HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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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

ATTORNEY-GENERAL OF THE COMMONWEALTH
Intervener

OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH

PART I INTERNET PUBLICATION

1 This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

The scope of the New York Convention (CS [15])

2 State practice informs the interpretation of the word "person" in Art I(1) of the New York Convention **(Vol 7, Tab 55)**: VCLT Art 31(3)(b). It confirms that "States" are "persons" within Art I(1), as awards against States in investor-State disputes are regularly enforced under the New York Convention: **PJ [92]-[93] (CAB 54)**; *CC/Devas v Republic of India* [2025] EWHC 964 (Comm) at [29] (**Vol 4, Tab 21**).

3 The Court is not required to decide the extent to which inter-State awards are covered by the New York Convention. There are various concepts other than "person" in Art I(1) that would inform the answer to that question, but its answer goes far beyond what is necessary to decide this case. All this Court need decide under NOC [2] is whether the word "person" includes States acting *jure gestionis* but not *jure imperii*. That distinction has no place in Art I(1): *Zhongshan Fucheng Industrial Investment Co Ltd v. Federal Republic of Nigeria*, 112 F 5th 1054 (DC Circuit, 2024) at 1068-1072 **(Vol 6, Tab 50)**.

Ratifying the New York Convention waives a State's immunity from proceedings for recognition and enforcement of an award (CS [18]-[29])

4 By ratifying the New York Convention, and subject to the effect of its commercial reservation, India accepted that every other Contracting State has an unqualified obligation to recognise and enforce awards within the scope of the Convention (including awards to which it is a party). That is incompatible with the maintenance of its immunity in domestic proceedings to recognise and enforce such awards.

5 That submission does not entail that Contracting States are required to enforce awards against non-Contracting States, notwithstanding the sovereign immunity of those States. By reason of Art 31(3)(c) of the VCLT, Art III of the New York Convention must be interpreted taking into account other relevant rules of international law, including the *pacta tertiis* principle (the treaty law rule of privity). So interpreted, Art III has no effect on the State immunity of non-Contracting States, notwithstanding that acceptance of the unqualified obligation it creates <u>does</u> waive State immunity for States that are party to the Convention: *Creighton Ltd v Qatar*, 181 F 3d 118 **(Vol 5, Tab 24)**; James Crawford,

Brownlie's Principles of Public International Law (9^{th} ed, Oxford University Press, 2019) at 370 **(not in JBA)**; *contra* Rej [16].

6 The United States authorities support the proposition that a State waives immunity by ratifying the New York Convention (without requiring proof of the existence of a valid arbitration agreement to establish waiver). India's submission to the contrary blurs reasoning that is directed to two distinct exceptions under United States law: *Foreign Sovereign Immunities Act 1976* (**Vol 2, Tab 7**). To the extent that the "waiver exception" authorities refer to the existence of an arbitration agreement, they are identifying a factum that must exist before Art III can be engaged, rather than requiring a valid arbitration agreement as a component of waiver: **PJ [47] (CAB 33-34)**; *Seetransport v Navimpex* 989 F 2d 572 at 578-579 (2^{nd} Circuit, 1993) **(Vol 6, Tab 41)**; *NextEra Energy Global Holdings BV v Kingdom of Spain*, 112 F 4^{th} 1088 at 1099-1100 (DC Circuit, 2024) (**Vol 5, Tab 34)**; *Process & Industrial Developments Ltd v Federal Republic of Nigeria*, 506 F Supp 3d 1 (DDC, 2020) **(Vol 6, Tab 39)**.

7 The reference to "rules of procedure of the territory" in Art III of the New York Convention cannot assist India in its argument that it has not submitted to jurisdiction, because the argument is circular: CS [30(c)]. Sir William Blair's decision in *CC/Devas (Mauritius) Ltd v Republic of India* [2025] EWHC 964 (Comm) **(Vol 4, Tab 21)** is under appeal and should not be followed.

The reciprocal effect of India's commercial reservation limits its submission to jurisdiction so as not to include non-commercial awards under Indian law (CS [31]-[42])

8 India's commercial reservation has the reciprocal effect provided for by Art 21 of the VCLT **(Vol 7, Tab 59)**. By reason of that reservation, India is not obliged to any other Contracting State to recognise and enforce awards that are not considered commercial under Indian domestic law. By reason of the customary international law rule reflected in Art 21(1)(b), the obligations of all other parties under (relevantly) Art III are modified "to the same extent" vis-à-vis India: *ILC Guide to Practice on Reservations to Treaties (with commentaries)* (2011) **p 461-462** (**Vol 12, Tab 106**).

9 The argument that ratification of the New York Convention waives sovereign immunity with respect to awards covered by that Convention depends upon a Contracting State having consented to other Contracting States having obligations under Art III to recognise and enforce awards against it. By reason of the reciprocal effect of the commercial

reservation, no Contracting State had any obligation to India to recognise and enforce awards not considered commercial under the law of India. The fact that Contracting Parties may have agreed, as between themselves, to enforce a wider category of awards against India is incapable of removing India's right to sovereign immunity with respect to that wider category of awards.

10 There is nothing in the nature of the commercial reservation that makes it incapable of having reciprocal operation. The contrary proposition is irreconcilable with Art XIV of the New York Convention, which was adopted in part for the purpose of ensuring that the commercial reservation did have such operation: **CS [36]**; van den Berg, *The New York Arbitration Convention of 1958* (1981, Kluwer Law and Taxation Publishers) at 14 **(Vol 8, Tab 84)**.

Date: 5 November 2025

Stephen Donaghue	**Callista Harris**	**Andrew O'Beid**