

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

CCDM HOLDINGS, LLC & ORS

APPELLANTS

AND

THE REPUBLIC OF INDIA

RESPONDENT

CCDM Holdings LLC v The Republic of India

[2026] HCA 9

Date of Hearing: 4 & 5 November 2025

Date of Judgment: 8 April 2026

S90/2025

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

B W Walker SC with J A Hogan-Doran SC and A F Garsia for the appellants
(instructed by Norton Rose Fulbright)

J T Gleeson SC and F T Roughley SC with C G Winnett for the respondent
(instructed White & Case)

S P Donaghue KC, Solicitor-General of the Commonwealth, with
C S A Harris and A A E O'Beid for the Attorney-General of the
Commonwealth, intervening (instructed by Australian Government
Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to
formal revision prior to publication in the Commonwealth Law
Reports.

CATCHWORDS

CCDM Holdings LLC v The Republic of India

Private international law – Foreign State immunity – Immunity from jurisdiction – Proceedings for recognition and enforcement of arbitral award – Where appellants assignees of investors who obtained arbitral award against respondent – Where appellants sought to have award recognised and enforced in Australia under Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) ("New York Convention") as implemented by Pt II of *International Arbitration Act 1974* (Cth) – Whether respondent's ratification of New York Convention amounted to waiver of respondent's foreign State immunity from jurisdiction for recognition and enforcement of foreign arbitral award in courts of other State parties to New York Convention – Whether clear and unmistakable intention that entry into New York Convention involves waiver of foreign State immunity – Whether text and context of New York Convention suggests State ratification intended to constitute waiver of foreign State immunity.

Words and phrases – "arbitral award", "arbitration", "clear and unmistakable", "commercial or private law dispute", "commercial transaction", "common understanding", "enforcement", "express reservation", "foreign arbitral award", "foreign State immunity", "immunity from jurisdiction", "intention", "intention to preserve", "persons, whether physical or legal", "practical effect", "preservation", "presumption", "private party", "ratification", "reciprocity", "recognition", "reservation", "scope", "sovereign equality", "sovereign immunity", "State practice", "submission to jurisdiction", "subsequent practice", "waiver".

Foreign States Immunities Act 1985 (Cth), ss 9, 10, 11, 17.

International Arbitration Act 1974 (Cth), ss 8, 9, Sch 1.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), Arts I, II, III, IV, V, VI, VII, XI, XIII, XIV.

Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965), Arts 53, 54, 55.

Vienna Convention on the Law of Treaties (1969), Art 31.

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Introduction

1 The appellants are assignees of, and have been substituted as parties for,¹ Mauritian investors who obtained an arbitral award in the Netherlands against the Republic of India. The award was for more than US\$111 million. The appellants seek to have their award recognised and enforced in Australia under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)² ("the New York Convention") as implemented by Pt II of the *International Arbitration Act 1974* (Cth).

2 The principal question throughout these proceedings, and the focus of this appeal, was the narrow issue of whether India's act of ratification of the New York Convention amounted to a waiver of foreign State immunity from jurisdiction for recognition and enforcement of a foreign arbitral award to which India is a party in the courts of other State parties to the New York Convention. In answer, India raised numerous other issues including: (i) whether the scope of the New York Convention extends to arbitrations where a State is a party that do not involve a commercial or private law dispute; and (ii) the scope of any waiver of immunity by India in light of India's reservation to the New York Convention that it would apply the Convention only to differences arising out of legal relationships which are considered as commercial under the law of India. The appellants, in common with the Mauritian investors in the arbitration, disclaimed reliance on the parties' agreement to arbitrate as itself being a waiver of foreign State immunity.

3 The principal question of waiver arises in this country in the context of the *Foreign States Immunities Act 1985* (Cth). Section 9 of that Act provides that "[e]xcept as provided by or under this Act, a foreign State is immune from the jurisdiction of the courts of Australia in a proceeding". Section 10(1) of that Act provides that "[a] foreign State is not immune in a proceeding in which it has submitted to the jurisdiction in accordance with this section". As s 10(2) provides, that submission to jurisdiction can occur at any time "by agreement or otherwise"

1 *CC/Devas (Mauritius) Ltd v Republic of India [No 2]* [2023] FCA 527.

2 330 UNTS 3.

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but submission does not occur "by reason only that [the foreign State] is a party to an agreement the proper law of which is the law of Australia".

4 The primary judge in the Federal Court of Australia (Jackman J) concluded that by its act of ratification of the New York Convention India had waived its foreign State immunity within ss 10(1) and 10(2), and had submitted to the jurisdiction of the courts of any State party to the New York Convention in proceedings for the recognition and enforcement of a foreign arbitral award to which India is a party. The primary judge rejected India's answers to the allegation of waiver, concluding that the waiver occurred by reason of India's ratification of the New York Convention.

5 The Full Court of the Federal Court of Australia (Sarah C Derrington, Stewart and Feutrill JJ) considered that there was "much to be said" for the reasoning of the primary judge on the principal question of waiver but concluded that even on the assumption that India had waived its foreign State immunity, the effect of India's reservation to the New York Convention was that the content of the obligations of other State parties, including those of Australia, had been correspondingly reduced so that any waiver of foreign State immunity by India would extend only to differences arising out of legal relationships which are considered as commercial under the law of India. The arbitral award was held not to fall within that commercial category.

6 This appeal should be decided on the principal, and narrow, issue of whether the act of ratification of the New York Convention by India was a waiver of India's foreign State immunity from jurisdiction for recognition and enforcement of a foreign arbitral award to which India is a party in the courts of other State parties to the New York Convention. Contrary to the reasons of the primary judge, and contrary to the assumption of the Full Court, the New York Convention displays neither a clear nor an unequivocal intention that entry into the Convention involves such a waiver. Rather, the indications from the text and context of the New York Convention suggest that State ratification was not intended to constitute, in and of itself, a waiver of foreign State immunity.

7 The effect of deciding this appeal on this basis is that the premise upon which the Full Court proceeded (and the conclusion of the primary judge)—that India waived its foreign State immunity merely by ratification of the New York Convention—is not established. The consequential reasoning of the Full Court which determined the scope of any waiver of foreign State immunity by India in light of its reservation does not arise. Nor is it necessary to decide an issue raised

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by India in its notice of contention concerning the scope of the New York Convention. As explained at the conclusion of these reasons, the issue of the Convention's scope should be decided in a case where it is determinative and where the point has been fully argued.

Background

8 In 1998, India and the Republic of Mauritius entered a bilateral investment treaty ("the Bilateral Investment Treaty").³ The Bilateral Investment Treaty was in force from 20 June 2000 until 22 March 2017. The Bilateral Investment Treaty was relevantly expressed to apply to "all investments made by investors of either Contracting Party in the territory of the other Contracting Party, accepted as such in accordance with its laws and regulations". The Bilateral Investment Treaty provided for arbitration of disputes with different possible arbitration regimes.

9 One arbitration regime under the Bilateral Investment Treaty was for arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) ("the ICSID Convention")⁴ in circumstances which, relevantly to this appeal, required both India and Mauritius to be parties to the ICSID Convention.⁵ India was not a party to the ICSID Convention. Another regime was for ad hoc arbitration under modified⁶ UNCITRAL Rules.⁷

10 In July 2012, three Mauritian investors commenced arbitral proceedings against India as an ad hoc arbitration in the Permanent Court of Arbitration under the Bilateral Investment Treaty. Under Art 16(1) of the UNCITRAL Rules and the terms of appointment in the arbitration, the seat of the arbitration was The Hague, the Netherlands. In the Netherlands arbitration, the Mauritian investors alleged that they had made investments in India within the meaning of the Bilateral Investment

3 Agreement between the Government of the Republic of India and the Government of the Republic of Mauritius for the Promotion and Protection of Investments.

4 575 UNTS 159.

5 Bilateral Investment Treaty, Art 8(2)(b).

6 Bilateral Investment Treaty, Art 8(2)(d).

7 United Nations Commission on International Trade Law Arbitration Rules (1976).

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Treaty and that, in breach of the Bilateral Investment Treaty, India had expropriated those investments without compensation.

11 The claim by the Mauritian investors in the Netherlands arbitration arose from their status as shareholders in an Indian company (Devas Multimedia Private Limited). In 2005, Devas Multimedia Private Limited entered an agreement ("the Devas agreement") with an Indian State-owned company (Antrix Corporation Limited) to lease part of an electromagnetic spectrum on two satellites (to be built, launched, and operated by the Indian Space Research Organisation) for the purposes of offering broadband wireless access and audio-video services throughout India.

12 In 2011, India annulled the Devas agreement. India claimed that the annulment was a policy decision to reserve part of the electromagnetic spectrum "for national needs, including for the needs of defence, para-military forces, railways and other public utility services as well as for societal needs, and having regard to the needs of the country's strategic requirements".

13 In the ad hoc arbitration in the Netherlands, the Mauritian investors alleged that the policy decision made by India was an expropriation of their investments in India in breach of various terms of the Bilateral Investment Treaty including Art 3 ("Promotion and Protection of Investments"), Art 4 ("Treatment of Investments"), and Art 6 ("Expropriation"). In the arbitration, India also challenged the jurisdiction of the arbitral tribunal ("the Tribunal").

14 On 25 July 2016, the Tribunal delivered an "Award on Jurisdiction and Merits", finding (by majority) that it had jurisdiction in relation to India's decision to annul the Devas agreement other than to the extent that the decision was directed to protection of India's essential security interests. The Tribunal concluded that India had breached its obligation under the provisions of the Bilateral Investment Treaty to accord fair and equitable treatment to the Mauritian investors.

15 On 13 October 2020, the Tribunal issued a Quantum Award addressing the extent of India's liability to the Mauritian investors including for compensation, compound interest, and costs. The Tribunal decided, by majority, that each of the Mauritian investors was entitled to compensation "in an amount corresponding to 40% of USD 740 million, multiplied by the percentage of its shareholding". The total amount of compensation in the Quantum Award was US\$111,296,000.

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16 After the Quantum Award was issued, Antrix Corporation Limited successfully brought a claim in the National Company Law Tribunal (exercising the jurisdiction of the High Court of India in respect of Indian company law matters) against its counterparty to the Devas agreement, Devas Multimedia Private Limited. The National Company Law Tribunal held that the management of Devas Multimedia Private Limited had engaged in fraud, that Devas Multimedia Private Limited had been incorporated to enter the Devas agreement for unlawful purposes, and that the Devas agreement was void. That decision was upheld by the National Company Law Appellate Tribunal and an appeal to the Supreme Court of India was dismissed.

17 On 21 April 2021, these proceedings were commenced by the Mauritian investors in the Federal Court. In their amended originating application, the Mauritian investors sought relief including an order under s 8(3) of the *International Arbitration Act* that the Quantum Award may be enforced as if it were a judgment of the Court and orders that judgment be entered in amounts giving effect to the Quantum Award.

18 On 12 April 2022, India brought an interlocutory application seeking to set aside the enforcement application by the Mauritian investors on the ground that India had immunity from the jurisdiction of the Court under s 9 of the *Foreign States Immunities Act*. The Mauritian investors alleged that India had waived its immunity by submission to the jurisdiction of Australian courts in accordance with s 10 of the *Foreign States Immunities Act*. The waiver was said to have occurred by India's ratification of the New York Convention, "in circumstances where the [Mauritian investors] tender a copy of the award together with what appears on its face to be an agreement to arbitrate the underlying dispute". The Mauritian investors did not rely on the arbitration agreement in the Bilateral Investment Agreement as an agreement to submit to the Court's jurisdiction, or as a separate basis for invoking the arbitration exception to immunity in s 17 of the *Foreign States Immunities Act*.

The New York Convention and India's reservation to it

19 The New York Convention has 172 State parties; 22 States have not signed the New York Convention to date. Each of Mauritius (which was the nationality of the investor parties to the arbitration) and India (as a party to the arbitration), the Netherlands (as the seat of the arbitration and location in which the Quantum Award was made), and Australia (as the venue in which enforcement is sought) is a party to the New York Convention.

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The New York Convention is set out in Sch 1 to the *International Arbitration Act*, and provides as follows in Arts I-III:

"ARTICLE I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.
2. The term 'arbitral awards' shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.
3. When signing, ratifying or acceding to this Convention, or notifying extensions 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.

ARTICLE II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
2. The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

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ARTICLE III

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."

21 The mechanics of the recognition process to which reference is made in Art III are provided by Arts IV and V. Article IV, to which s 9 of the *International Arbitration Act* gives effect, provides for the process to obtain recognition and enforcement. This includes that the party seeking recognition and enforcement must "supply ... [t]he duly authenticated original award or a duly certified copy thereof" and "[t]he original agreement referred to in article II or a duly certified copy thereof". Article V, to which s 8 of the *International Arbitration Act* gives effect, provides for defences by the party against whom enforcement is sought. Relevantly, under Art V(1)(a), the party against whom recognition and enforcement of the award is sought may request that the recognition or enforcement be refused by furnishing "to the competent authority where the recognition and enforcement is sought ... proof that" the arbitration agreement "is not valid under the law to which the parties have subjected it".

22 By instrument of ratification deposited 13 July 1960, with effect on 11 October 1960, India ratified the New York Convention with the following reservations:

"In accordance with Article I of the Convention, the Government of India declare that they will apply the Convention to the recognition and enforcement of awards made only in the territory of a State, party to this Convention. They further declare that they will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the Law of India."

No such reservation was made by the Netherlands, Australia or Mauritius upon entry into the New York Convention.

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Proceedings in the Federal Court and Full Court of the Federal Court

23 Before the primary judge in the Federal Court, the principal issue was whether "by signing the New York Convention" India had submitted to the jurisdiction of the Federal Court, within the meaning of ss 10(1) and 10(2) of the *Foreign States Immunities Act*. Since a submission to the jurisdiction by India could only give rise to rights of enforcement by the appellants in accordance with the mechanics of Art IV, the appellants relied upon the signing of the New York Convention in circumstances, within Art IV,⁸ "where the [appellants] have tendered a copy of the award to which India was a party together with what appears on its face to be an agreement with India to arbitrate the underlying dispute".⁹

24 The primary judge explained that if the signing, and thereby the ratification, of the New York Convention were a submission by India to the jurisdiction of the Federal Court, and thus a waiver of India's sovereign immunity, then a number of subsidiary issues would arise. One issue, described as subsidiary but in fact anterior to the issue of submission to jurisdiction by India, was whether the scope of the New York Convention was limited to "awards involving a commercial or private law dispute (as opposed to disputes concerning the conduct of the State acting in its governmental capacity)".¹⁰ Another issue was whether the extent of waiver of immunity by ratification of the New York Convention was limited to circumstances in which an award was made in arbitral proceedings to which the foreign State had voluntarily submitted.¹¹ If that were the case, then questions would arise as to whether the appellants could establish that India had voluntarily submitted to arbitral proceedings without at that stage resolving issues of alleged fraud and disputes about the validity of that agreement in favour of the appellants.¹²

8 *CCDM Holdings LLC v Republic of India [No 3]* [2023] FCA 1266 at [44], [98].

9 *CCDM Holdings LLC v Republic of India [No 3]* [2023] FCA 1266 at [31].

10 *CCDM Holdings LLC v Republic of India [No 3]* [2023] FCA 1266 at [32(b)]; see also at [58].

11 *CCDM Holdings LLC v Republic of India [No 3]* [2023] FCA 1266 at [32(d)].

12 *CCDM Holdings LLC v Republic of India [No 3]* [2023] FCA 1266 at [97]-[98]; see also at [101]-[102].

25 A separate issue was whether any other exception to foreign State immunity applied. The appellants argued that India's annulment of the Devas agreement (but not mere entry into the Devas agreement or the Bilateral Investment Treaty) was a "commercial transaction" within the exception to foreign State immunity in s 11 of the *Foreign States Immunities Act*.¹³ That issue can be put to one side because the primary judge concluded that the annulment was not a commercial transaction within the meaning of s 11,¹⁴ and the appellants did not press a notice of contention in the Full Court disputing this conclusion.

26 The primary judge held that, consistently with the test recognised by this Court in *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl*¹⁵ for a waiver of foreign State immunity within ss 10(1) and 10(2) of the *Foreign States Immunities Act*, there was a "clear"¹⁶ and "unmistakable"¹⁷ implication from the New York Convention, particularly Art III (interpreted in the context of Arts I(1) and II(1)), that ratification of that Convention by a State party involved waiver of the foreign State immunity of that party, and hence submission to the jurisdiction of other State parties for the purposes of the Convention. This was in circumstances where the State party is apparently a party to an award made under an arbitration agreement irrespective of the validity of that agreement or its application to the dispute the subject of the award.¹⁸ His Honour concluded that any defences to recognition and enforcement that India might have, consistently with Art V of the New York Convention, were to be determined at a later stage of the proceeding in which India was found to have submitted to the jurisdiction.¹⁹ His Honour held

13 *CCDM Holdings LLC v Republic of India [No 3]* [2023] FCA 1266 at [33].

14 *CCDM Holdings LLC v Republic of India [No 3]* [2023] FCA 1266 at [120].

15 (2023) 275 CLR 292.

16 *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl* (2023) 275 CLR 292 at 311 [26].

17 *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl* (2023) 275 CLR 292 at 313 [29].

18 *CCDM Holdings LLC v Republic of India [No 3]* [2023] FCA 1266 at [43]-[44], [51].

19 *CCDM Holdings LLC v Republic of India [No 3]* [2023] FCA 1266 at [44].

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that none of the subsidiary issues detracted from the waiver of foreign State immunity which gave rise to prima facie rights of recognition and enforcement in Australian courts as the conditions of Art IV had been met.²⁰

27 The primary judge considered that the "clear" and "unmistakable" implication of waiver of foreign State immunity arose given that Art I(1) refers in broad and general terms to "differences between persons, whether physical or legal" and Art II(1) refers to differences "concerning a subject matter capable of settlement by arbitration".²¹ As India accepted that "legal persons" could include States and did not suggest that the "differences" between it and the Mauritian investors were a subject incapable of settlement by arbitration, the primary judge considered that the relevant issue was whether the text of the New York Convention supported India's proposed confinement of any waiver of foreign State immunity to any "differences" involving States under "commercial" or "private" law. The primary judge could not "see any textual basis for that supposed limitation".²²

28 The primary judge also considered that the reference in Art III to the recognition and enforcement of arbitral awards "in accordance with the rules of procedure of the territory where the award is relied upon" did not convey any intention to preserve foreign State immunity of a State which was a party to an award. The primary judge accepted the appellants' argument that as the "very question" of waiver of foreign State immunity had to be decided, whether the "rules of procedure" in Art III included foreign State immunity was an "arid point of taxonomy".²³

29 An appeal to the Full Court of the Federal Court was allowed. In a joint judgment, the Full Court assumed, without deciding, that the primary judge was correct that the scope of the New York Convention was not limited to awards

20 *CCDM Holdings LLC v Republic of India [No 3]* [2023] FCA 1266 at [102]-[103], [121].

21 *CCDM Holdings LLC v Republic of India [No 3]* [2023] FCA 1266 at [42].

22 *CCDM Holdings LLC v Republic of India [No 3]* [2023] FCA 1266 at [58]; see also at [59].

23 *CCDM Holdings LLC v Republic of India [No 3]* [2023] FCA 1266 at [96].

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involving a commercial or private law dispute to which a State was a party.²⁴ On the "principal issue", the Full Court considered, without deciding, that "essentially for the reasons that the primary judge gave", there was "much to be said in support of a conclusion that by ratifying the Convention India waived immunity in respect of awards that are within India's commercial reservation".²⁵

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The Full Court nevertheless held that the primary judge had erred in concluding that Art III of the New York Convention required Australia to enforce an award within the scope of the Convention on a basis that was broader than the terms of India's reservation.²⁶ The Full Court considered that the "reciprocal" effect of India's reservation was to reduce the content of the obligations of other State parties to the New York Convention.²⁷ In effect, the Full Court treated India's reservation as to how *India* would apply the New York Convention in its territory as reducing the obligations of other States to apply the New York Convention when India was a party to an arbitral award, thus reducing the extent of India's waiver of immunity from the jurisdiction of courts of the other State parties to the Convention.²⁸ In the absence of any evidence of Indian law, the Full Court further

24 *Republic of India v CCDM Holdings LLC* (2025) 307 FCR 308 at 317 [53].

25 *Republic of India v CCDM Holdings LLC* (2025) 307 FCR 308 at 317 [52], 321 [72].

26 *Republic of India v CCDM Holdings LLC* (2025) 307 FCR 308 at 320-321 [70].

27 *Republic of India v CCDM Holdings LLC* (2025) 307 FCR 308 at 319-320 [64]-[68], referring to International Law Commission, *Report of the International Law Commission on the work of its sixty-third session (26 April–3 June and 4 July–12 August 2011)*, UN Doc A/66/10/Add.1, in [2011] *Yearbook of the International Law Commission*, vol 2, 1 at 34 [4.2.4] ("*Guide to Practice on Reservations to Treaties*"); Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331, Arts 2(1)(d), 21. But see International Law Commission, *Guide to Practice on Reservations to Treaties* at 34 [4.2.5].

28 *Republic of India v CCDM Holdings LLC* (2025) 307 FCR 308 at 319 [64], 320 [68]-[69], 321 [73]. Compare Gaja, "Problems of applicability of International Conventions on Commercial Arbitration", in L'Associazione Italiana per l'Arbitrato (ed), *Commercial Arbitration: Essays in memoriam Eugenio Minoli* (1974) 191 at 210-211.

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reasoned that Australian law should be applied to determine whether the circumstances of the arbitral award were "commercial" within the meaning of India's reservation.²⁹ The Full Court held that the circumstances were not "commercial". The scope of any waiver of foreign State immunity by India was therefore considered not to extend to the circumstances upon which the appellants relied.³⁰

31 The same principal issue raised by the parties in the courts below was reargued in this Court by ground four of the appellants' notice of appeal. That ground was that "[t]he Full Court erred in finding that India's ratification of the [New York Convention] was not a waiver of [foreign State] immunity for the purposes of s 10(2) [of the] *Foreign States Immunities Act 1985* (Cth) in proceedings to enforce the Award". As the appellants put the point in written submissions, the question was whether "ratification of the [New York] Convention [was] sufficient to be a waiver of immunity". Within the New York Convention the waiver was said to arise from Art III, in the context of the New York Convention as a whole.

No waiver of immunity by ratification of the New York Convention

The strength of the presumption of foreign State immunity

32 Sovereign immunity—the immunity of a State from the exercise of authority by the courts of a foreign State—has been described by the International Court of Justice as a general rule of customary international law.³¹ That general rule derives in part from the principle of sovereign equality of States, "one of the fundamental principles of the international legal order".³² As this Court described

29 *Republic of India v CCDM Holdings LLC* (2025) 307 FCR 308 at 322 [77].

30 *Republic of India v CCDM Holdings LLC* (2025) 307 FCR 308 at 323 [82]-[83].

31 *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* [2012] ICJ Rep 99 at 123 [56].

32 *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* [2012] ICJ Rep 99 at 123 [57], referring to Charter of the United Nations (1945), Art 2(1).

the principle of sovereign equality in *Kingdom of Spain*,³³ it is a "political principle that those who are independent and autonomous cannot, except by consent, exercise authority over, or establish an external source of authority over, others of independent and autonomous status".

33 In many States, including Australia, foreign State immunity is not absolute but is subject to a range of exceptions where the courts of the local State retain some jurisdiction over the foreign State as part of the local State's territorial sovereignty.³⁴ But within the preserved area of immunity, there is a strong presumption that a foreign State has not abandoned its independence and autonomy by waiving that otherwise preserved immunity.³⁵ As Marshall CJ said in *The Schooner Exchange v McFaddon*:³⁶

"One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him."

34 The strength of the presumption that foreign State immunity has not been waived is the primary reason for the principle that any waiver of foreign State immunity in an international agreement must be clear and unmistakable. Such

33 (2023) 275 CLR 292 at 312 [26], quoting *Li v Zhou* (2014) 87 NSWLR 20 at 30 [37], in turn referring to Charlesworth and Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000) at 124, 145.

34 See *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* [2012] ICJ Rep 99 at 124 [57].

35 See Yang, *State Immunity in International Law* (2012) at 37.

36 (1812) 11 US 116 at 137.

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waiver must be derived from the express words of the agreement (including necessary implications from those words).³⁷

The presumption of foreign State immunity was not overcome

35 The starting point in assessing whether the presumption of foreign State immunity is overcome in the New York Convention is that the text of the Convention contains no express reference to foreign State immunity. So too there is limited and potentially conflicting consideration of foreign State immunity in the travaux préparatoires to the New York Convention. This is an inauspicious start for any submission that ratification of the New York Convention was a clear, unmistakable, and unequivocal waiver of foreign State immunity.

36 The absence of any express mention of foreign State immunity in the text of the New York Convention read in the context of the limited and ambiguous consideration of foreign State immunity in the travaux préparatoires is unsurprising. As Professor Sanders, the "father of the New York Convention",³⁸ observed, it was hoped that "as large a number of States as possible will adhere to the Convention".³⁹ In light of the importance of the fundamental principle of sovereign immunity, an inclusion of express waiver of sovereign immunity would have been highly contentious and would have been the subject of considerable debate and controversy. Hence, Professor Bjorklund remarked that it is "clear ... based on the negotiating history of the Convention, that the delegates did not intend to preclude an immunity-based argument in enforcement actions against states".⁴⁰

37 *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl* (2023) 275 CLR 292 at 308-312 [19]-[26], 313 [29].

38 Ross, "Pieter Sanders 1912-2012" (2012) 7(5) *Global Arbitration Review* 13.

39 Sanders, "The New York Convention", in Union Internationale des Avocats (ed), *International Commercial Arbitration* (1960) 292 at 327.

40 Bjorklund, "Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politization of International Investment Disputes" (2010) 21 *American Review of International Arbitration* 211 at 219, referring, inter alia, to Fox, "State Immunity and the New York Convention", in Gaillard and Di Pietro

37 To the limited extent that there is consideration of foreign State immunity in the travaux préparatoires, that consideration demonstrates an intention to preserve foreign State immunity in the courts of other States. The travaux préparatoires include a report of a committee appointed by the United Nations Economic and Social Council ("the Ad Hoc Committee") to address problems with two earlier conventions ("the Geneva Arbitration Conventions")⁴¹ and to consider a draft of a proposed new convention ("the ICC Draft Convention") by the International Chamber of Commerce ("the ICC") Committee on International Commercial Arbitration. The Ad Hoc Committee report recorded that "the Committee concluded that it would be desirable to establish a new convention which while going further than the Geneva Convention [of 1927] in facilitating the enforcement of foreign arbitral awards, would at the same time maintain generally recognized principles of justice and respect the sovereign rights of States".⁴²

38 As for the text of the New York Convention, the apparent breadth and generality of Arts I(1) and II(1) are to be considered in the context of Art III. Article III, the provision principally relied upon by the appellants as establishing a waiver of foreign State immunity by State parties to the New York Convention, implies the preservation of foreign State immunity. In Art III, the obligation of contracting States to enforce arbitral awards is expressed to be "in accordance with the rules of procedure of the territory where the award is relied upon". Contrary to the conclusion of the primary judge and the submissions for the appellants, that recognition and enforcement of an arbitral award is to be "in accordance with the rules of procedure of the territory" where the recognition and enforcement that is sought is relevant to the question whether a State's ratification of the New York Convention involved a waiver of foreign State immunity by that State. Contrary to the submission of the Attorney-General of the Commonwealth, there is no suggestion in the travaux préparatoires that some narrower, confined approach, such as rules concerning the presentation of documents and translations, was intended by the reference to rules of procedure in Art III. Rather, it is widely

(eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (2008) 829 at 830-831.

41 Protocol on Arbitration Clauses (1923) 27 LNTS 157; Convention on the Execution of Foreign Arbitral Awards (1927) 92 LNTS 301.

42 United Nations Economic and Social Council, *Report of the Committee on the Enforcement of International Arbitral Awards*, UN Doc E/2704 (1955) at 5 [14].

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accepted that the rules of procedure also include defences to a claim such as limitation periods.⁴³ So too, the rules of foreign State immunity, although jurisdictional, are treated at international law as rules of procedure.⁴⁴

39

Article III thus qualifies the obligation of contracting States to enforce arbitral awards by reference to whatever rules of foreign State immunity are adopted by the territory where the award is relied upon. That qualification is inconsistent with a waiver of foreign State immunity having occurred merely by ratification of the New York Convention, which would have left no role for the rules of foreign State immunity in the territory where the award is relied upon. Consistently with this reasoning, Professor Bermann, the Reporter for the *Restatement of the US Law of International Commercial and Investor-State Arbitration*,⁴⁵ expressed the view that "Art[] Ill preserves sovereign immunity as a jurisdictional defense under national law, to the extent it exists".⁴⁶ The same approach is taken by other leading commentators.⁴⁷

43 Gaillard and Bermann (eds), *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards: New York, 1958* (2017) at 96-97 [30].

44 *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] ICJ Rep 3 at 25 [60]; *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* [2012] ICJ Rep 99 at 124 [58], 140 [93].

45 American Law Institute, *Restatement of the US Law of International Commercial and Investor-State Arbitration* (2023).

46 Bermann, "Procedures for the Enforcement of New York Convention Awards", in Ferrari and Rosenfeld (eds), *Autonomous Versus Domestic Concepts under the New York Convention* (2021) 55 at 74.

47 Bjorklund, "Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politization of International Investment Disputes" (2010) 21 *American Review of International Arbitration* 211 at 219; Olmedo, "Immunity Defences and the Enforcement of Awards in Investor-State Disputes", in Gore et al (eds), *International Investment Law and Investor-State Disputes in Central Asia: Emerging Issues* (2022) 333 at 341. See also Crawford, "A Foreign State Immunities

40 This interpretation of the New York Convention is not inconsistent with the limited State practice to which this Court was referred. Considerable time and effort in the submissions of the parties and the Attorney-General of the Commonwealth were devoted to analysis of authorities in the United States, as representing State practice concerning issues of foreign State immunity in the context of the New York Convention. In considering the United States authorities, Sir William Blair concluded that "a State does not waive immunity (or submit to the jurisdiction) merely by becoming party to the [New York Convention]".⁴⁸ The same position was recognised in the application of English law in the United Kingdom.⁴⁹

41 The appellants and the Attorney-General of the Commonwealth submitted that, contrary to the view of Sir William Blair, the United States authority was an example of State practice that recognised that a State waived foreign State immunity by ratification of the New York Convention. It is unnecessary to consider in any detail this submission concerning the present position in the United States. Article 31(3)(b) of the Vienna Convention on the Law of Treaties (1969)⁵⁰ provides that the context for interpretation of a treaty includes "[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". The subsequent practice must show a "common understanding of the parties as to the meaning of the terms",⁵¹ with the force of the State practice depending on the extent to which the practice is

Act for Australia?" (1978-1980) 8 *Australian Year Book of International Law* 71 at 102, fn 42.

48 *CC/Devas (Mauritius) Ltd v Republic of India* [2025] 1 WLR 4287 at 4303 [55].

49 *CC/Devas (Mauritius) Ltd v Republic of India* [2025] 1 WLR 4287 at 4309 [81].

50 1155 UNTS 331.

51 Gardiner, *Treaty Interpretation*, 2nd ed (2015) at 256, quoting [1966] *Yearbook of the International Law Commission*, vol 2 at 222 [15] and citing earlier references at [1964] *Yearbook of the International Law Commission*, vol 1 at 282 [3], [5], 296 [39], 298 [56]-[57], 299 [64] and [1964] *Yearbook of the International Law Commission*, vol 2 at 204 [13].

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"concordant, common and consistent".⁵² Even if the appellants and the Attorney-General of the Commonwealth were correct that the present authority in the United States supports ratification of the New York Convention as being an act of waiver, that would plainly not be sufficient to establish any substantial degree of common understanding across the 172 State parties to the Convention.

42 It is, in any event, at least arguable that to the extent that any degree of common understanding can be discerned from the present authority in the United States,⁵³ considered alongside authority in the United Kingdom⁵⁴ and Canada,⁵⁵ that understanding is that ratification of the New York Convention, by itself, is not a sufficient act of waiver of foreign State immunity. Indeed, the assertion of the appellants and the Attorney-General of the Commonwealth about present State practice in the United States to the contrary is in tension with the present position of the United States executive, which is itself an act of State practice.⁵⁶ In a brief to the United States Court of Appeals for the District of Columbia Circuit, the executive of the United States has argued that ratification of the New York

52 Gardiner, *Treaty Interpretation*, 2nd ed (2015) at 256-257. See also Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed (1984) at 137.

53 *Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co v Navimpex Centrala Navala* (1993) 989 F 2d 572 at 578-579, distinguishing *Frolova v Union of Soviet Socialist Republics* (1985) 761 F 2d 370 at 376-378; *Process and Industrial Developments Ltd v Federal Republic of Nigeria* (2020) 506 F Supp 3d 1 at 7 [8], not addressed on appeal in *Process and Industrial Developments Ltd v Federal Republic of Nigeria* (2022) 27 F 4th 771 at 775 [4]; *Preble-Rish Haiti, SA v Republic of Haiti* (unreported, United States District Court for the Southern District of New York, 29 June 2023) at 18; *Global Voice Group SA v Republic of Guinea* (unreported, United States District Court for the District of Columbia, 18 February 2025) at 42-43. Compare *Creighton Ltd v Government of the State of Qatar* (1999) 181 F 3d 118 at 123 [4]; *NextEra Energy Global Holdings BV v Kingdom of Spain* (2024) 112 F 4th 1088 at 1100; *Stabil LLC v Russian Federation* (2026) 167 F 4th 506 at 523 (not deciding).

54 *CC/Devas (Mauritius) Ltd v Republic of India* [2025] 1 WLR 4287.

55 *Republic of India v CCDM Holdings, LLC* [2024] QCCA 1620 at [80].

56 Gardiner, *Treaty Interpretation*, 2nd ed (2015) at 257.

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Convention is not sufficient for a waiver of immunity and, although an agreement to arbitrate would be a necessary condition for such a waiver, "it is far from clear that the waiver exception could apply at all in such actions" and that courts should rely on the United States legislation providing for a "specific arbitration exception rather than the more general waiver exception".⁵⁷

A broader basis for waiver?

43 Consistently with the appellants' notice of appeal, the appellants maintained throughout this appeal, as they did in the courts below, that because ratification of the New York Convention was sufficient to be a waiver of immunity, the entry by India into the Bilateral Investment Treaty and the consequent Quantum Award were merely circumstances which engaged Art IV and gave the waiver practical effect. Hence, the appellants submitted in this Court that the Bilateral Investment Treaty was no more than "part of the setting in which one considers that question" of waiver so that even an express reservation of State immunity in a later bilateral investment treaty could not negate the waiver of immunity that was said to arise from earlier ratification of the New York Convention. So too, the Attorney-General of the Commonwealth submitted in this Court that the circumstances of entry into the Bilateral Investment Treaty were merely facts upon which the waiver of foreign State immunity would operate: for the waiver to have effect "you need to have an arbitration agreement that can meet Article IV". The primary judge's conclusion that the validity of the arbitration agreement and its application to the dispute were immaterial to the question of waiver of immunity (but could be raised subsequently by India as a ground for refusing enforcement of the award) reflected the appellants' argument that waiver was effected by India having ratified the New York Convention (and not by any agreement to arbitrate in the Bilateral Investment Treaty). It was only argued that the arbitration agreement and the award were no more than the facts or circumstances necessary to give practical effect to the waiver. Other observations of the primary judge and the Full Court which might be construed as suggesting that the Bilateral Investment Treaty or the Quantum Award added anything further to the appellants' waiver argument need to be understood in light of how the case was run before those courts.

44 In the oral submissions for the Attorney-General of the Commonwealth in this Court, however, there was a faint attempt to broaden the scope of the grounds

57 *NextEra Energy Global Holdings BV v Kingdom of Spain*, Brief for the United States as Amicus Curiae (2024) at 19, 22.

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of appeal and contention. The Attorney-General appeared to submit that if ratification of the New York Convention did not amount to a waiver of foreign State immunity then (i) the ratification of the New York Convention by India, together with (ii) entry by India into an arbitration agreement, was capable of amounting to a waiver. Such a submission should not be entertained, not merely because it lies beyond the scope of the grounds of appeal and was not addressed by the courts below but also because the submission raises a number of issues that were not explored in this Court including: (i) whether India's waiver would operate in relation to States other than Mauritius, which was the only other party to the relevant arbitration agreement; and (ii) the relationship between the provision concerning waiver of foreign State immunity, s 10, and the "arbitration exception" to foreign State immunity in s 17(2) of the *Foreign States Immunities Act*.

No analogy can be drawn with the ICSID Convention

45 In *Kingdom of Spain*,⁵⁸ this Court held that the Kingdom of Spain had waived its foreign State immunity from recognition and enforcement of foreign arbitral awards by entering into the ICSID Convention and becoming bound by Arts 53, 54 and 55 of that Convention.⁵⁹ The appellants and the Attorney-General of the Commonwealth (intervening) in this proceeding sought to draw an analogy between the waiver of foreign State immunity by entry into the ICSID Convention and the asserted waiver of foreign State immunity by entry into the New York Convention. At every point, the asserted analogy fails.

46 First, unlike the New York Convention, which is concerned with "persons, whether physical or legal", the ICSID Convention is expressly concerned with disputes to which a State is a party.⁶⁰ Unsurprisingly, therefore, the travaux préparatoires for the ICSID Convention, unlike the New York Convention,

58 *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl* (2023) 275 CLR 292.

59 See also *The Kingdom of Spain v Infrastructure Services Luxembourg S.À.R.L.* [2026] UKSC 9.

60 *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl* (2023) 275 CLR 292 at 303-304 [1], citing ICSID Convention, Art 36.

involved detailed consideration of the existence and scope of foreign State immunity.⁶¹

47 Secondly, unlike the New York Convention, the issue of foreign State immunity was the subject of the express provision in Art 55 of the ICSID Convention. Article 55 was inserted to preserve State immunity only from execution.⁶² The express words of Art 55, when read with Art 54, were a basis for the conclusion in United States authority that ratification of the ICSID Convention involved a waiver of foreign State immunity from jurisdiction.⁶³ By contrast, and as explained above, the express words of Art III of the New York Convention, "in accordance with the rules of procedure of the territory where the award is relied upon", support the preservation of foreign State immunity from jurisdiction.⁶⁴

48 Thirdly, on proper analysis, the analogy sought by the appellants and the Attorney-General of the Commonwealth is not supported by a reference in *Kingdom of Spain*⁶⁵ to a footnote in commentary by the International Law Commission. In that footnote the International Law Commission referred to a source which included the ICSID Convention as an example of State practice where a State has "previously expressed its consent to ... jurisdiction in the

61 *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl* (2023) 275 CLR 292 at 322-325 [51]-[58]. See Bjorklund, "Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politization of International Investment Disputes" (2010) 21 *American Review of International Arbitration* 211 at 219-220.

62 *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl* (2023) 275 CLR 292 at 324 [55].

63 *Liberian Eastern Timber Corporation v Government of the Republic of Liberia* (1986) 650 F Supp 73 at 76; *Mobil Cerro Negro Ltd v Bolivarian Republic of Venezuela* (2017) 863 F (3d) 96 at 102. See also *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl* (2023) 275 CLR 292 at 330-331 [74].

64 See also *Infrastructure Services Luxembourg SARL v Kingdom of Spain* [2025] 2 WLR 621 at 660 [102(i)]; [2025] 2 All ER 693 at 727.

65 (2023) 275 CLR 292 at 331 [75].

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provision of a treaty or an international agreement".⁶⁶ As the appellants and the Attorney-General of the Commonwealth submitted, the same source included the New York Convention as another example. The appellants submitted that that footnote had therefore equated the approach taken by the ICSID Convention and the New York Convention as examples of waiver of foreign State immunity.

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The provisions of the ICSID Convention to which reference was made in the source cited by the International Law Commission in support of the suggestion of waiver of immunity by entry into the ICSID Convention were Arts 53, 54 and 55,⁶⁷ which were the very articles in issue in *Kingdom of Spain*. By contrast, the provisions of the New York Convention to which reference was made in support of the assertion of waiver were Arts II, III, V, VI, VII, XI, XIII and XIV.⁶⁸ It is unclear, therefore, whether the basis of the suggestion by the International Law Commission was that a waiver of foreign State immunity arose from Art III or, for example, from Art II, which might be seen, at least in part, as corresponding to the arbitration exception to foreign State immunity. That arbitration exception is contained in provisions such as s 17(2) of the *Foreign States Immunities Act* and its counterpart in other States.⁶⁹ The appellants did not rely upon s 17(2) at any stage in these proceedings.

66 International Law Commission, *Report of the International Law Commission on the work of its forty-third session (29 April–19 July 1991)*, UN Doc A/46/10 (1991) at 52, fn 89, referring to United Nations, *Materials on Jurisdictional Immunities of States and their Property* (1982) at 150-178.

67 United Nations, *Materials on Jurisdictional Immunities of States and their Property* (1982) at 155-156.

68 United Nations, *Materials on Jurisdictional Immunities of States and their Property* (1982) at 151-153.

69 See, eg, *Foreign Sovereign Immunities Act of 1976* 28 USC §1605(a)(6); *State Immunity Act 1978* (UK), s 9; *State Immunity Act 1979* (Singapore), s 11; *State Immunity Ordinance 1981* (Pakistan), s 10; *Foreign States Immunities Act 1981* (South Africa), s 10.

The scope of the New York Convention

50 Other than two issues in India's notice of contention which were abandoned by India, India relied upon a contention that "[i]nsofar as the [New York] Convention applies to awards in which a State is a party, it only applies to awards involving a commercial or private law dispute, and the dispute the subject of the Quantum Award is not of that character". An instance of this limit was initially said by India to be the "exclusionary category" of inter-State disputes.

51 This issue of the scope of the New York Convention is anterior to the question of whether India waived its foreign State immunity by ratification of the New York Convention since the inapplicability of the New York Convention would mean that no issue would arise in this proceeding concerning any waiver of its foreign State immunity or the scope of such waiver. Nevertheless, the issue of scope was raised only as an alternative submission. The issue involves difficult questions of non-textual limits to the scope of the New York Convention which were not raised by the facts of this appeal and thus not fully explored in the submissions of the parties.

52 An example of the difficult questions concerning scope is the extent to which, if at all, the New York Convention applies to inter-State disputes. The New York Convention developed from the Geneva Arbitration Conventions which, as the New York Convention provided, would cease to have effect between contracting States when those States became bound by the New York Convention.⁷⁰ The Geneva Arbitration Conventions applied to persons who were subject to the jurisdiction of the contracting States rather than the contracting States themselves.⁷¹ Those Conventions did not apply to inter-State disputes.

53 Although the text of Art I(1) of the New York Convention did not expressly confine the meaning of differences between "persons, whether physical or legal" either to non-State parties or to commercial or private law disputes, the New York

70 New York Convention, Art VII(2).

71 Protocol on Arbitration Clauses (1923) 27 LNTS 157, Art 1; Convention on the Execution of Foreign Arbitral Awards (1927) 92 LNTS 301, Art 1.

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Convention predated bilateral investment treaties and investor-State arbitrations.⁷² In addition, a proposed amendment by Yugoslavia to restrict the scope of the New York Convention, in the same way as the Geneva Arbitration Conventions, to persons subject to the jurisdiction of a contracting State was supported by a majority, although not by the required two-thirds majority.⁷³ Some commentators have pointed to passages in the travaux préparatoires which might reveal an intention to exclude awards between States,⁷⁴ including a view expressed by the Ad Hoc Committee that the ICC Draft Convention did not "deal with arbitration between States, but with the recognition and enforcement in one country of arbitral awards made in another country".⁷⁵ On the other hand, other commentators such as Mr Contini, who was the Secretary of the Ad Hoc Committee, and Professor Crawford considered there to be a degree of support in the travaux préparatoires for the inclusion of States in their capacity as entities with rights and duties under private law.⁷⁶

72 See Vandevelde, "A Brief History of International Investment Agreements" (2005) 12 *UC Davis Journal of International Law & Policy* 157 at 169, 174.

73 Crawford, "A Foreign State Immunities Act for Australia?" (1978-1980) 8 *Australian Year Book of International Law* 71 at 101; Gaja, *International Commercial Arbitration: New York Convention* (1978) at III.C.134.

74 See van den Berg, *The New York Arbitration Convention of 1958* (1981) at 282, citing Cappelli-Perciballi, "The Application of the New York Convention of 1958 to Disputes Between States and Between State Entities and Private Individuals: The Problem of Sovereign Immunity" (1978) 12 *International Lawyer* 197 at 199, citing in turn United Nations Economic and Social Council, *United Nations Conference on International Commercial Arbitration: Summary Record of the Sixteenth Meeting*, UN Doc E/CONF.26/SR.16 (1958) at 5.

75 United Nations Economic and Social Council, *Report of the Committee on the Enforcement of International Arbitral Awards*, UN Doc E/2704 (1955) at 5 [17].

76 Contini, "The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (1959) 8 *The American Journal of Comparative Law* 283 at 294; Crawford, "A Foreign State Immunities Act for Australia?" (1978-1980) 8 *Australian Year Book of International Law* 71 at 101.

54 Another difficulty and further conflicting views arise in relation to the extent to which the New York Convention applies between a State and a private party. In support of its ground of contention that the scope of the New York Convention is limited to commercial or private law disputes, India pointed to the express purpose of the ICC Draft Convention as being "to facilitate the enforcement of awards relating to international commercial disputes"⁷⁷ and the purpose of the Conference of Plenipotentiaries, convened by resolution of the United Nations Economic and Social Council after the publication of the Ad Hoc Committee report, as being to consider "other possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes".⁷⁸

55 By contrast, however, in the discussion of the ICC Draft Convention in 1958, the United Kingdom representative observed that the difficulty with a Swiss proposal that the title refer to "arbitral awards in private law" was that "the Convention might apply to public arbitral bodies".⁷⁹ Further, as the ICC itself observed, in relation to Art I of the Ad Hoc Committee's draft convention, not all national systems of law "provide for a distinct commercial law" so "their dissimilarity makes it difficult to limit the scope of the Convention to commercial disputes."⁸⁰

56 The complexity of the issue concerning the scope of the New York Convention is not limited to the presence of potentially conflicting views in the travaux préparatoires to, and commentary on, the New York Convention. The issue of scope might also intersect with the difficult distinction involved in questions of

77 Committee on Non-Governmental Organisations, *Enforcement of International Arbitral Awards: Statement submitted by the International Chamber of Commerce*, UN Doc E/C.2/373 (1953) at 8.

78 *Recognition and enforcement of foreign arbitral awards*, ESC Res 604 (XXI), UN Doc E/2889 (1956), cl 1(a)(ii).

79 United Nations Economic and Social Council, *United Nations Conference on International Commercial Arbitration: Summary Record of the Twenty-Third Meeting*, UN Doc E/CONF.26/SR.23 (1958) at 5.

80 United Nations Economic and Social Council, *Recognition and Enforcement of Foreign Arbitral Awards: Report by the Secretary-General*, UN Doc E/2822 (1956), annex 2 at 7.

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restrictive State immunity,⁸¹ described by the International Court of Justice as being between whether "the acts in question fall to be assessed by reference to the law governing the exercise of sovereign power (*ius imperii*) or the law concerning non-sovereign activities of a State, especially private and commercial activities (*ius gestionis*)".⁸²

57 Since India cannot be said to have waived its foreign State immunity by ratifying the New York Convention, it is unnecessary to determine the scope of the New York Convention in this case. The issues concerning scope of the New York Convention should be decided in a case where they are determinative and where those issues have been fully explored. It suffices in this case to say that any indications that the New York Convention might not extend to disputes concerning the exercise of the sovereign power of a State provide further support for the conclusion that if those disputes are within the scope of the New York Convention then the ratification of the New York Convention does not involve a waiver of foreign State immunity.

Conclusion

58 The appeal must be dismissed with costs.

81 Crawford, "International Law and Foreign Sovereigns: Distinguishing Immune Transactions" (1983) 54 *British Year Book of International Law* 75; Fox and Webb, *The Law of State Immunity*, 3rd ed (2013) at 35. See also Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States" (1951) 28 *British Year Book of International Law* 220.

82 *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* [2012] ICJ Rep 99 at 125 [60]. See also *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2012) 247 CLR 240 at 244 [5]-[6]; *Argentum Exploration Ltd v The Silver* [2025] AC 555 at 594 [102].

