HIGH COURT OF AUSTRALIA

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Form 27E – Appellant's reply

Note: see rule 44.05.5.

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' REPLY

Part I: These submissions are in a form suitable for publication on the Internet.

Part II: Arguments on the NOC and in Reply to the Appeal

1. The abbreviations used in the Appellants' submissions in chief (**AS**) are used herein.

2. The parties agree on the central legal issue raised by this appeal concerning the interpretation of Art III Convention and its application to s 10 FSIA.

3. India's submissions (**RS**) on the NOC (pressing Grounds [2] and [3]) lend no support to the erroneous and unexpected approach taken by the Full Court in upholding India's then appeal. Both grounds raise arguments well traversed before the primary judge and the Full Court. The primary judge found against India. The Full Court found force in the primary judge's treatment of the arguments in NOC[3]: FC[72] CAB 136. See §II(A)-(C) below.

4. As to the appeal (**NOA**), neither the RS nor §D of the intervener's submissions (**IS**) overcome: (a) the difference in language defining the scope of the Convention in Art I(1) and the commercial reservation in Art I(3); (b) the limited reciprocity agreed in Art XIV; or (c) the multilateral nature of the Convention; and (d) the clear practice of States, including India. See §II(D)-(E) below. The application for leave to intervene is not opposed.

A. Introductory points (RS[4]-[21]) and India's 'first topic' (RS[22]-[36])

5. ***Approach to the Notice of Appeal and the onus***: India at RS[15]-[16] wrongly criticises the Appellants for not proving the Convention applies to the Awards. The Full Court

approached the effect of India's commercial reservation under Art I(3) 'on the assumption in the [investors'] favour' on the issues raised by India in the then appeal: FC[53] CAB 131. India has the onus on the NOC to displace the decision of the primary judge should this Court hold that the Full Court erred in its finding (FC[55] CAB 132) on India's reservation.

6. ***Methodology and the threshold in Spain***: The threshold for submission under s 10(2) FSIA by treaty, as articulated in *Spain,* is not under challenge in these proceedings by either party.[1] *Contra* RS[23], AS[59] is *consistent with* the need to first undertake a proper interpretation of the Convention *before* asking whether the test articulated in *Spain* has been met. Having accepted the correct approach, India fails to apply it.

10 7. India disregards the proper approach to treaty interpretation of starting with the ordinary meaning of Arts I(1) and III Convention and the surrounding textual context. Instead, India jumps directly to relevant rules of international law (per Art 31(3) VCLT; see RS[24]-[26]), then to the Convention's 'background, object and purpose' (RS[27]-[30]), before moving onto the ***travaux*** *préparatoires* (Art 32; RS[31]-[33]). India also erroneously conflates the concept of 'commerciality' for the purposes of the commercial reservation with the commercial transactions exception in s 11(3) FSIA (RS[9]-[12]).

8. In contrast, an orthodox and correct application of Arts 31-32 VCLT begins with the primacy of the text even as context, object and purpose of the treaty are considered, leaving the *travaux* to their important,[2] but subsidiary, role (*cf.* RS[31]-[33]): PJ[28]-[29] CAB 23.[3]

20 9. Even within Art 31 VCLT, rules of international law (Art 31(3)(c)) must be treated with care as they are matters to be considered beyond, not in place of, the text, the context of the Convention and its object and purpose. The proper interpretation of the text of the Convention is consistent with the general law of immunity. This was so in *Spain* in respect of the ICSID Convention.[4] The ILC considered that *both* the Convention and the ICSID Convention contain the requisite clarity of express waiver of immunity under the test in international law.[5] While the test applies to both conventions, the Convention cannot be interpreted by comparison with the ICSID Convention, which is later in time (*cf.* RS[14]-[15], [35]-[36], [87]).

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[1] See AS[19]-[20], [23], [54]; RS[22].
[2] *Evans v Air Canada* (2025) 99 ALJR 941, [6]-[8] (Gageler CJ, Edelman, Steward, Gleeson, Beech-Jones JJ).
[3] Citing *Morrison v Peacock* (2002) 210 CLR 274, 279 [16] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne JJ) and *Li v Zhou* (2014) 87 NSWLR 20, 28 [26] (Basten JA, Bathurst CJ and Beazley P agreeing).
[4] See *Spain HCA*, 308-312 [19]-[26] (Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson, Jagot JJ).
[5] See AS[55] fn 35. See also IS[23].

B. Art I(1) and the scope of the Convention (India's 'second topic', RS[37]-[47]; NOC[2])

10. ***Text***: Art III Convention applies to 'awards' as defined in Art I. There being no issue that the Awards were arbitral awards made in another State (the Netherlands), the unqualified application of the Convention to awards 'arising out of differences between persons, natural or legal', invites immediate application to an investment dispute between two legal entities concerning the application of a bilateral investment treaty to a commercial investment made by private parties in the territory of the respondent State.

11. India's contention that that the scope of the Convention as plainly stated in Art I(1) does 'not include awards concerning the conduct of a State *jure imperii* or in its governmental capacity, as opposed to acts of a State which are *jure gestionis*' (RS[37]) finds no support in the ordinary meaning of Art I(1), is question begging, and should be rejected. India starts inauspiciously (RS[38]) with the *dissenting* judgment of Judge Katsas in *Zhongshan Fucheng*, and entirely ignores the majority which, having seen a draft of their brother's judgment, systematically dismantles its reasoning.[6] When India turns to the text of Art I(1) (RS[41]), it identifies no textual or principled basis for *qualifying* the entirely *unqualified* use of terms such as 'award', 'differences' and 'persons, whether physical or legal'. At RS[40] India overreads AS[17]. The Appellants maintain their position below that it would be absurd for awards in inter-State disputes issued by the PCA under the 1899 and 1907 *Conventions for the Pacific Settlement of International Disputes* to lie within the scope of the enforcement mechanism in Art III Convention.[7] *Contra* RS[43], that outer bound does not support the further narrowing of the scope of the Convention for investment treaty awards. Other States readily accept that the Convention applies to investor-State awards arising from acts *jure imperii*[8] – including awards in favour of the original investors' co-shareholders in Devas India.[9]

12. ***Context***: As a matter of textual *context*, the text and structure of the Convention make plain that any restriction to commercial disputes, as a species of 'private law' matters, was relegated to a reservation pursuant to Art I(3). This clear choice by States *supports* reading 'awards' as applying to investor-State awards.

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[6] *Zhongshan Fucheng*, 112 F 4th 1054 (DC Cir, 2024) (Millett and Childs JJ). See also RS[42] where India does not address the majority's response to the dissenting argument at 1067.
[7] See App RS[37]-[40] ABFM 947-948 (Tab 16). At first instance: Applicants' submissions in Reply filed 2 December 2022 [69]-[70] (**FCA Reply Sub**) RBFM 50 (Tab 4).
[8] See, e.g., *BG Group Plc v Republic of Argentina*, 572 US 25 (2014); PJ Appendix A, CAB 69-93.
[9] *Republic of India v Deutsche Telekom AG* [2023] SGCA(I) 10; *Republic of India v CCDM Holdings LLC* [2024] QCCA 1620, leave to appeal refused: *Republic of India v CCDM Holdings LLC* (Supreme Court of Canada, 41660, 18 Sep 2025).

13. ***Object and purpose***: *First*, the approach at PJ[51] and PJ[61] (CAB 35, 40) adopted *India's* articulation of the object and purpose of the Convention,[10] and was methodologically sound (*cf.* RS[28]). Similarly, the Appellants have always maintained that the Convention's object and purpose is to expand the scope of the recognition and enforcement of foreign arbitral awards.[11] Both support the Appellants' interpretation of Art I(1).

14. *Second*, in its general discussion (RS[27]-[36]), India both overstates the logical implications of the primary judge's findings and then seeks to narrow excessively the object and purpose of the Convention by bypassing the purpose apparent in the terms of Art I:

a. There is no methodological basis for using the history of the 'Geneva Treaties' to restrict the scope of the very differently worded Convention (*cf.* RS[29]-[30]).

b. An appeal to international law beyond the terms of the Convention goes nowhere. The consent of States to enforcement of awards against them does not lead to 'formulat[ing] new arrangements in respect of a large and altogether different topic as fundamental as state immunity' (RS[28]) or 'rework[ing]' the rules of territorial sovereignty (RS[34], see also RS[42]). Rather, the sovereign rights referred to in India's submissions (RS[33]-[34], [42]) are *consistent with* the object and purpose of the Convention as described by the Appellants. Any submission in Art III 'properly understood [is] as an application of the immunity rule, not an exception to it'[12] as immunity 'is based on the assertion or presumption that such exercise is without consent'.[13]

c. The *travaux* do not support India's description of object and purpose. Out of context 'motherhood' statements referencing the 'sovereign rights of States', as in the Ad Hoc Committee Report, are no foundation for imputing into the Convention an object and purpose of preserving State immunity which is absent from any of its text (*cf.* RS[31]). Similarly, references to exploring additional measures in relation to 'private law disputes' in Resolution 604 and the 1958 Conference Final Act are not inconsistent with the scope of Art I(1) going beyond this description (*cf.* RS[32]).

15. ***Travaux***: It follows from ordinary textual analysis in light of context, object and purpose and the unqualified use of the term 'awards' in Art I that there is no sufficient ambiguity or obscurity to be resolved. Nor is it 'manifestly absurd or unreasonable' to arrive at such a result.

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[10] PJ[51] and PJ[61] refer to India's articulation of object and purpose in oral submissions as to 'overcome the perceived difficulties in the enforcement by countries of foreign awards, by creating a convenient mechanism for enforcement no more onerous than the enforcement of domestic awards (T57.41-45)': CAB 35, 40.
[11] FCA Reply Sub [59] RBFM 47 (Tab 4).
[12] Australian Law Reform Commission (**ALRC**), *Foreign State Immunity* (Report No 24, June 1984), 8 [10].
[13] 1982 Report, 239: see AS fn 34.

As correctly noted by the primary judge at PJ[86] (CAB 52), the *travaux* cannot be used to introduce ambiguity where none exists.

16. In any event (*cf.* RS[44]), the *travaux* reinforce the Appellants' position that any limitation in the Convention's application to awards, differences or relationships was confined to the reservation in Art I(3).

a. At the 1958 drafting conference, discussion of using 'commercial' to define which awards would be enforced under the Convention quickly fell away.[14] The attempt to reopen the ICC's recommendation to limit awards to 'commercial disputes'[15] was not followed by other drafters who supported a broad application to any civil dispute, including the Australian[16] and Czechoslovakian representatives.[17]

b. Thereafter, the restriction to 'commercial' matters proceeded within the context of a reservation as later found in Art I(3).[18] This was a concession to attract support for the Convention from civil law countries which, at that time, (a) distinguished between commercial and non-commercial civil transactions; and (b) did not recognise arbitration outside 'commercial' matters as defined by their domestic law.[19]

c. The absence of explicit reference to investor-State awards in the *travaux* before the era of BIT arbitration *explains* rather than tells *against* the Convention applying to investor-State arbitration if the text plainly accommodates it (*cf.* RS[35]). *First*, arbitration between foreign investors and States was well-known before the Convention was drafted; so was the difficulty of enforcing resultant awards.[20] *Second*, the ICSID Convention goes well beyond recognition and enforcement (see Chs I-III, IV (Arts 36-52)). Again, it is not a source of interpretation of the Convention (*cf.* RS[87]).

17. ***Commentators***: *First*, it must be recalled that the views of commentators are not a source of interpretation but may provide useful analysis and commentary (PJ[87] CAB 52). *Second*, India's return to the commentary at RS[45] does not advance matters. The primary

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[14] United Nations Economic and Social Council, UN Conference on International Commercial Arbitration (**ECOSOC Conference**) *Summary Record of Fourth Meeting*, UN Doc E/CONF.26/SR.4, 2. By the sixth meeting, the suggestion had fallen away: *Summary Record of the Sixth Meeting*, UN Doc E/CONF.26/SR.6, 5-6, 10.
[15] ECOSOC Conference, *Summary Record of Fourth Meeting*, UN Doc E/CONF.26/SR.4, 2.
[16] ECOSOC Conference, *Summary Record of Fifteenth Meeting*, UN Doc E/CONF.26/SR.15, 8.
[17] ECOSOC Conference, *Summary Record of the Seventh Meeting*, UN Doc E/CONF.26/SR.7, 3.
[18] ECOSOC Conference, *Summary Record of the Twenty-Third Meeting*, E/CONF.26/SR.23, 7-9, 11-12.
[19] See, e.g., UN Economic and Social Council, Recognition and Enforcement of Foreign Arbitral Awards*: Comments by Governments on the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UN Doc E/2822/Add.4, 4; Bernd Ehle, 'Article I' in Reinmar Wolff (ed), *New York Convention: Article-by-Article Commentary* (Bloomsbury, 2019) 25, 79-80.
[20] *Lena Goldfields Ltd v Union of Soviet Socialist Republics*, Award, (1936) 5 ILR 3; VV Veeder, 'The Lena Goldfields Arbitration' (1998) 47 *International and Comparative Law Quarterly* 747, 786-790.

judge's understanding of Prof van den Berg's position at PJ[92] (CAB 54) is sound. At p 99, in a section considering whether there is any conflict between the Convention and the ICSID Convention, the learned author said that the former 'does not exclude from its field of application an…award between a State and a foreign national relating to an investment dispute'.[21] The footnote to this passage cross-refers to the later section including p 279 which is quoted by India. This shows that Prof van den Berg saw this position as consistent with his statement at p 99, and so too the works of P Contini, L Cappelli-Perciballi, Profs Sanders and GW Haight cited by him. The approach of the primary judge to the views of Professor Crawford at PJ[91] (CAB 53-54) was also sound (*cf.* RS[46]).

C. Art III (India's 'fourth topic', RS[74]-[87]; NOC[3])

18. As the Convention applies to the Awards, one turns to the interpretation of Art III and NOC Ground 3. The primary judge was correct to conclude that Art III contains a promise by each Contracting State to all other Contracting States to enforce awards (PJ[43] CAB 30-31). (It is unnecessary to the appeal to determine whether Art III is, like Art 54 ICSID Convention, an obligation *erga omnes partes*.)[22] Neither of India's arguments in this Court answer the primary judge's findings.

19. ***Text***: *Spain* makes clear that the lack of explicit reference to State immunity does *not* mean waiver cannot be express in the sense of a necessary implication (*cf.* RS[79]). On a textual basis alone, the agreement of India to other States enforcing awards to which India is a party is an unmistakable submission to jurisdiction: PJ[51] CAB 35.

20. ***Context, object and purpose and the travaux***: At RS[80]-[81], India conflates all these aspects of treaty interpretation. The primary judge gave a thorough and reasoned explanation of the interpretation of Art III with close attention to VCLT methodology, including context, object and purpose, and in the appropriate way, the *travaux*. Nothing in India's brief submissions on this point impugns that approach (see AS[24]-[26]).

21. ***'Rules of procedure'***: The phrase 'in accordance with the rules of procedure in the territory where the award is relied upon' does not qualify the agreement and promise found in Art III to the exercise of jurisdiction, because national laws of sovereign immunity are not 'rules of procedure' per Art III: (a) If States parties had intended this, they could have said so *explicitly*. (b) In many if not most cases of awards against 'persons', immunity does not arise. 'Rules of procedure' being rules of general application indicates procedural rules that can apply

[21] Albert Jan van den Berg, *The New York Arbitration Convention of 1958* (Kluwer Law 1981) 99.
[22] See ***Blasket*** *Renewable Investments LLC v Kingdom of Spain* [2025] FCA 1028, [269] (Stewart J).

to *any* person. (c) The reference in the second sentence of Art III to 'more onerous conditions' in connection with fees and charges indicates curial procedure and court administrative rules and charges only. (d) This interpretation is closer to the objects and purposes of the treaty.

22. Any ambiguity in the words 'rules of procedure' is resolved by reference to the *travaux*, which make clear that the drafters understood 'rules of procedure' to have a limited, narrow operation, applying to such matters as 'requirements concerning the validation of the award', 'rules governing the presentation of documents', and 'recognition of the award's validity'.[23]

23. ***Other jurisdictions***: The decisions of other jurisdictions highlighted by India do little to advance matters in this Court. For the ICSID award enforcement case quoted by India at RS[83], the obiter comment on Art III acknowledges the Court of Appeal of England and Wales had not heard argument on the issues now presented.[24] Permission to appeal has been granted from the Convention case referred to at RS[84]-[85].[25] India was found not to be immune in parallel proceedings in Canada, where it also did not rely on reciprocity of its reservation.[26]

24. ***Commentators***: At RS[86], Professor Crawford's comments as to the role of 'rules of procedure' in Art III were in a footnote expressing concern over the suggestion that Convention 'requires enforcement of foreign awards involving third States, irrespective of whether the third State is itself a party to the Convention'.[27] No such interpretation is advanced in this case. Prof Bjorklund's article (RS[86]) addresses the distinction between enforcement and execution immunities and is premised on waiver of jurisdictional immunity where there is an agreement to arbitrate and the Convention applies (stating at p 218 'there is no doubt that [the Convention] permits enforcement against foreign States'). Prof Bjorklund's comments quoted by India are about *execution* immunity.

D. Art I(3) and the commercial reservation (India's 'third topic' RS[48]-[73]; NOA)

25. The metaphorical language of species and genus at RS[48] and [51] distorts the ordinary textual interpretation of Art I (see AS[35]). Art I(1) involves the application of one subject (the Convention) to a particular object (awards in respect of differences between persons). Art I(3) involves a different subject (the reserving State) applying the Convention (as direct object) to certain types of relationships (the indirect object). India reads the Convention in a way that

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[23] UN ECOSOC, *Summary Record of the Tenth Meeting*, UN Doc E/CONF.26/SR.10, 4, 7, 6.
[24] *Infrastructure Services Luxembourg Sarl v Kingdom of Spain* [2024] EWCA Civ 1257, [102(i)], [102(ii)] (Phillips LJ). The case is the subject of an appeal to the Supreme Court: *Infrastructure Services Luxembourg Sarl v Kingdom of Spain (Permission to Appeal)* [2025] 1 WLUK 644.
[25] *CC/Devas (Mauritius) Ltd v Republic of India* [2025] EWHC 1189 (Sir William Blair).
[26] *CCDM Holdings LLC v Republic of India* [2024] QCCA 1620 (leave to appeal refused: *Republic of India v CCDM Holdings LLC* (Supreme Court of Canada, 41660, 18 Sep 2025)).
[27] James Crawford, "A Foreign State Immunities Act for Australia?" (1980) 8 *Aus Yearbook of Int Law* 71, 102.

would limit another State's application of the Convention to an award from a third State even if neither of those States has made any reservation, contrary to the plain terms of Arts I and III and contrary to its own implementing legislation and concessions made below (AS[61]-[62]; [32] below), and well beyond the terms of Art XIV (AS[41]; [42]-[44] below (as to the IS)).

26. **NOA 1**: The Appellants do not challenge the premise of reciprocity in customary international law or that it is embodied in Art 21 VCLT. However, Art 21 is not the correct starting point (*cf.* RS[53]). Rather, it is the proper interpretation of the Convention – especially Arts I, III and XIV – that matters, and whether it says anything at all about the limits to reciprocity of any reservation and what can or must be done by a non-reserving State faced with enforcement of a foreign award in its territory.

27. ***Text***: In considering the verb 'apply' (RS[55]), India fails to grapple with the linguistic changes as between Art I(1) and Art I(3) (see [25] above). Nationality is immaterial since the nationality of an award party has the same passive role in both Arts I(1) and I(3) (*cf.* RS[56]).[28] Other examples of the ways in which a Contracting State may 'apply' the Convention do not assist (*contra* RS[55]): (a) enforcement of arbitration agreements per Art II is done *by* India through its law and courts *in* India (likewise imposing conditions or fees *in* India (Art III)); (b) seeking recognition and enforcement of an award is not an application *by* India *of* the Convention; it is an application *by* an award party *under* the Convention as implemented into Indian national law; (c) India taking steps to extend the Convention's application to territories not already covered at the time of signature (Art X) is India implementing the Convention within its territory. It is not correct to equate what *India* can or would do – what *it* would 'treat…as being subject to the Convention' (FC[72] CAB 136) – with what India has agreed *another* State can or must do.

28. As to the absence of the words 'on the basis of reciprocity' from the commercial reservation (RS[57]), the text of Art I(3), especially read in context, indicates that the commercial reservation is independent of a general rule of reciprocity entitling (let alone requiring) a non-reserving State to refuse enforcement. Refences to national law (RS[58]) are merely another textual indicator in support of the Appellants' interpretation.

29. ***Context***: India's reliance on the Full Court's reasoning in relation to Art XIV at RS[61] ignores the fundamental point made at AS[41] that it does not limit what Contracting States other than India can or must do 'between and amongst' them (*cf.* FC[69] CAB 135) within the

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[28] *Odin Shipping Co (Pte) Ltd v Aguas Industriales de Tarragona* (4 October 1983) Tribunal Supremo, in Albert Jan van den Berg (ed), *ICCA Yearbook Commercial Arbitration* (1986) 528 (foreign award enforceable even if local award unenforceable in State of a party).

terms of the Convention. That the express terms of Art XIV are more limited than the customary rule as expressed in Art 21 VCLT is telling. The limited effect of Art XIV is further dealt with in relation to the IS in §E below, especially [42]-[44].

30. ***Object and purpose***: India also misapplies the role of object and purpose at RS[62]. The question is not one of the purpose of the commercial reservation, which is apparent from its text. In any event, it is trite that reservations that qualify the scope of the *acceding* State's obligations can promote wider ratification of treaties. Limits on the reciprocal effect of a reservation may also promote the 'object and purpose' of accession by other States.

31. ***Travaux***: As found below (PJ[86] CAB 51-52) and outlined at AS[43], the text and *travaux* make plain that States parties rejected a broad limitation on the *scope* of Art I. India's interpretation undermines this (*contra* RS[63]). Art I(3) was a concession to some civil law countries, limiting the disturbance the Convention might make *within* their territories (AS[27c], [43]). That other treaties allow for reservations to which domestic law is relevant does not detract from the territorial link here.

32. India's conclusion that the commercial reservation is not territorially limited is only reached because of its flawed interpretation process. The primary judge did not have to deal with the question given the unqualified concession India (properly) made before the Court.[29] Footnote 45 (RS[59]) ignores the logical consequences of PJ[58] CAB 38: if Australia's reservations were the only relevant reservations, it follows that India's is not relevant.

33. The way India misunderstands the alleged source of waiver and the rights and duties involved at RS[60] is telling. The question is not one of 'India's rights and duties' under Art III, but rather what *consent* India has given to enforcing States by agreement to the Convention, including its consent to a multilateral convention in which enforcing States assume obligations towards awards from other States and involving nationals of yet further States. Refusal to enforce an award on public policy grounds under Art V(2)(b) is merely an exercise of jurisdiction that arises only once the Convention is found to apply to India;[30] there is no authority cited to suggest the public policy ground extends to State immunity. It is also not to the point that Australia, Mauritius and the Netherlands knew of India's reservation, if the reservation's effect between them is limited by Art I(3) or Art XIV. India likewise 'knew' that it was agreeing with other and future Contracting States like Australia that they would be bound

[29] AS[61]-[62], fn 41, 43, 44.
[30] PJ[44] CAB 31.

by Arts I(1) and III in respect of awards from other Contracting States in favour of nationals of yet further Contracting States including against India.

34. ***Commentators***: At RS[66] India seeks to set to one side the work of various publicists rather than attempting to articulate how the material cited at FC[69] CAB 135 supports the Full Court's finding or engaging with the points that the Appellants have made at AS[47].

35. ***Practice***: At RS[64], India does not engage with the straightforward point that the *examples* of States' implementing legislation, including India's, appear consistent with the collection of legislation from well over 100 States indicating that no State implements the reservations of other Contracting States (AS[45] fn 20). The note to s 8(3) IAA added in 2022 arose only from new *ex parte* provisions in the FSIA.[31] It cannot affect the application of s 10 FSIA to a foreign State's accession to the Convention.

36. At RS[65] India overlooks the point that only few cases can be identified: it is unsurprising that only a few courts have rejected an obviously wrong argument put unsuccessfully, some 45 years ago, against an Indian party. Other cases where Art XIV was unsuccessfully relied upon are noted by UNCITRAL: see [44] below. The presence of that authority in materials cited by the Full Court contradicts the conclusion of the Full Court.

37. **Conclusion**: For reasons explained at AS[33]-[48], the Full Court erred in either assuming or implicitly supposing that the commercial reservation could operate reciprocally on the rights and obligations of other Contracting States by application of customary law.

38. **NOA 2**: As to RS[68], *first*, a reservation does not affect obligations 'between and amongst' *other* States (see [29] above). *Second*, India has agreed to what those States will do and the Convention itself limits the inverse effect on Australia-India relations through Art XIV (see [45], [46] below). *Third*, the proposition that the Convention is 'subject to' custom: (a) inverts the true position – a treaty can depart from customary law, and custom is merely a source (beyond context) of interpretation of the ordinary meaning of the words used (Art 31(3)(c) VCLT); and (b) the consent in Art III is not an exception to the customary rule, but the application of the rule States have immunity from exercise of jurisdiction *without their consent*.

39. **NOA 3***: First*, see [38] above. *Second*, mere joinder of issue is not sufficient to make the question of waiver 'equivocal'.

40. **NOA 4-5**: India's submissions at RS[70] do nothing beyond explaining the logical conclusion of its argument. Nothing that India puts forward at RS[71]-[72] grapples with the

[31] Explanatory Memorandum, *Courts and Tribunals Legislation Amendment* (2021 Measures No 1) Bill 2021, at [14], [142]-[147] generally, and [180] in relation to the note to s 8(3) IAA.

unqualified concession before the primary judge, its position in other fora or its own legislation implementing the Convention (see AS[61]-AS[62]; [23], [25] above).

E. Response to Intervener's Submissions (IS)

41. The intervener relies on two matters in support of the Full Court; the customary law embodied in Art 21 VCLT and Art XIV Convention: IS[32]-[33]. IS[34] merely replicates the Full Court's reasoning. IS[35] asserts a position on the effect of customary law without further analysis (first sentence) and then turns to Art XIV for support (second sentence). The reliance on Art XIV in IS[35]-[42] is misplaced.

42. *First*, the ILC's Guide (IS[35] fn 41) notes only that Art XIV 'recalls' the principle of reciprocity in 'general terms'. The ILC makes no comment on Art XIV's effect on proceedings to enforce awards under Art III. Nor does the ILC engage with the literature at AS[47] that predates the guide, or consider the *travaux* noted at AS[43].

43. *Second*, the *travaux* at IS[36] merely confirms that Art XIV as adopted was proposed to remedy the perceived defect in various articles, without specifying how the commercial reservation would operate reciprocally in Art II or III proceedings involving non-reserving States. Nothing in the limited discussion in the *travaux* indicates that Art XIV was intended to operate otherwise than in accordance with its terms. It is not in the same terms as the general reciprocity reservation in the first sentence of Art I(3); that reservation directs attention to the status of a foreign State from which an award emanates, the 'Award State'. In contrast, the commercial reservation is directed to the State making the declaration and what it will do in its territory in Art II or III proceedings (AS[35]). Nor can the narrower terms of Art XIV be equated with the broad terms of Art 21 VCLT.

44. Thus, *third*, the clear effect and purpose of Art XIV Convention is that it bars States with reservations, such as India, from acting inconsistently with their reservation. Reciprocity (if invoked by the enforcing State) operates only in the defensive sense submitted at AS[46]-[47]. Art XIV operates in a straightforward way before the International Court of Justice, and can also in Art II or Art III Convention proceedings. In Art III proceedings the obligation is to enforce an award. Here, the Award State (the Netherlands) has no reservations. Moreover, the State where enforcement is sought (Australia) has exercised its right to make no reservations, nor (if it matters) do the home State of the enforcing parties have any relevant reservations (Mauritius or the United States of America (**US**)[32]). That Art XIV presents no barrier to

[32] In the US, 'commercial' *includes* investor-State claims: see AS[63] fn 46. As to assignees, see *Blasket*, [287]-[326] (Stewart J) (assigned ICSID awards).

enforcement in such cases, better achieves the Convention's object and purpose (AS[42]). It is telling that, as UNCITRAL notes, enforcement of an arbitral award has never been denied based on Art XIV.[33] Moreover, States such as Australia have not implemented Art XIV to bar enforcement or in any event given effect to any State's reservations bar their own: AS[45]; [35] above. *Contra* IS[37], *Fertilizer* was rightly decided. Thus, *contra* IS[38]-[41], India's agreement to jurisdiction in this case found its agreement to Art III Convention is unaffected by India's reservation and Art XIV.

45. *Fourth*, and further as to IS[38]-[41], even if India's commercial reservation operated reciprocally in respect of *primary* obligations owed by enforcing States to India per Art 21(1)(b) VCLT (IS[33]-[34]; *cf.* AS[52]), the result would be the same. Because Art I(1) and Art I(3) Convention have different language, States are not agreeing that the Convention does not apply to awards merely because another State makes a commercial reservation, only that the State which made the reservation need not apply the Convention to the award: AS[35]. Nor is that the reciprocal effect of any reservation. India's reservation does not become a reservation by the Netherlands in respect of the application of the Convention to awards made there or by Australia in respect of the enforcement in Australia of Dutch awards. Even if reciprocity frees Australia of the *obligation to India* to apply the Convention *to an award*, this is not the same as Australia reciprocally agreeing that the Convention does not apply to such awards, especially if those awards do not come from India. Still less are Australia, the Netherlands, Mauritius and the US agreeing 'between and amongst them' (FC[69] CAB 135) that the Convention does not apply to awards merely because a Contracting State party to (or of a party to) the award has made the reservation. (The intervener accepts that there is no effect on the obligations *between* other States (IS[40]), while India's concession at first instance extended also to obligations to India: AS[61]. Reservations are only ever opposable between the reserving State and other States.[34]) The agreement by India to Arts I(1) and III suffices for the Awards to be enforced without India acting inconsistently with its reservation.

46. *Fifth*, rules on State immunity do not resolve the problem in the case at hand (*cf.* IS[39]). Nowhere does the Convention say that the obligation to enforce an award, or the interpretation of that obligation, is subject to State immunity,[35] whether under customary international law or, still less, domestic law, and nothing is cited to that effect. IS[40] accepts that India's reservation

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[33] UNCITRAL, New York Convention Guide, Art XIV, para 3, citing inter alia *Union of India v Lief Hoegh & Co*, AIR 1983 Guj 34 (High Court of Gujarat) (Art II proceeding); *Fertilizer*, 953.
[34] ILC Guide, 4.1.1, Commentary (1).
[35] The intervener agrees that Art III 'rules of procedure' do not include immunity rules: IS[30].

does not affect the obligation as 'between and amongst' *other* Contracting States (*contra* FC[69]) but then interferes with those obligations by reference to State immunity. State immunity is not a *jus cogens* rule, and States were already resiling from absolute immunity in 1958.[36] (Indeed, the issues in this appeal would be moot had Australia implemented in s 17 FSIA the 'wider' view[37] that mere agreement to arbitrate was a submission to the court's jurisdiction.[38])

47. *Sixth*, the intervener does not grapple with the multilateral nature of the Convention and India's agreement to Australia assuming obligations to other Contracting States (see AS[40], [52]-[53]). The Court should not, with respect, fall into the outdated[39] supposition that multilateral treaties merely give rise to bundles of bilateral relations; instead, they 'characteristically establish a framework of rules applicable to all States parties'.[40] This is particularly so where an obligation to recognise an award may be owed indivisibly[41] to the Contracting State whose interests may be specially affected so as to ground the state responsibility of Australia for failure to enforce an award, including the Award State, and the award creditors' home States which might assert rights of diplomatic protection.[42] The agreement to enforce awards even from non-Contracting States (where Contracting State nationals may arbitrate) indicates support for a collective legal regime of award enforcement consistent with multilateral obligations.[43]

48. *Lastly*, IS[41] adds nothing to the issue at hand, while IS[42] merely states the consequence of the intervener's argument.

49. **Conclusion**: The appeal should be upheld.

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[36] H Fox and P Webb, *The Law of State Immunity* (Oxford University Press, 3rd ed, 2013) 145-6, 156-159, 161.
[37] See ALRC, *Foreign State Immunity*, (Report No 24, June 1984) 62-63 [106]-[107].
[38] *Foreign Sovereign Immunities Act 1978* (28 USC §1605(a)(6)); *State Immunity Act 1978* (UK) s 9(1).
[39] B Simma, 'Bilateralism and Community Interest in the Law of State Responsibility' in Dinstein and Tabory (eds), *International Law at a Time of Perplexity* (Martinus Nijhoff, 1989) 822-3; G Perrin, 'La Détermination de l'Etat Lésé. Les Régimes Dissociables et les Régimes Indissociables' in Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century* (Martinus Nijhoff, 1996) 244.
[40] ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, UN Doc A/56/10, 118 [8]; ILC, *Third Report on State Responsibility by Mr James Crawford, Special Rapporteur*, UN Doc A/CN.4/507, [106]-[107] and Table 1; *Blasket*, [246] (Stewart J).
[41] ILC, *Fourth Report on State Responsibility*, UN Doc A/CN.4/444, and Add. 1-3* [92].
[42] See *Blasket*, [313] (Stewart J).
[43] *Blasket*, [243]-[248] (Stewart J).