III Convention and Art 54 ICSID Convention are agreements by Contracting States as to what another (enforcing) State 'shall' and so *can* do, namely exercise jurisdiction in its territory including to fulfil obligations to third parties, whether the State of the award-creditor/investor (both

[35] 1982 Report, 242 fn 281 and International Law Commission, *Report of the International Law Commission on the Work of its Forty-Third Session*, UN Doc A/46/10 (1991) 51-52 fn 89 (**1991 Report**) both referring to *Materials on Jurisdictional Immunities of States and their Property* (United Nations Legislative Series, 1982) 150-178; *Spain HCA*, [22]-[26], [75] (Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ).
[36] 1982 Report cited in Australian Law Reform Commission, *Foreign State Immunity* (Report No 24, June 1984) 43 [78]-[79], fns 1-2.

treaties) or the State where an award is made (the Convention); (iii) again, the commercial reservation only qualifies what India will do in its territory, not what enforcing Contracting States who have not made the commercial reservation must, or can and will do, in respect of awards from a third state (see [53] above).

58. *Fourth*, the two points made by the Full Court at FC[74] CAB 137 are unavailing. (i) As the commercial reservation is not reciprocal, the observation that Spain's agreement to ICSID Convention was not qualified in the same way as India's agreement to the Convention goes nowhere. (ii) The absence of an equivalent to Art 55 ICSID Convention is of no significance: Art 54 by itself supports a necessary implication of waiver of immunity.[37] Article 55 ICSID Convention merely ensures that the necessary implication in Art 54 does not also override *execution* immunity.[38]

59. Further, it should not be that merely raising a 'live issue' (or even 'serious question to be tried') on the effect of India's reservation is a sufficient basis to find that its submission to jurisdiction is not 'unequivocal'. The Full Court did not find this, nor is it correct in principle. As this Court established in *Spain HCA*, one must engage in orthodox treaty interpretation to determine the meaning of Art I(3) Convention and any effect on the submission in Art III. It could not be the case that the mere raising of an argument is sufficient to introduce doubt that avoids the application of s 10 FSIA, where the ordinary task of interpreting a Convention will dispel such doubt. Once the task of treaty interpretation has been discharged by the courts of an enforcing State, and the conclusion is reached that a State party to an award has expressly waived its immunity notwithstanding it has made its own commercial reservation, the enforcing State's court can and must exercise jurisdiction.

Appeal Ground 5

60. Although the Full Court's identification and application of Art 21 VCLT and the Guide might be considered largely matters of law,[39] the Court's failure to raise these issues with the parties before determining the appeal resulted in a fundamental unfairness to the Appellants, who were denied an opportunity to address weighty points that are not all one

[37] *Spain HCA*, [71]-[73] (Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ).
[38] International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (18 March 1965) [43].
[39] *Australian Competition and Consumer Commission v PT Garuda Indonesia Ltd (No 9)* (2013) 212 FCR 406, [47]-[48] (Perram J).

way. It was not incumbent on the Appellants to have foreseen the need to address the issue. Since the analysis and conclusion of the Full Court lacks any support from over 60 years of Convention law, practice and commentary across 172 States, the Applicants had no duty to raise, anticipate, or be on notice of such an approach.

61. Further, India's submissions and concessions at first instance as to the operation of the commercial reservation and grounds of appeal did not require that the issue be addressed. At first instance, the Appellants submitted that India's commercial reservation applied only to recognition and enforcement of awards *in India*; it did not qualify enforcement of an award unless the forum State had made it.[40] India expressly conceded that what 'cannot be done' under the Convention is 'for any state to contract [*viz - reduce*] *the ability* of other states and, indeed, *the duty* of other states to recognise and enforce *all awards* otherwise within the convention' (emphasis added).[41]

62. Before the Full Court, the Appellants reiterated their position on Art III Convention.[42] The Full Court correctly found that the Appellants submitted that 'India agreed that Australia *can* enforce the Convention in [Australia's] territory without the commercial reservation': FC[61] CAB 133 (emphasis added). At no point did India submit that the reservation operated reciprocally, whether in accordance with Art 21 VCLT or otherwise. Instead, India argued (as it had below) that: (i) Art I(1) Convention, properly interpreted, confines the Convention to differences between 'parties acting within the sphere of private commerce', principally by reference to the *travaux*;[43] and (ii) the commercial reservation further narrowed what was required *of India* – 'limit[ing] [its] obligations of recognition enforcement to a subset' of awards.[44] It was otherwise merely 'context' for not interpreting Art III as a form of submission, without further explanation or analysis.[45] Hence, the primary judge's finding at PJ[58] CAB 38-39.

63. Another consequence of the Full Court introducing matters alien to the proceedings as constituted by the issues raised and joined by the parties, was that their Honours

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[40] ICCA Guide, 4.
[41] Transcript of Proceedings, *CCDM Holdings, LLC v Republic of India* (Federal Court of Australia, NSD 347/2021, Jackman J, 28 September 2023) P244.11-24 (Gleeson SC) ABFM 877.
[42] Respondents' (now Appellants) submissions filed 28 March 2024 in the Full Court (**App RS**) [29] ABFM 944-945.
[43] India's submissions filed 26 February 2024 in the Full Court (**App AS**) [27] ABFM 921; Transcript of Proceedings, *Republic of India v CCDM Holdings, LLC* (Full Court of the Federal Court of Australia, NSD 1306/2023, S C Derrington, Stewart and Feutrill JJ, 23 May 2024) (**AT**) P25-28, P58.20-P59.47 (Roughley SC) ABFM 1027-1030, 1060-1061.
[44] AT, P22.5-24, P58.6-19 (Roughley SC) ABFM 1024-1026, 1060.
[45] App AS, [27], [42]-[43] ABFM 921, 926-927; see also India's submissions in reply filed 22 April 2024 in the Full Court, [22] ABFM 1001.

determined the scope of India's commercial reservation without any evidence of Indian law or argument as to how an Australian court applying Australian law should regard the legal relationship with investors acting under the protection of a bilateral investment treaty that affords them direct rights, which US courts have found is a 'commercial' legal relationship,[46] and where 'commercial' goes beyond contractual in, Australia[47], the US, [48] and the UK.[49] This is a question of Australian law that arises (i) absent proof of Indian law; (ii) if the reciprocal operation of a commercial reservation is such that the enforcing court need not enforce awards not considered commercial under *its* law; and (iii) is distinct from the breadth of the 'commercial exception' in s 11 FSIA.

10 **Part VI(3): The reasoning of the primary judge should be accepted**

64. Once it is accepted that there is error in the approach of the Full Court, the question in these proceedings is whether there is a submission to jurisdiction by India for the purposes of s 10 FSIA by reason of its agreement to Art III Convention. The answer to that question is yes, for the reasons explained by the primary judge. Notice of Contention Ground 1, not raised in either court below, will be addressed if pressed and permitted.

Part VII: Orders Sought by the Appellants

65. The orders sought are as set out in the Notice of Appeal.

Part VIII: Time Required for Oral Argument

66. The Appellants estimate that up to 1 day is likely to be required for the
20 presentation of the argument, depending on the nature and extent of the Notice of Contention, with up to 1 hour in reply.

Dated: 31 July 2025

Bret Walker + 61 2 8257 2527 caroline.davoren@stjames.net.au

Justin Hogan-Doran +61 2 8224 3004 jhd@7thfloor.com.au

Anna Garsia +61 2 8029 6224 agarsia@12thfloor.com.au

[46] *Zhongshan Fucheng*, 1065. See also Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2010) [226]-[234].
[47] *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2012) 247 CLR 240, [43] (French CJ, Gummow, Hayne, and Crennan JJ); *Commercial Arbitration Act 2010* (NSW) s 1; *UNCITRAL Model Law on International Commercial Arbitration* (2006) Art I(1).
[48] *Belize Social Development Limited v Government of Belize*, 794 F 3d 99 (DC Cir, 2015).
[49] *Ecuador v Occidental Exploration and Production Co (CA)* [2006] QB 432.

Tamlyn Mills
Norton Rose Fulbright
Solicitor for the Appellants
Telephone: +61 2 9330 8906
Email: tamlyn.mills@nortonrosefulbright.com

ANNEXURE TO APPELLANTS' SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
Australian legislation					
1	*Foreign States Immunities Act 1985* (Cth)	Compilation No 4 (21 October 2016 to 17 February 2022)	ss 9, 10, 11	Act in force on the date that the application for the recognition and enforcement of the subject award was made.	21 April 2021
2	*International Arbitration Act 1974* (Cth)	Compilation No 13 (26 October 2018 to 17 February 2022)	s 8, Schedule 1	Act in force on the date that the application for the recognition and enforcement of the subject award was made	21 April 2021
3	*Commercial Arbitration Act 2010* (NSW)	Compilation No 61	s 1	Act as currently in force	14 January 2018 to present
Treaties					
4	*United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3	As entered into force	Arts I(1), I(3), III, IV, V, XIV	Convention as currently in force	Entered into force on 7 June 1959

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
5	*Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159	As entered into force	Arts 53, 54, 55	Convention as currently in force	Entered into force on 14 October 1966
6	*Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331	As entered into force	Arts 21, 31-32, 53, 60	Convention as currently in force	Entered into force on 27 January 1980
7	*Convention on the Execution of Foreign Arbitral Awards*, opened for signature 26 September 1927, 92 LNTS 301	As entered into force	Art 1	Convention as in force	Entered into force on 25 July 1929
8	*Protocol on Arbitration Clauses*, opened for signature 24 September 1923, 27 LNTS 157	As entered into force	Art 1	Protocol as in force	Entered into force 28 July 1924

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
Rules					
9	*Arbitration Rules of the United Nations Commission on International Trade Law*, GA Res 31/98	Rules as adopted by the United Nations General Assembly	-	Rules the Arbitration was conducted under	15 December 1976
10	United Nations Commission on International Trade Law, *Model Law on International Commercial Arbitration*	1985, with amendments as adopted in 2006	Art I(1)	As currently given effect	4 December 2006