HIGH COURT OF AUSTRALIA

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Details of Filing

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Form 27F – Outline of oral submissions

Note: see rule 44.08.2.

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' OUTLINE OF ORAL SUBMISSIONS

Part I: This submission is in a form suitable for publication on the Internet.

Part II: Introductory points

1. Abbreviations used in the Appellants' submissions in chief (**AS**) and in reply (**AR**) are used herein. **RS** is the Respondent's submissions and **Rej** is the Respondent's rejoinder.

2. The central issue is whether the Respondent has consented to the exercise of jurisdiction by an Australian Court for the purposes of s 10 FSIA (JBA 1/3/33-34) in proceedings under Art III Convention (JBA 7/55/1753) and s 8 IAA (JBA 1/4/72-74) to enforce an award made in the Netherlands in favour of Mauritian investors, and since assigned to US nationals, against India.

3. This Court in *Spain HCA* (JBA 3/11/380) identified the approach for determining whether there is submission by treaty under s 10 FSIA. The Convention must be interpreted in accordance with customary law as embodied in Arts 31-32 VCLT (JBA 7/59/1837) to determine if there was an express agreement to submit to jurisdiction that is clear and unmistakable: AS[19]; AR[6]-[9].

4. The issues of treaty interpretation that arise in these proceedings require attention to Arts I(1), I(3), III and XIV Convention. India has made a declaration of the commercial reservation under Art I(3). The effect of that declaration on any agreement by India to submit *in this case* turns on the terms of the Convention and such rules of customary international law as may apply to the commercial reservation.

5. Given the structure of the Convention and the issues presented, it is logical and convenient to address points arising in the NOC (as pressed) and then the NOA.

Topic 1: Art I(1) and the scope of the Convention (NOC [2])

6. Art I(1) defines the scope of application of the Convention to the recognition and enforcement of arbitral awards. The ordinary meaning of the text of Art I in context and read in light of the object and purpose of the Convention puts no limit on the scope either of the persons who may be parties or the types of differences.

7. Thus, the text of Art I(1) (JBA/7/55/1751) readily embraces investor-State arbitration: AR[10]-[11]. It is also consistent with the Convention's object and purpose: PJ[61] (CAB 40); AR[13]-[14]; *cf.* RS[30], [42]. The courts of many countries can and do enforce such awards under the Convention: PJ[93] (CAB 54-55); PJ Appendix (CAB 69-93). Its application is well supported by commentators: AR[17]; PJ[92] (CAB 54); van den Berg 99, 279 (JBA 8/84/2201, 2238); Bjorklund (JBA 8/87/2287).

8. This result does not change because the literal application of the Convention to some disputes arising only between States would give rise to an absurd or unreasonable interpretation of Art I(1): AR[11]; *cf.* Rej[3]-[7]. The *travaux* resolves that absurdity by identifying inter-State disputes within the jurisdiction of the PCA as falling beyond scope (JBA7/79/2067). These were disputes under the Conventions for the Pacific Settlement of Disputes (Chs II: JBA 7/51/1686-1689; 7/52/1706-1709) involving sovereignty, boundary delimitation, conduct in war, diplomatic protection and concession agreements: AR[11]; RS(FCAFC) [37]-[40] (ABFM III/16/947-8); AS2(FCA) [69]-[70] (RBFM I/4/50). Domestic mechanisms are plainly unsuited to enforcing inter-State awards under those Conventions, unlike investor-State awards.

9. The Convention is not limited to commercial or private law disputes: *cf.* RS [37], [41]; Rej[7]. Art I(1) contains no such qualification: AR[10]-[11]. Instead, Art I(3) permits Contracting States to declare they will only apply the Convention to differences arising from 'commercial' relationships so considered under their domestic law. The commercial reservation is a declaration as to how the Convention will be applied by a reserving State not as to how the Convention applies to the reserving State or more generally: AS[21]; AR Pt D. Although private and commercial disputes were a significant focus for drafting States (*cf.* RS[31]-[32], [44]), arbitration between States and foreign investors was known of in 1958: AR[16(c)]. The *travaux* confirms that States confined commerciality as a criterion for the application of the Convention to the commercial reservation in Art I(3), to address the concern of some States: AR[16]; *travaux* (SJBA 3/5/92-96). Therefore, whether the claim arises for *acte iure imperii* or *gestionis* in BIT disputes is of no matter under Art I(1) Convention: *Zhongshang* DC Cir (JBA 6/50/1633-1642); AR[11]; *cf.* RS[38]; Rej[8].

10. State immunity as a rule of international law (Art 31(3)(c) VCLT) cannot override the plain terms of Art I interpreted in its context and in light of the Convention's object and purpose so as to displace investor-State awards or limit the scope of awards caught by the Convention: *Vattenfall* [154] (JBA 6/49/1597) AR[9]; *cf.* RS[24]-[25]. In any event, submission by agreement is an expression of the rule, and as such is a well-recognised 'exception': AR[9]; ALRC 8[10] (JBA 8/90/2371); 1982 Report (JBA 10/108/3298).

Topic 2: Art III and the clear unmistakable submission to jurisdiction (NOC [3])

11. Art III, as properly interpreted by the primary judge, is a clear agreement that any 'arbitral award' to which the Convention applies must be recognised and enforced in accordance with national procedures, carrying with it the necessary implication that domestic courts will exercise jurisdiction over its parties: AS[18]-[21], [23]-[24], [27]; AR[18]-[20]; PJ[43], [103] (CAB 30-31, 59). See also FC[72] (CAB 136). The same position is adopted in two US Circuit Courts: AS[26]; PJ[46] (CAB 32) *Seetransport* (2nd Cir) (JBA 6/41/1341-1342); *Creighton* (DC Cir) (JBA 5/24/888); IS[22]; *cf.* Rej[23].

12. *Textually*, the phrase 'in accordance with the rules of procedure' does not limit the agreement in Art III, it merely identifies the methods by which the agreement to enforce an award is given effect: AR[21]. The *travaux* indicates a concern with formalities such as proof, to facilitate enforcement without 'unnecessary inconvenience': AR[22]; *travaux* (JBA 7/76/2046-2050). As such rules may not be substantially more onerous than those for domestic awards, they must be comparable with such rules. The reference to conditions, fees and charges is consistent with this narrow scope.

13. Commentators are not a source of interpretation: AR[17]; PJ[87] (CAB 52). India fails to read the commentators in context: AR[24]; *cf.* RS[86]; Rej[21].

14. *Cf.* Rej[13]-[14], there is no 'lacuna' for awards against non-Contracting States that 'rules of procedure' sought or needed to address. Convention States must bring domestic legislation into conformity with their obligations: Brownlie 48-49 (JBA 10/111/3348-3349); *Exchange of Greek and Turkish Populations* [1925] PCIJ 10 at 20-21 (JBA 5/32/1108, 1110).

15. Even if the 'rules of procedure' refers to national immunity laws, the point is circular as s 10 FSIA is engaged by the agreement in Art III (PJ[94]-[96] (CAB 55-56)).

Topic 3: Operation and effect of the commercial reservation (NOA)

16. The core issue is the extent of any 'reciprocal' operation of the commercial reservation made by a Contracting State in relation to an award made against it in a non-reserving

Contracting State, in favour of nationals of a non-reserving Contracting State, sought to be enforced under Art III in a non-reserving Contracting State.

17. At first instance, the Respondent conceded its reservation had no effect on Australia's obligations: AS[61]; (ABFM III/12/877). Without notice, the Full Court incorrectly relied on custom to limit Australia's *obligation* to India ([FC]72 (CAB 136)) and between and amongst Contracting States ([FC]69 (CAB 135)), to find that India's Art III *consent* to jurisdiction was not clearly and unmistakably given for s10 FSIA: AS[28]-[32].

18. Grounds 1–4 raise interconnected issues of interpretation of the Convention and the effect of customary international law on India's commercial reservation.

19. ***Ground 1***: Custom is subject to treaty: AS[33]; Villiger 18[38] (SJBA 3/10/132). Regarding the ***text*** of Art I(3) second sentence, *first*, the commercial reservation defines how the reserving State applies the Convention in *its* territory to an award, not the scope of the Convention *per se* under Art I(1): AS[35], [37], [39]; AR[27]-[28]. The reservation addressed domestic concerns of some States: *travaux* (SJBA 3/5/92-96); AS[43]; AR[31]. *Second*, it is not concerned with nationality of a party to the award, but only the State in its capacity as the enforcing State: AS[36] *cf.* 1923/1927 Geneva Protocol and Convention (Art I: JBA 7/53/1719; 7/54/1732). *Third*, the basis of the reservation was not reciprocity unlike the first sentence of Art I(3): AS[37]. *Fourth*, it operates per the domestic law of the reserving State: AS[38], [51]. *Fifth*, there is no indication in the text or *travaux* that other States accepted any reciprocal burden to give effect to the reservation: AS[42]-[43].

20. Critically, *sixth*, Contracting States only briefly discussed (JBA 7/82/2088-2089) and by Art XIV provided for a limited form of reciprocity to prevent States acting inconsistently with their reservation in dealings with other States: AS[41]; AR[29], [41]-[44]; *cf.* IS[36]. *Contra* FC[69] (CAB 135), commentators agree Art XIV can only have a limited, defensive role that would not affect enforcement of an award in a State without the commercial reservation, at least if the award is from a non-reserving State as here: AS[47]; AR[34]; van den Berg 14-15 (JBA 8/84/2141-2142); Kölbl 556-557 (SJBA 3/7/111-112); Nacimiento 544-547 (JBA 11/120/3545-3550); UNCITRAL Secretariat 329[6] (JBA 9/98/2877-2879); ICCA Guide (SJBA 3/9/123). There is no support for reciprocity of the kind applied by the Full Court or any reliance on Art 21 VCLT: *cf.* RS[66]. *Fertilizer Corp* (JBA 5/26/912-913) correctly recognised the textual differences between the two reservations in Art I(3) and adopted a narrow, defensive interpretation of Art XIV: AS[46]; AR[44].

21. The ***object and purpose*** of the Convention as found by the primary judge (PJ[51] (CAB 35)) favours limiting the reservation to its application in reserving States and the bar in Art XIV. The focus is on *the treaty* as a whole not *the reservation*: AR[30]; *cf.* RS[62].

22. ***Beyond text and context***, State immunity as a rule of international law has no effect on Art III: [10] above and AR[46]; *cf.* RS[68]; IS[39]. It cannot affect relations between Australia and the Netherlands given Art 21 VCLT: AR[38], *cf.* IS[39]. Further, the Convention is multilateral. Multilateral conventions are not just a series of bilateral relations: AR[47]; *Blasket* [246] (JBA 4/18/689-690). Reservations cannot operate 'between and amongst' *other* Contracting States (*cf.* FC[69] (CAB 135)): Art 21(2) VCLT (JBA 7/59/1834); AS[40]. The award State (the Netherlands) is entitled to enforcement: AR[45].

23. Contracting States including the Respondent implement the Convention without giving effect to reservations bar their own: AS[45]; AR[35].

24. ***Ground 2*****:** In applying custom, the Full Court failed to properly consider the nature and content of the obligation; for a Dutch award, Australia's obligations are not 'reciprocal' to India but 'mutually' owed to the Netherlands: AS[49]-[50]. That the reservation is directed to the territory or situations obtaining in a reserving State limits its reciprocity: AS[51]; ILC Guide, Guideline 4.2.5(11) (JBA 10/106/3123); see *travaux* at [19] above.

25. ***Ground 3***: Even if the reservation reduces Australia's co-operative *obligation* to India, the *consent* in Art III is logically unaffected: AS[52]-[53]; AR[33].

26. ***Ground 4*****:** The Full Court misapplied the (later) ICSID Convention to the (earlier) Convention: AS[54]-[59]; *cf.* RS[87]. The ILC considered both Art III Convention and Art 54 ICSID Convention as examples of express submission: AS[55]; AR[9]; 1982 Report 242 (JBA 10/108/3301) citing at n 281 UN Materials 151 (JBA 12/129/4155, 4159). The 1982 Report relied on by the ALRC (43 [78]-[79] nn.1-2 (JBA 8/90/2386)) is to identical effect as the 1991 Report 51-52 (JBA 10/105/3048-3049) cited in *Spain HCA* [22]-[26], [75] (JBA 3/11/397-400, 419). India's attempt to interpret the Convention by relying on silence about the Convention in the *travaux* of the ICSID Convention is without authority (*cf.* RS[36]).

27. ***Ground 5*****:** Ground 5 is maintained as the Appellants were not at fault: AS[60]-[63]. Special leave having been granted, it may be sufficient to observe its cogency.

4 November 2025

Bret Walker