HIGH COURT OF AUSTRALIA

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File Number:	S90/2025
File Title:	CCDM Holdings, LLC & Ors v. The Republic of India
Registry:	Sydney
Document filed:	Form 27C - A-G Cth - Submissions seeking leave to intervene
Filing party:	Intervener
Date filed:	11 Sep 2025

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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

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (SEEKING LEAVE TO INTERVENE)

PART I: FORM OF SUBMISSIONS AND INTERVENTION

1. These submissions are in a form suitable for publication on the internet.

PART II: BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth (**Attorney-General**) applies for leave to intervene without supporting any party: *High Court Rules 2004* (Cth) r 42.08A and 44.04.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. The Attorney-General should be granted leave to intervene for three reasons.

4. *First*, the Attorney-General is the Minister with responsibility for administering the *Foreign States Immunities Act 1985* (Cth) (**FSI Act**),[1] with which this appeal is centrally concerned. That Act concerns one aspect of the Commonwealth's executive power under s 61 of the Constitution with respect to Australia's relations with foreign States.[2] Specifically, it gives domestic effect to the rule of customary international law concerning State immunity, being a rule that is binding on Australia.[3] As such, the Attorney-General seeks to address matters that bear directly on Australia's compliance with its international obligations, and that also form an important aspect of Australia's dealings with foreign States (not least because it is important that the law of State immunity is applied in Australia consistently with international law, so that foreign States will in turn ensure that Australia reciprocally benefits from the proper application of State immunity if and when it is sued before foreign courts).

5. *Second*, the Commonwealth's legal interests are substantially affected on the further basis that the appeal will have a direct impact upon Australia's obligations as a party to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (**NY Convention**),[4] the interpretation of which is also central in this appeal. For both of those reasons, this appeal has "a bearing … upon [the Commonwealth's] … executive powers or other direct interests"[5] of a kind sufficient to support intervention.[6]

6. *Third*, the Attorney-General's submissions would not wholly support those of either party. Lacking a financial stake in the result of the appeal, the Attorney-General is able

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1 *Administrative Arrangements Orders* made 13 May 2025.

2 *Victoria v Commonwealth* (1996) 187 CLR 416 at 478 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ), quoting *R v Burgess; Ex parte Henry* (1936) 55 CLR 308 at 643-644 (Latham CJ).

3 *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)* [2012] ICJ Rep 99 at [56].

4 Opened for signature on 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959); [1975] ATS 25.

5 *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 182 (Kitto J). See also *Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391 at 400-401.

6 *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37 at [2] (the Court).

to assist the Court in the correct resolution of important questions of international law, the answers to which have divided foreign courts. The High Court will be the first apex court to answer those questions.

7. This Court granted the Attorney-General leave to intervene in an analogous context in *Firebird Global Master Fund III Ltd v Republic of Nauru* (2015) 258 CLR 31.

PART IV: ARGUMENT

A. Overview

8. If granted leave to intervene, in summary the Attorney-General will submit:

(a) *First*, the NY Convention's application to arbitral awards to which a State is a party is not limited to awards "involving a commercial or private law dispute" or to awards involving acts *jure gestionis* (an issue raised by Ground 2 of the Notice of Contention (**NOC**)) (**Section B**).

(b) *Second*, subject to the effect of any reservations, by ratifying the NY Convention a State submits to the jurisdiction of Australian courts for the purposes of s 10(2) of the FSI Act, thereby waiving State immunity in relation to proceedings for the recognition and enforcement of an award to which the NY Convention applies (an issue raised by Ground 4 of the Notice of Appeal (**NOA**)) (**Section C**).

(c) *Third*, the "commercial reservation" authorised by the second sentence of Art I(3) of the NY Convention operates reciprocally to limit the obligation of other Contracting States to recognise and enforce awards with respect to the reserving State. By reason of that reciprocal operation, India's ratification of the NY Convention subject to the commercial reservation supports an unmistakeable implication that it has waived State immunity *only* with respect to awards concerning disputes arising out of legal relationships considered "commercial" under Indian law (an issue raised by Grounds 1, 2 and 3 of the NOA) (**Section D**).

(d) *Fourth*, while the Attorney-General will make submissions as to the principles the Court should apply in deciding whether an arbitral award concerns a dispute arising out of a legal relationship considered "commercial" under the law of a foreign State, she makes no submissions as to the application of those principles to the award underlying this appeal (**Section E**).

B. The NY Convention is not limited to awards that involve commercial or private law disputes or to awards concerning acts *jure gestionis*

9. The NY Convention's application to arbitral awards to which a State is a party is not limited to awards "involving a private or commercial law dispute"[7] (cf NOC [2]) or to awards concerning "acts of a State which are *jure gestionis*" (cf RS [37]).[8]

10. The NY Convention is to be interpreted in accordance with the rules of customary international law. That is so for two reasons: (i) India is not a party to the *Vienna Convention on the Law of Treaties* (**VCLT**);[9] and (ii) the NY Convention was concluded before the VCLT entered into force on 27 January 1980.[10] However, as this Court has previously recognised, the relevant customary law rules are reflected in Arts 31 and 32 of the VCLT.[11] Pursuant to Art 31(1), a treaty must "be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Pursuant to Art 31(3)(c), "any relevant rules of international law applicable in the relations between the parties" are to be taken into account. Pursuant to Art 32, after application of the rules of interpretation in Art 31, recourse may be had to the *travaux préparatoires* as a supplementary means of interpretation in order either to confirm a treaty's meaning or, if the treaty's meaning is otherwise "ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable", to determine its meaning.

11. ***Ordinary meaning of the terms of Art I(1)***: The argument that the NY Convention applies to awards to which a State is a party only if the award involves a commercial or private law dispute or only if it involves acts *jure gestionis* is contrary to the text of Art I(1). By its terms, Art I provides that the NY Convention applies to "arbitral awards" made in another State, and arising out of "differences" between "persons, whether physical or legal" – which includes States.[12] By reason of the second sentence of Art I, it also applies to awards that are not considered domestic awards in the State in which their recognition

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7 This same argument was recently rejected in *Zhongshan Fucheng v Federal Republic of Nigeria*, 112 F 4th 1054 (DC Circuit, 2024). A petition for certiorari was withdrawn by consent.

8 Of course, the application of the NY Convention to an award to which a State is a party can be further narrowed by the reservations provided for by Art I(3), where made.

9 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980); [1974] ATS 2.

10 VCLT, Art 4.

11 *Kingdom of Spain* (2023) 275 CLR 292 at [38] (the Court); *CRI026 v Republic of Nauru* (2018) 92 ALJR 529 at [22] (Kiefel CJ, Gageler and Nettle JJ).

12 See eg James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 8th ed, 2012) at 115-116.

and enforcement are sought. There is no textual basis for limiting the application of the NY Convention in relation to awards to which a State is a party to those involving private or commercial law disputes (those being categories the boundaries of which are, in any case, ambiguous[13]). The terms "awards", "differences" and "persons" in Art I(1) mean what they say (PJ [86], CAB 51-52; cf RS [43]). Breadth should not be conflated with ambiguity.

12. Once it is recognised that the word "person" includes a State, there is no foundation in the text for confining that recognition to the State acting in any particular capacity or only when party to a particular kind of dispute. The conclusion that a "person" in Art I(1) includes a State in relation to a wide category of disputes is powerfully evidenced by the regular practice in investor-State disputes[14] (whether under bilateral or multilateral investment treaties) by which arbitral awards that are not made under the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*[15] (**ICSID Convention**) are nearly always subject to enforcement under the NY Convention.[16]

13. ***Object and purpose***: While a treaty must be interpreted in light of its object and purpose, the object and purpose of the NY Convention is to facilitate the enforcement of arbitral awards to which it applies.[17] It is *not* to "preserve the sovereign rights of States" (cf RS [30]-[31]), nor is it concerned only with "private law transactions" (cf RS [30], [41]).

14. ***Article 31(3)(c)***: Equally, neither "the private law focus of [ECOSOC] Resolution 604" nor "the distinction between *acta jure imperii* / *acta jure gestionis*" properly bears upon

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13 For example, RS [31] relies on an article by Paolo Contini, but, as the primary judge pointed out (PJ [89], CAB 53), Mr Contini regarded the NY Convention as applicable to States acting in a non-commercial capacity provided that the dispute is of a private law nature rather than a matter of public international law. That is not the conception of "private law transactions" advanced by the Respondent. See also PJ [88] (CAB 53). The fact that the commentators on which the Respondent relies "variously carve out 'political' matters or questions of public international law" (RS [45]) demonstrates the indeterminacy of the asserted limit on the scope of Art I of the NY Convention.

14 The Appendix to the primary judge's reasons lists 30 occasions on which the NY Convention has been applied to investor-State arbitral awards.

15 Opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966); [1991] ATS 23.

16 Andrea Bjorklund, "State Immunity and the Enforcement of Investor-State Arbitral Awards" in *Christina* Bender et al (eds), *International Investment Law: Essays in Honour of Christoph Schreuer* (OUP, 2009) 302 at 303 and 308; Andrea Bjorklund, "Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: the Re-Politicization of International Investment Disputes" (2010) 21 *American Review of International Arbitration* 211 at 217-218.

17 Albert Jan van den Berg, *The New York Arbitration Convention of 1958* (Kluwer Law and Taxation Publishers, 1981) at 267, 310.

the interpretation of the NY Convention (cf RS [42]). Pursuant to Art 31(3)(c) of the VCLT, a treaty must be interpreted taking into account "any relevant rules of international law applicable in the relations between the parties". But, in Resolution 604, ECOSOC decided to call a conference [RC item 22]. That resolution does not contain "rules" of international law and thus is outside VCLT Art 31(3)(c). The "distinction between *acta jure imperii / acta jure gestionis*" is a distinction that is made in the law of State immunity. Even if that distinction is properly characterised as a "rule" of international law (which is doubtful), it is not one that is "relevant" to the interpretation of Art I(1), for it is a distinction with no bearing on the meaning of "award", "differences", "persons" or any other term in Art I(1).

15. ***Travaux préparatoires***: The Respondent seeks to use the *travaux préparatoires* to create ambiguity, and then to resolve that ambiguity by substituting statements made in the *travaux* for the breadth of the text that the Contracting States actually adopted. That is impermissible (PJ [86], CAB 52). *Travaux préparatoires* are a supplementary means of interpretation. As is recognised in Art 32 of the VCLT, they may only be used: (i) to confirm the meaning of treaty text that results from the application of the rule in Art 31 of the VCLT; or (ii) to determine meaning, where it would otherwise be ambiguous or manifestly absurd or unreasonable. Neither of those conditions is satisfied here. In any event, even if resort to the *travaux* was permissible, they indicate that the only awards to which a State is a party that were not intended to be within the scope of the NY Convention are inter-State awards (RS [40], [44]; RC item 17.1 [17]). They do not support the existence of a broader category of arbitral awards to which a State is a party that is excluded from the NY Convention, notwithstanding the width of the text of Art I.

C. States submit to the jurisdiction of the Australian courts under s 10(2) of the FSI Act by ratifying the NY Convention (subject to applicable reservations)

16. Pursuant to s 9 of the FSI Act, foreign States enjoy immunity from the jurisdiction of Australian courts unless an exception set out in the FSI Act is engaged. One of those exceptions is submission to jurisdiction in accordance with s 10 of the FSI Act. Section 10(1) provides that a "foreign State is not immune in a proceeding in which it has submitted to the jurisdiction in accordance with this section". Such a submission can be "by agreement" (s 10(2)), with "agreement" defined to include "a treaty" (s 3(1)).

17. In *Kingdom of Spain*, this Court explained the proper approach to determining whether a State, by ratifying a treaty, has waived its immunity by submitting to the jurisdiction of

Australian courts for the purposes of s 10(2) of the FSI Act.[18] A waiver of immunity in a treaty must be "express".[19] However, this "require[es] only that the expression of waiver be *derived* from the express words of the international agreement, whether as an express term or as a term implied for reasons including necessity".[20] Regarding the latter, a "high level of clarity and necessity are required before inferring that a foreign State has waived its immunity in a treaty".[21] For that reason, "waiver 'is rarely accomplished by implication' and only arises where 'the waiver was unmistakable'".[22]

18. For the reasons that follow, properly interpreted (and subject to any reservations), Art III of the NY Convention gives rise to a sufficiently clear and necessary implication that Contracting States have waived their immunity from jurisdiction in proceedings before the domestic courts of other Contracting States for the recognition and enforcement of an arbitral award to which the NY Convention applies. As explained below, that implication is derived from the express words of Art III.

19. ***Ordinary meaning of the terms of Art III***: In full, Art III of the NY Convention provides as follows:

> Each 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, *under the conditions laid down in the following articles*. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards. (emphasis added)

20. Interpreting the terms of Art III in accordance with their ordinary meaning, Australia has an obligation ("shall") to every other Contracting State – including but not limited to India – to "recognize" arbitral awards to which the NY Convention applies as "binding" and to "enforce them".[23] That obligation is expressed to apply to "arbitral awards" – that is, *any* arbitral awards – within the scope of the NY Convention, including awards to which the

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18 *Kingdom of Spain v Infrastructure Services Luxembourg Sárl* (2023) 275 CLR 292, [38] (the Court) (***Kingdom of Spain***).

19 *Kingdom of Spain* (2023) 275 CLR 292 at [20] (the Court).

20 *Kingdom of Spain* (2023) 275 CLR 292 at [25] (the Court) (emphasis in original).

21 *Kingdom of Spain* (2023) 275 CLR 292 at [28] (the Court).

22 *Kingdom of Spain* (2023) 275 CLR 292 at [29] (the Court).

23 The Attorney-General does not submit that the obligation in Art III extends to execution of an award: cf *Kingdom of Spain* (2023) 275 CLR 292 at [45], [47] (the Court). That question does not arise in this appeal.

relevant Contracting State is a party.[24] In short, Australia owes an obligation to all other Contracting States to recognise and enforce arbitral awards to which the NY Convention applies (subject, in the case of the subset of awards to which a State is party, to any reservations made by that State, which may confine the waiver of State immunity that is otherwise implicit in ratification of the NY Convention).

21. Subject to the effect of the commercial reservation (addressed in Section D below), India's ratification of the NY Convention is inconsistent with the preservation of its immunity from the jurisdiction of the domestic courts of other Contracting States in so far as proceedings are brought for the recognition and enforcement of arbitral awards to which the NY Convention applies. Immunity from jurisdiction is a matter that must be addressed before an award can be recognised and enforced. To the extent that a Contracting State is under an obligation to all other Contracting States to "recognize" and "enforce" arbitral awards to which the NY Convention applies – that being a class of arbitral awards which necessarily includes within its ambit awards against other Contracting States – a State's ratification of the NY Convention implies the waiver of State immunity in respect of awards of that kind. That follows because the maintenance of State immunity with respect to such awards would be inconsistent with the obligation of each Contracting State to "recognize" or "enforce" those awards (cf RS [80]). Thus, and relevantly to the present appeal, India cannot simultaneously agree that Australia "shall" (and so, implicitly, *can*) "recognize" and "enforce" the "arbitral awards" identified in Art I (which include not just awards in favour of India or its nationals, but also awards in favour of third parties against India, and awards made by tribunals seated in India) whilst also claiming an immunity to which it would otherwise be entitled that would mean Australia cannot comply with that very obligation with respect to some of those arbitral awards. The primary judge's reasoning to that effect was correct (PJ [43], [51], CAB 31, 35).

22. Consistently with the above, American appellate courts have held that a State waives State immunity by ratifying the NY Convention. Specifically, in *Seetransport v Navimpex*, the United States Court of Appeal for the 2nd Circuit thought it clear that "when a country becomes a signatory to the Convention, by the very provisions of the Convention, the

[24] James Crawford, 'A Foreign State Immunities Act for Australia?' (1980) 8 *Australian Year Book of International Law* 71 at 101.

signatory State must have contemplated enforcement actions in other States".[25] The United States Court of Appeals for the DC Circuit has agreed with that view.[26]

23. Again consistently with the above, the International Law Commission (**ILC**) identified the NY Convention as an example of an international agreement in which States have expressed their consent to the exercise of jurisdiction against them.[27] This Court considered the inclusion of the ICSID Convention on that same ILC list to be persuasive in *Kingdom of Spain* (cf PJ [39]-[40]).[28]

24. The reasoning in *Kingdom of Spain* supports the same conclusion. That case concerned whether the ratification of the ICSID Convention involved submission to jurisdiction. This Court held that it did. The language of Art 54 of the ICSID Convention, which underpinned that conclusion, is relevantly similar to that of Art III of the NY Convention: both articles require States Parties to "recognize" arbitral awards as "binding" and "enforce" them.[29] In *Kingdom of Spain*, the Court regarded that obligation as inconsistent with the maintenance of immunity from jurisdiction in proceedings for recognition and enforcement of an ICSID award. That is equally the case with respect to an award to which the NY Convention applies. While it is true that the Court drew on some other features of the ICSID Convention, which are not found in the NY Convention, to bolster that conclusion,[30] there are features of the NY Convention that support the same conclusion.

25. ***Context***: Art III limits a Contracting State's obligation to recognise and enforce arbitral awards by stating that a Contracting State is only obliged to do those things "under the conditions laid down in the following articles". Those articles thereby form part of the "context" of Art III for the purposes of treaty interpretation. The conditions in those articles are as follows:

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25 *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co v Navimpex Centrala Navala* 989 F 2d 572 (2nd Circuit, 1993) at 578.

26 *Creighton Ltd v Qatar*, 181 F 3d 118, 126 (DC Circuit, 1999); *Tatneft v Ukraine*, 771 Fed Appx 9 (DC Circuit, 2019).

27 International Law Commission, "Draft articles on jurisdictional immunities of States and their property and commentaries thereto", *Report of the International Law Commission on the work of its forty-third session*, UN Doc A/46/10 (1991) at page 28 fn 78, referring to United Nations, *Materials on Jurisdictional Immunities of States and their Property* (1982) page 151.

28 *Kingdom of Spain* (2023) 275 CLR 292 at [75] fn 134. Note the typographical error in fn 134: the Court referred to fn 89 in the ILC's report when it is clear it was referring to fn 78.

29 Unlike Art III of the NY Convention, Art 54 of the ICSID Convention does limit enforcement to "pecuniary obligations" created by an award, but that difference is irrelevant for present purposes.

30 *Kingdom of Spain* (2023) 275 CLR 292 at [69], [71]-[72] (the Court).

(a) Art IV sets out the documents that a party applying for recognition and enforcement must supply to the Contracting State in which recognition and enforcement are sought;

(b) Art V sets out when recognition and enforcement "may be refused" by that Contracting State; and

(c) Art VI sets out when the Contracting State may stay proceedings for recognition and enforcement.

26. Regarding Art V specifically, paragraph (1) provides that "*[r]ecognition and enforcement of the award may be refused*, at the request of the party against whom it is invoked, *only if* that party furnishes to the competent authority where the recognition and enforcement is sought, proof that" one of five grounds is made out (none of which relates to State immunity). Article V(2) then provides that "[r]ecognition and enforcement of an arbitral award may *also* be refused if the competent authority in the country where recognition and enforcement is sought finds that" one of two grounds is made out (again, neither of which relates to State immunity). The language of Art V (specifically, "only if" and "also") makes plain that Art V sets out an exhaustive list of the grounds on which a Contracting State may refuse to recognise and enforce an arbitral award. Commentary confirms that Art V is an "exhaustive" code of the grounds on which recognition and enforcement may be refused, that exhaustive quality being regarded as an "improvement" on previous treaties.[31]

27. Two points emerge from that context. First, the drafters consciously addressed, and exhaustively defined, the exceptions to the general obligation that is imposed by Art III to recognise and enforce arbitral awards. Secondly, none of the "conditions laid down" in the NY Convention limit the obligation to recognise and enforce arbitral awards by reference to the rules of State immunity. Thus, the context of Art III reinforces the conclusion that Contracting States to the NY Convention have waived their immunity from jurisdiction in proceedings for the recognition and enforcement of arbitral awards to which the Convention applies in the domestic courts of other Contracting States (subject to the effect of any reservations).

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[31] Albert Jan van den Berg, *The New York Arbitration Convention of 1958* (Kluwer Law and Taxation Publishers, 1981) at 265; Nigel Blackaby KC, Constantine Partasides KC and Alan Redfern, *Redfern and Hunter on International Arbitration* (Kluwer Law International, 7th ed, 2022) at [11.56]. See also *Trina Solar (US) Inc v Jasmin Solar Pty Ltd* (2017) 247 FCR 1 at [54], where Greenwood J emphasised the words "only if" in the chapeau of Art V(1) of the NY Convention.

28. ***Object and purpose***: It is uncontroversial that the NY Convention was designed to facilitate the enforcement of arbitral awards to which it applies.[32] It therefore is not surprising that the NY Convention has been recognised as having a "pro-enforcement bias",[33] meaning that it "has simplified the procedure for enforcing foreign awards while also *limiting* the grounds upon which the enforcement of such awards may be resisted".[34]

29. Interpreting Art III in light of the object and purpose of facilitating enforcement tends against a construction that treats State immunity as having been implicitly preserved. Such an interpretation would add an additional ground on which recognition and enforcement of arbitral awards may be refused, being a ground not provided for in the exhaustive text of the NY Convention.

30. ***"in accordance with the rules of procedure of the territory where the award is relied upon"***: The terms of Art III specify that a Contracting State is to recognise and enforce arbitral awards "in accordance with [its] rules of procedure". Contrary to RS [77], for the following reasons the phrase "rules of procedure" in Art III does not encompass (and does not have the effect of preserving) customary international rules regarding State immunity:

    (a) Interpreted in accordance with its ordinary meaning, in the clause "recognize arbitral awards as binding and enforce them in accordance with the rules of procedure", the phrase "rules of procedure" refers to the relevant Contracting State's procedures for the recognition and enforcement of arbitral awards. To illustrate, in the case of Australia, the phrase refers to the rules found in ss 9 and 10 of the *International Arbitration Act 1974* (Cth) (**IA Act**). The conclusion that the procedural rules to which Art III refers are those regarding the recognition and enforcement of arbitral awards is indicated by the earlier part of the clause ("recognize arbitral awards as binding and enforce them in accordance with").

    (b) The *travaux préparatoires* of the NY Convention support the conclusion that, in referring to "rules of procedure", Contracting States were concerned with matters such as the rules governing the presentation of documents and the need for

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32 Albert Jan van den Berg, *The New York Arbitration Convention of 1958* (Kluwer Law and Taxation Publishers, 1981) at 267, 310.

33 *Parsons & Whittemore Overseas Co Inc v Société Génerale de L'Industrie de Papier (RAKTA)*, 508 F 2d 969 (2nd Circuit, 1974) at 973.

34 *Hub Street Equipment Pty Ltd v Energy City Qatar Holding Co* (2021) 290 FCR 298 at [64], [102] (Stewart J, Allsop CJ and Middleton J agreeing) (emphasis added).

translations, not the rules of State immunity.[35]

(c) On any view, the phrase "rules of procedure of the territory where the award is relied upon" directs attention to the domestic law of the forum where recognition and enforcement are sought. Thus, even if the phrase "rules of procedure" in Art III includes the law pertaining to State immunity, such immunity can be relevant only to the extent that it is provided for in the domestic laws of the forum. Article III does not affect the content of those laws or the scope of any immunity they confer.[36] Once that is recognised the reference to "rules of procedure" in Art III cannot assist the Respondent, because whether s 9 of the FSI Act confers immunity depends upon whether a State has submitted to jurisdiction for the purposes of s 10(2) of the FSI Act (the immunity conferred by s 9 being qualified by the provisions providing for submission to jurisdiction in s 10). That directs attention back to the effect of ratification of the NY Convention. In other words, *if* Art III is qualified by s 9 of the FSI Act, it must *also* be qualified by s 10(2), leading to a circular process that is incapable of establishing any qualification on the ordinary effect of ratifying the NY Convention.

D. India's ratification of the NY Convention subject to the commercial reservation has the effect that it has unmistakeably submitted to the jurisdiction of Australian courts under s 10(2) of the FSI Act only with respect to awards within that reservation

31. ***The "commercial reservation"***: Art I(3) of the NY Convention expressly authorises States to make two reservations; the latter (italicised below) being the "commercial reservation". It provides as follows:

> When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also *declare that it will apply 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.*

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35 United Nations Economic and Social Council, *United Nations Conference on International Commercial Arbitration: Summary Record of the Tenth Meeting*, UN Doc E/CONF.26/SR.10 (12 September 1958) at pages 6-8.

36 That, no doubt, is why India submitted before the primary judge that "Art III … preserves sovereign immunity to the extent that it exists under the national law of the forum as a jurisdictional defence that precludes a forum court from proceeding to exercise jurisdiction on the merits": PJ [96], CAB 56.

32. ***The reciprocal operation of the commercial reservation***: A commercial reservation declared by a Contracting State pursuant to Art I(3) of the NY Convention applies reciprocally. That conclusion follows either from the rules of customary international law embodied in Art 21 of the VCLT or from Art XIV of the NY Convention itself.

33. Article 21 of the VCLT deals with the "[l]egal effects of reservations", in terms that reflect customary international law.[37] It applies to reservations "expressly authorized by a treaty",[38] such that it clearly applies to the commercial reservation authorised by Art I(3) of the NY Convention. Article 21 provides:

> 1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:
>
> (a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and
>
> (b) modifies those provisions to the same extent for that other party in its relations with the reserving State.
>
> 2. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se.

34. Article 21(1)(a) makes plain that, as a result of its commercial reservation, India is not obliged to recognise or enforce an arbitral award that does not concern differences arising out of legal relationships that are considered as commercial under the law of India.[39] India not being obliged to recognise or enforce awards of that kind, Art 21(1)(b) of the VCLT recognises that the *other parties* to the NY Convention are not obliged – in their relations with India – to recognise or enforce awards of the same kind. Thus, if India attempted to enforce a non-commercial award in the courts of another Contracting State, the reciprocal

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37 Daniel Müller, "1969 Vienna Convention: Article 21, Legal effects of reservations and of objections to reservations" in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary (Vol 1)* (Oxford University Press, 2011) at [10]-[11]. See also Daniel Müller, "1986 Vienna Convention: Article 21, Legal effects of reservations and of objections to reservations" in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary (Vol 1)* (Oxford University Press, 2011) at [2] (the fact that Art 21 was left unchanged in the 1986 *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations* "confirms, once again, the customary character of the rules determining the legal effects of a reservation as reflected in both Vienna Conventions"). While the VCLT does not directly govern the interpretation of the NY Convention (for the reasons given above at [10]), neither the appellants nor the respondent contests that Art 21 of the VCLT reflects customary international law (AS [49]; RS [53]).

38 VCLT, Art 20(1).

39 See, eg, DW Greig, 'Reservations: Equity as a Balancing Factor?' (1995) 16 *Australian Year Book of International Law* 21 at 140 fn 450.

operation of India's commercial reservation would mean that Art III would not require that State to recognise or enforce that award (whether or not that State had itself made the commercial reservation). That analysis is entirely consistent with paragraph 4.2.4 of the ILC's 2011 Guide to Practice on Reservations to Treaties,[40] upon which the Full Court relied (FC [64], CAB 134).

35. There is nothing in the "nature" of the obligations excluded by the commercial reservation, in the "object and purpose" of the NY Convention, or in the content of the reservation, that prevents the reservation's reciprocal operation (cf AS [49]-[51], invoking paragraph 4.2.5 of the ILC's 2011 Guide; RS [68]-[69]). So much is confirmed by Art XIV of the NY Convention, which provides that: "[a] Contracting State shall not be entitled to avail itself of the [NY Convention] against other Contracting States except to the extent that it is itself bound to apply the Convention". That effectively replicates Art 21(1) of the VCLT, in the specific context of a treaty that expressly authorises the commercial reservation.[41]

36. Article XIV was included in the 1955 draft of the NY Convention, at which time it was solely concerned with the position of federal States with constituent political entities that may not apply the Convention.[42] Its purpose changed over the course of the 1958 United Nations Conference on International Commercial Arbitration. At the 20th meeting of the Conference, the delegations initially adopted the article in the form it took in the 1955 draft, but they deferred a question about whether the reciprocal effect it generated would be applied across the NY Convention, or only to the special case of federal States.[43] At the 24th meeting, the Conference returned to the reciprocity issue, and decided to "upgrade" the federal reciprocity clause to have broader application.[44] The following exchange at that meeting puts beyond doubt that the commercial reservation was intended

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40 Adopted by the International Law Commission in United Nations, *Report of the International Law Commission on the work of its sixty-third session*, UN Doc A/66/10 (at [75]) (2011) (**2011 Guide**).

41 International Law Commission, *Guide to Practice on Reservations to Treaties with commentaries*, UN Doc A/66/10/Add.1 (26 April – 3 June and 4 July – 12 August) at Guideline 4.2.4 [33] fn 2142 (at page 463).

42 United Nations Economic and Social Council, *Report of the Committee on the Enforcement of International Arbitral Awards*, UN Doc E/AC.42/4/Rev.1 (28 March 1955) at Annexure, page 5, Article X(2); Albert Jan van den Berg, *The New York Arbitration Convention of 1958* (Kluwer Law and Taxation Publishers, 1981) at 14. This was also discussed at the 1958 Conference: United Nations Economic and Social Council, *United Nations Conference on International Commercial Arbitration: Summary Record of the Twentieth Meeting*, UN Doc E/CONF.26/SR.20 (5 June 1958) at pages 5-11.

43 United Nations Economic and Social Council, *United Nations Conference on International Commercial Arbitration: Summary Record of the Twentieth Meeting*, UN Doc E/CONF.26/SR.20 (5 June 1958) at page 10.

44 Albert Jan van den Berg, *The New York Arbitration Convention of 1958* (Kluwer Law and Taxation Publishers, 1981) at 14.

to apply reciprocally:[45]

> Mr. ROGNLIEN (Norway) reintroduced his delegation's earlier *proposal for a general reciprocity clause* … Some provision had already been made for reciprocity in the first sentence of article I, paragraph 3, and in article XI, paragraph (2), but *no* corresponding words had been inserted in *the second sentence of article I, paragraph 3 [the commercial reservation]*, in article X or in article XIII, paragraph 2. *A general clause*, contained in a separate article inserted immediately after article XIII, *would remedy all those defects*.
>
> Mr. de SYDOW (Sweden) thought that the general clause proposed by the Norwegian representative was unnecessary. Due provision for reciprocity had already been made in all the contexts where it had some significance.
>
> The Norwegian proposal was ***adopted*** by 13 votes to 5, with 16 abstentions.

37. The above clearly reflects an intention that the commercial reservation in Art I(3) would apply reciprocally. Nothing in the text or context of the NY Convention suggests any different conclusion. In particular:

(a) ***Express mention of reciprocity in Art I(3)***: The use of the phrase "on the basis of reciprocity" in the reservation authorised by the first sentence of Art I(3), and the lack of that phrase in the commercial reservation, does not indicate an intention that the commercial reservation was not to have reciprocal effect. That is because, in the first sentence of Art I(3), the term "reciprocity" is used in a different sense. The phrase "on the basis of reciprocity" in the first reservation does not purport to confer reciprocal effect on the reservation, but is simply a textual indication that a Contracting State can limit its obligations under the NY Convention to awards made in other Contracting States. The reference to reciprocity in that sentence reflects and explains the reason the negotiating parties included the first reservation: to encourage States to become parties to the NY Convention. Nevertheless, Professor van den Berg foresaw that those two different concepts of reciprocity meant the phrase "on the basis of reciprocity" in Art I(3) was likely to confuse.[46] The decision of the United States District Court for the Southern District of Ohio in *Fertilizer Corp of India v IDI Management, Inc*[47] (AS [46]) is a product of that confusion, and should not be followed.

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45 United Nations Economic and Social Council, *United Nations Conference on International Commercial Arbitration: Summary Record of the Twenty-Fourth Meeting*, UN Doc E/CONF.26/SR.24 (10 June 1958) at pages 6-7 (bold and italic emphasis added; underlined emphasis in original).

46 Albert Jan van den Berg, *The New York Arbitration Convention of 1958* (Kluwer Law and Taxation Publishers, 1981) at 14.

47 517 F Supp 948 at 952-953 (SD Ohio, 1981).

(b) ***Application of foreign law is no obstacle***: The commercial reservation having reciprocal effect would mean that the Australian courts could be required to apply foreign law, but that does not undermine the conclusion that the reservation so operates. Australian courts can and do apply foreign law.[48] Moreover, the NY Convention envisages that the courts of a Contracting State will apply the domestic law of other countries.[49]

38. ***Ratification of the NY Convention subject to the commercial reservation waives State immunity only with respect to disputes within that reservation*:** Where a Contracting State has made a "commercial reservation" under Art I(3), one effect of that reservation is to limit the scope of the waiver of immunity from jurisdiction that would otherwise be made under Art III of the NY Convention. For the reasons that follow, such ratification does not reveal an "unmistakeable" intention to waive State immunity in relation to proceedings for the recognition and enforcement of arbitral awards dealing with disputes arising out of relationships that are *not* considered "commercial" under the law of the ratifying State.

39. Article 21(2) of the VCLT makes clear that India's commercial reservation does not modify the NY Convention as between other Contracting States (such as, for example, Australia and The Netherlands, being the seat of the award sought to be enforced). However, to the extent that Contracting States agreed in the NY Convention to recognise and enforce the subset of arbitral awards to which another State is a party, that agreement can be given effect only if and to the extent that *that State* has waived State immunity. Thus, an agreement between (for example) Australia and The Netherlands to recognise and enforce arbitral awards to which India is a party would be of no moment except to the extent that India waives its immunity with respect to domestic proceedings seeking such recognition or enforcement. That follows because Australia and The Netherlands cannot, by agreement between themselves, dispense with Australia's customary international law obligation "to respect and give effect to"[50] India's immunity from the jurisdiction of Australian courts.

40. For that reason, while India's commercial reservation does not modify the NY Convention as between other Contracting States, it is nevertheless relevant to the

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48 *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 at [81] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

49 See NY Convention, Art V(1)(a), (d), (e).

50 *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)* [2012] ICJ Rep 99 at [56].

operation of the NY Convention as between those parties (cf AS [40]). That is because it informs the extent to which India's ratification of the NY Convention waives the immunity to which it is otherwise entitled, such waiver being necessary in order to leave room for Contracting States to give effect to Art III when recognising or enforcing arbitral awards against India.

41. To develop that reasoning, it is necessarily implicit in India's ratification of the NY Convention that, to the extent that arbitral awards concern differences arising out of legal relationships that are considered as commercial under the law of India, India thereby waived State immunity. That necessary implication arises because all Contracting States would be *obliged* by Art III to recognise and enforce awards of that kind, notwithstanding the reciprocal operation of India's commercial reservation. For India to maintain that it could claim State immunity to resist such recognition and enforcement would be inconsistent with its ratification of a treaty that requires that very recognition and enforcement by other Contracting States. The Full Court accepted that there was "much to be said in support of that conclusion" (FC [72], CAB 136), essentially for the reasons given by the primary judge (PJ [43], CAB 31).

42. But – critically – there is no such necessary implication with respect to awards that are *not* commercial under the law of India. That follows because the reciprocal operation of India's commercial reservation means that other Contracting States are *not obliged* to recognise and enforce arbitral awards against India that are not commercial under the law of India, notwithstanding the apparent breadth of Art III. And, because other Contracting States are not obliged to recognise or enforce such awards, India's ratification of the NY Convention provides no basis for a necessary inference that India *consented* to them doing so (cf AS [52]). The Full Court was therefore correct to find that it could not conclude (at least with the requisite level of confidence: see paragraph 17 above) that India had waived State immunity in proceedings to recognise and enforce arbitral awards in respect of disputes that are *not* commercial under the law of India (FC [72], CAB 136).

E. Whether a dispute arises out of a legal relationship that is "commercial" under the law of India

43. For the reasons addressed above, India's ratification of the NY Convention clearly and unmistakeably involved a submission to jurisdiction for the purposes of s 10(2) of the FSI Act only if the Quantum Award arose out of a legal relationship that is considered "commercial" under the law of India. The Attorney-General takes no position on whether

the award is of that character. The Attorney-General does, however, make four submissions as to the principles the Court should apply in deciding that issue.

44. *First*, in the absence of evidence of Indian law, the Full Court considered this issue by applying the evidentiary presumption that Indian law is the same as Australian law (FC [77], CAB 137). However, that presumption "is only of assistance in a case where it can be given practical content", which is not the case if "[t]here is no Australian law on the subject".[51] There is no Australian law on the topic of what is considered "commercial" under Australian law for the purposes of the commercial reservation found in Art I(3). That is not surprising, because a fundamental classification of "commercial" matters for all purposes simply does not exist in Australia's legal system, unlike some civil legal systems with separate codes for civil and commercial disputes.[52] Further, unlike common law countries which have made the commercial reservation (which, of course, Australia has not), Australia has not enacted legislation introducing or defining the term "commercial" for the purposes of Art I(3).[53]

45. *Second*, the justification for applying the presumption is one of reasonableness. It reflects the fact that, because many legal systems share similarities on points of law, there may be no "real likelihood that any differences between the applicable foreign law and [domestic] law on a particular issue may lead to a different outcome".[54] It may be doubted whether it is reasonable to apply the presumption where a State has sought to confine its obligations under the NY Convention to differences arising out of legal relationships which are considered "commercial" under its own law (rather than "commercial" more generally).

46. *Third*, if the Court does apply the presumption, the Full Court was wrong to assess what

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51 *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 at [16] (Gleeson CJ); see also *Damberg v Damberg* (2001) 52 NSWLR 492 at [118]-[120], [143]-[144] (Heydon JA, Spigelman CJ and Sheller JA agreeing).

52 The possibility that the domestic law of a State might not recognise this category was pointed out by the United Kingdom and Sweden in 1955 when the initial draft of the Convention was produced: see United Nations Economic and Social Council, *Committee on the Enforcement of International Arbitral Awards: Summary Record of the Second Meeting*, UN Doc E/AC.42/SR.2 (23 March 1955) at pages 5, 8.

53 Compare the position in the United States: *Federal Arbitration Act*, 9 USC § 202: "An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract or agreement … falls under the Convention."

54 *Brownlie v FS Cairo (Nile Plaza) LLC* [2022] AC 995 (***Brownlie II***) at [123]-[124] (Lord Leggatt JSC, Lord Reed PSC, Lord Lloyd Jones, Lord Briggs and Lord Burrows JJSC agreeing), which was applied in *CC/Devas (Mauritius) Ltd v Republic of India* [2025] EWHC 964 (Comm) at [97] (Sir William Blair). The Court in *Brownlie II* distinguished in principle between the presumption of similarity and the application of forum law by default, also known as the "default rule". The default rule as described in *Brownlie II* does not arise in this case.

is "commercial" by reference to s 11 of the FSI Act. The Full Court offered no reason for resorting to that provision, other than that the two concepts of "commercial" would "overlap" (FC [79], CAB 138). It offered no explanation of the extent of that overlap. But, more importantly, Australia's foreign State immunity legislation should not determine the meaning of "commercial" for the purposes of Art I(3) of the NY Convention (a question of significance in many cases that do not concern arbitral awards to which a State is a party) simply because that question happens to have arisen in a proceeding in which the parties are in dispute about State immunity.

47. *Fourth*, if the Court does seek to give content to the meaning of "commercial" under Australian law, it should look to the IA Act. That Act implements the NY Convention and, importantly, gives force of law to the UNCITRAL Model Law for International Commercial Arbitration.[55] The Model Law expressly indicates that the term "commercial" should be read widely.[56]

PART V: ESTIMATED TIME

48. The Attorney-General estimates that up to 1.5 hours will be required for oral argument.

Dated: 11 September 2025

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[55] IA Act, Pt III.

[56] IA Act, Sch 2. See the endnote to the word "commercial" in Art 1(1) of the Model Law, stating that it "should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not" (and then giving various inclusive examples).

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

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AND: **THE REPUBLIC OF INDIA**
Respondent

ANNEXURE TO THE SUBMISSIONS OF THE ATTORNEY-GENERAL

Pursuant to Practice Direction No.1 of 2024, the Attorney-General sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	**Description**	**Version**	**Provisions**	**Reason for providing this version**	**Applicable date or dates**
Constitutional provisions					
1.	*Commonwealth Constitution*	Current	Section 61	In force at all relevant times	All relevant times

No.	Description	Version	Provisions	Reason for providing this version	Applicable date or dates
Statutory provisions					
Commonwealth statutes					
2.	*Foreign States Immunities Act 1985* (Cth)	Compilation No 4 (21 October 2016 to 17 February 2022)	Sections 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
3.	*International Arbitration Act 1974* (Cth)	Compilation No 13 (26 October 2018 to 17 February 2022)	Sections 9, 10, Pt III, Sch 2	Act in force on the date that the application for the recognition and enforcement of the subject award was made	21 April 2021
Foreign statutes					
4.	*Federal Arbitration Act* (USA)	9 USC (2024)	§ 202	For illustrative purposes only	All relevant times

No.	Description	Version	Provisions	Reason for providing this version	Applicable date or dates
			Treaties		
5.	*Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* opened for signature on 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959)	As entered into force	Articles I, III, IV, V, VI, XIV	Convention as currently in force	Entered into force on 7 June 1959
6.	*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	Article 54	Convention as currently in force	Entered into force on 14 October 1966

No.	Description	Version	Provisions	Reason for providing this version	Applicable date or dates
7.	*Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331	As entered into force	Articles 21, 31, 32	Convention as currently in force	Entered into force on 27 January 1980