CCDM Holdings LLC v Republic of India:

A Two-Part Piece on Foreign State Immunity, Investment Arbitration Enforcement and the Rule of Law

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Article 1: The CCDM Decision, Doctrinal Problems & Comparative Analysis of Enforcement Practice

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I. A Decision Out of Step

In April 2026, the High Court of Australia handed down *CCDM Holdings LLC v Republic of India* [2026] HCA 9[1] (*CCDM*), dismissing an appeal seeking recognition and enforcement of an investment arbitration award made in favour of CCDM Holdings LLC against the Republic of India. The award arose from an ad hoc arbitration conducted under the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL Rules"), pursuant to the Agreement between the Government of the Republic of Mauritius and the Government of the Republic of India for the Promotion and Protection of Investments (the "Mauritius-India Bilateral Investment Treaty" or the "BIT"). The arbitration was seated in The Hague, the Netherlands, and the award was sought to be recognised and enforced under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention"), as implemented in Australia by the International Arbitration Act 1974 (Cth). The central question was whether India enjoyed foreign State immunity from the enforcement proceedings under the Foreign States Immunities Act 1985 (Cth) ("FSIA").

In dismissing the appeal and denying enforcement, the High Court of Australia left the most important legal question in the case unanswered. This question is whether India's express agreement to arbitrate investment disputes under the Bilateral Investment Treaty with Mauritius itself constituted a waiver of India's foreign State immunity from enforcement proceedings, as distinct from execution proceedings. And it is a question to which the consistent practice of every major enforcement jurisdiction, and indeed Australia's own Federal Court in *Infrastructure Services Luxembourg S.à.r.l v Kingdom of Spain*[2], had until now provided a clear and affirmative answer.

In my view, the decision raises three primary concerns. First, the Court's legal reasoning on state practice and the New York Convention is doctrinally unsound in the context of investment arbitration. Second, the Commonwealth's intervention through the Solicitor-General appears to have handed the Court its escape route. Third, for any practitioner who cares about the integrity of the Australian judicial process, the rule of law and the sanctity of international investment arbitration, the Court expressly noted that the Mauritius-India

[1] *CCDM Holdings LLC v Republic of India* [2026] HCA 9
[2] Infrastructure Services Luxembourg S.*à*.r.l v Kingdom of Spain [2024] FCAFC 113

Bilateral Investment Treaty was not raised by the appellants as an instrument giving rise in and of itself to a waiver, and then declined to engage with it as such. In a case of this constitutional and public international law significance, that approach is, in my view, inappropriate. Even the English Court deferred that question to be determined following Hague parallel proceedings relating to the Hague's decision not to set aside the award.[3]

Australia continues to invest reputational and institutional capital in positioning itself as a credible, rule-of-law arbitration jurisdiction. *CCDM*[4] arguably puts that reputation at risk. This article explains how we got here, why it is wrong, and what could have been done differently, by counsel, by the Solicitor-General, and by the Court itself.

II. The Facts of the Case

CCDM Holdings LLC, incorporated in Mauritius, held investments in India. When those investments were adversely affected by conduct attributable to the Indian State, CCDM commenced investment arbitration proceedings under the Agreement between the Government of the Republic of Mauritius and the Government of the Republic of India for the Promotion and Protection of Investments. The Mauritius-India Bilateral Investment Treaty (BIT) was in force from 1998 and terminated in 2017, but had protections surviving for a further 15 years for pre-termination investments. The arbitration was conducted on an ad hoc basis under the UNCITRAL Rules[5], as opposed to the ICSID Convention[6], and resulted in an award in CCDM's favour.

The issue for the Court was whether, within section 10(2) of the Foreign States Immunities Act 1985 (Cth), India's 1960 ratification of the New York Convention, subject to reservations, constituted in and of itself, a relevant agreement to submit to the Federal Court's jurisdiction in a proceeding to enforce an arbitral award to which India is a party. The High Court answered that question in the negative, dismissing the appeal, and concluding it was therefore unnecessary to decide the scope of the New York Convention or the effect of India's commercial reservation.

What the Court did not decide, and what the Court specifically said was not raised by either party, was whether India's specific agreement to arbitrate under the Mauritius-India BIT, the very instrument giving rise to the award, itself constituted the waiver of immunity. When Steward J asked CCDM's counsel whether it had been argued that the very entry into the BIT was in and of itself a submission to jurisdiction, Mr Walker for the appellants confirmed: "No." He described the BIT as "the beginning of the story" and "the means by which there was an award coming," but not in itself a consent or waiver. That concession, and the failure to lead with the BIT as the primary and independent waiver instrument, may well have cost CCDM its case and resulted in this precedent.

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[3] Hague decided not to set aside the award in 2023 and in Nov 2025, there were proceedings to recuse judges on that case https://legalblogs.wolterskluwer.com/arbitration-blog/navigating-sovereign-immunity-in-the-enforcement-of-investment-awards-after-ccdevas-v-india/ and see https://jusmundi.com/en/document/decision/nl-cc-devas-mauritius-ltd-devas-employees-mauritius-private-limited-and-telcom-devas-mauritius-limited-v-republic-of-india-uitspraak-van-het-gerechtshof-den-haag-thursday-6th-november-2025#decision_85924

[4] CCDM Holdings LLC v Republic of India (n 1)

[5] UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006

[6] Foreign States Immunities Act (1985) (Cth) s 10(2)

III. Hierarchy of Enforcement Practice

Before turning to what went wrong in *CCDM*[7], it is worth establishing what the law is in the jurisdictions that arguably matter most for international investment arbitration enforcement. The picture is relatively consistent, and at odds with what the High Court decided.

A Preliminary Note on Terminology: Recognition, Enforcement and Execution

Recognition is the judicial act by which a court in the forum State accepts that a foreign arbitral award is valid, final, and binding. It is declaratory in character. The court is not yet doing anything to the award debtor; it is establishing that the award has legal standing within the forum's legal order. Under Article III of the New York Convention[8], the obligation of contracting States to "recognise arbitral awards as binding" is directed at this stage. Under the International Arbitration Act 1974 (Cth), an application under s 8(3)(a)[9] is the domestic mechanism by which a party seeks that recognition.

Enforcement, in the technically precise sense, is the subsequent step by which the court gives domestic procedural force to the recognised award, typically by entering judgment in the terms of the award. The award thereby acquires the same legal status as any judgment of the court. Under the International Arbitration Act 1974 (Cth), this is the function of s 8(3)(b)[10]. At this stage, no asset has yet been touched. The critical point for present purposes is that both recognition and enforcement (in this composite sense) operate at the level of jurisdiction: the court is being asked to exercise authority over the foreign State respondent by adjudicating whether the award should be given domestic legal force. It is at this stage that sovereign immunity from jurisdiction, governed in Australia by s 9 and s 10 of the Foreign States Immunities Act 1985 (Cth)[11], is the operative legal question.

Execution is a wholly separate, subsequent stage that does not arise unless and until recognition and enforcement have been obtained. Execution involves the physical realisation of the judgment against the debtor's assets: garnishee orders, charging orders, seizure of property, and attachment orders. A foreign State may have entirely lost its immunity from jurisdiction at the recognition and enforcement stage while still retaining immunity from execution in respect of assets used for sovereign purposes.

The significance of this three-stage framework for the present case is substantial. The central question before every court in the CCDM proceedings, whether India's ratification of the New York Convention, and/or its agreement to arbitrate under the Mauritius-India BIT, constituted a waiver of its immunity, was a question about Stage 1 and Stage 2: whether the Australian court had jurisdiction to hear the recognition and enforcement application at all.

Questions of Stage 3, whether any specific Indian asset in Australia could be attached to satisfy a judgment, never arose, because the applicants were defeated at the threshold jurisdictional stage.

III(a) England and Wales (with references to Australia)

English courts operate under the *State Immunity Act 1978* (SIA)[12], which is similar to Australia's relevant legislation concerning Foreign State Immunity (Foreign States Immunities Act 1985 (Cth))[13]. Section 9[14] of the SIA provides that a State is not immune from

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[7] CCDM Holdings LLC v Republic of India (n 1)
[8] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) Article III
[9] International Arbitration Act (1974) (Cth) s 8(3)(a)
[10] International Arbitration Act (1974) (Cth) s 8(3)(b)
[11] Foreign State Immunities Act (1985) s 9, s 10
[12] State Immunity Act (1978)
[13] Foreign State Immunities Act (1985) (Cth)
[14] State Immunity Act (1978) s 9

proceedings in respect of which it has agreed in writing to submit to arbitration (similar to Australia's ss9 and 10)[15].

English law has consistently distinguished between adjudicative immunity (immunity from the enforcement proceedings themselves) and execution immunity (immunity from execution against specific assets). A State with a valid arbitration agreement that has agreed to arbitrate loses immunity; it may retain it in respect of assets used for sovereign purposes.

The CCDM case itself was tested under English Law in the London Commercial Court in *CC/Devas (Mauritius) Ltd v Republic of India*[16]. On 17 April 2025, Blair J rejected that India's ratification of the New York Convention was enough, alone, to constitute a waiver of its foreign state immunity by "prior written agreement" pursuant to s2(2) of the SIA[17].

However, the Court expressly deferred the question of whether India had waived its immunity by agreeing to arbitration under the Mauritius-India bilateral investment treaty (as opposed to by virtue of its accession to the New York Convention) within the meaning of section 9 of the State Immunity Act (the so-called arbitration exception).

As a result, the English courts have not actually resolved whether the Mauritius-India BIT constitutes a sufficient "written agreement" to arbitrate for section 9[18], and therefore whether it operates as a waiver of immunity at the recognition stage.

By the time the London Commercial Court deferred consideration of the section 9 arbitration exception, the Supreme Court of the Netherlands (3 February 2023) had already refused to set aside the award. What remained before the Dutch courts were ancillary procedural matters, including the later 26 November 2025 recusal decision, rather than a live annulment risk.

Against that backdrop, the continued deferral of the section 9[19] inquiry sits uneasily with the posture of the case and reinforces a broader tension in English law and Australia, in contrast with the rest of the world. While BITs are conventionally understood as advanced consent to arbitration, if courts are reluctant to treat that consent as extending to enforcement where the underlying arbitration is not conducted via ICSID, they risk blurring the distinction between adjudicative immunity and immunity from execution.

Australia itself is not without precedent on the general proposition that BITs are conventionally understood as consenting to the arbitration point. I have written about an Australian case previously, namely *Infrastructure Services Luxembourg S.*à*.r.l v Kingdom of Spain*[20] [https://www.linkedin.com/pulse/foreign-state-immunity-fsi-icsid-stephanie-hunt] ('Kingdom of Spain case'), in which the Federal Court found that Spain's agreement to arbitrate under the Energy Charter Treaty[21] was sufficient to establish a waiver of foreign State immunity for recognition and enforcement of the resulting award, while preserving immunity from execution against diplomatic and military assets.[22]

The Energy Charter Treaty provides investors with a choice of arbitral mechanisms, including ICSID arbitration, arbitration under the UNCITRAL Rules, and arbitration under the rules of the Stockholm Chamber of Commerce. In the Kingdom of Spain case, the investor pursued the ICSID mechanism, one of the three paths available under the ECT.

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[15] Foreign State Immunity Act (1985) (Cth) ss 9 and 10
[16] CC/Devas (Mauritius) Ltd v Republic of India [2026] EWHC 414 (Comm)
[17] State Immunity Act (1978) s 2(2)
[18] SIA s 9 (n 14)
[19] Ibid
[20] *Infrastructure Services Luxembourg S.*à*.r.l v Kingdom of Spain (n 2)*
[21] The International Energy Charter, Consolidated Energy Charter Treaty (1998) updated 15 January 2016
[22] Steph Hunt, "Foreign State Immunity (FSI)/ICSID" (LinkedIn, 20 April 2023) https://www.linkedin.com/pulse/foreign-state-immunity-fsi-icsid-stephanie-hunt accessed 19 May 2026

In CCDM, by contrast, the Bilateral Investment Treaty between Mauritius and India provided for ad hoc arbitration under the UNCITRAL Rules, and the resulting award was sought to be recognised and enforced under the New York Convention rather than the self-contained ICSID framework. It is therefore understandable that the High Court could not apply the Kingdom of Spain case's precedent directly. However, both the Australian and British Courts should have looked to the other international jurisprudence that addresses precisely this scenario: the enforcement of ad hoc UNCITRAL investment arbitration awards outside the ICSID framework, including as pursued by investors under the second pathway of the ECT, for example. In fact, English law already provides precisely that answer.

In *Stati v Republic of Kazakhstan*[23], the Court of Appeal dealt with exactly the non-ICSID side of ECT arbitration enforcement and confirmed that Kazakhstan's agreement to arbitrate under the Energy Charter Treaty constituted a waiver of adjudicative immunity under section 9[24] for recognition and enforcement proceedings in England. The result was the same as in the ICSID context: a State that has signed an arbitration agreement under a treaty cannot thereafter invoke sovereign immunity to resist recognition of the resulting award. The *Yukos* cases, *Hulley Enterprises Ltd v Russian Federation*[25] and related proceedings, applied the same principle. English courts have not held that mere ratification of the New York Convention constitutes a free-standing waiver of immunity, but they do hold, consistently and clearly, that a State's specific agreement to arbitrate under a treaty does, independent of any New York Convention accession.

III(b) Singapore

Singapore's *State Immunity Act 1979*[26] also closely mirrors the UK SIA. Section 11 provides that a State is not immune from arbitration-related proceedings where it has agreed in writing to submit to arbitration.

This position was confirmed in *Republic of the Philippines v Maler*[27], where the Singapore Court of Appeal held that a State's agreement to arbitrate constitutes a waiver of adjudicative and enforcement immunity.

The Court drew a clear distinction between (i) the jurisdiction of the court to recognise and enforce an award and (ii) the separate question of whether State assets are immune from execution. In doing so, it reaffirmed that consent to arbitration engages the statutory arbitration exception, even where enforcement is pursued under the New York Convention as implemented through Singapore's International Arbitration Act.

Notably, the Philippines, like India, acceded to the New York Convention with a "commercial reservation", limiting its application to disputes arising out of commercial legal relationships. The distinction is critical in the investment arbitration context. Where a State's waiver of immunity is grounded in its consent to arbitration under a bilateral investment treaty, the existence of a commercial reservation to the New York Convention is immaterial to the immunity analysis.

Maler Foundation sought enforcement via the New York Convention as implemented through Singapore's International Arbitration Act, and the Singapore Court of Appeal rejected any reliance on the Philippines' commercial reservation to avoid enforcement.

III(c) France

French law adopts one of the most expansive approaches to State immunity among major enforcement jurisdictions in the context of investment arbitration. Although France has not

[23] *Stati v Republic of Kazakhstan* [2018] EWCA Civ 1896
[24] SIA s 9 (n 14)
[25] *Hulley Enterprises Ltd v Russian Federation [2025] EWCA Civ 108*
[26] SIA 1979 (n 12)
[27] Republic of the Philippines v Maler Foundation [2014] SGCA 43

historically codified State immunity statute (except recently as regards execution discussed below), its courts have long applied customary international law under the restrictive theory of immunity in a manner that is consistently favourable to the enforcement of arbitral awards.

In this context, French courts have typically treated a State's consent to arbitration under bilateral investment treaties as sufficient, without more, to displace adjudicative immunity at the recognition and enforcement stage. This reflects a broader doctrinal position, originating in cases such as *Creighton Ltd v Government of Qatar*[28], that an agreement to arbitrate constitutes an implied waiver of immunity from jurisdiction. While *Creighton* arose in a commercial arbitration context, its reasoning has been applied more generally and underpins the French approach to treaty-based arbitration, where consent to arbitration in a BIT is treated as the operative waiver.

The principal constraints in France arise not at the recognition stage, but at the execution stage (a different stage to that dealt with in the Australian CCDM case). In particular, Loi Sapin II (Law No. 2016-1691)[29] introduced a requirement of prior judicial authorisation before measures of attachment may be taken against State assets. These provisions apply across the board, including in the enforcement of investment treaty awards, and reflect a policy choice to protect sovereign assets while preserving the enforceability of arbitral awards at the jurisdictional stage.

Accordingly, the French position draws a clear and coherent distinction that treaty-based consent to arbitration is sufficient to displace adjudicative immunity, while execution against State assets remains subject to additional safeguards. In the investment arbitration context, this produces a more stable and predictable enforcement framework than that currently emerging in jurisdictions such as England and Australia, where the relationship between treaty consent and sovereign immunity appears contested and out of step with major arbitration jurisdictions.

III(d) Switzerland

Swiss courts apply the restrictive theory of State immunity as a matter of customary international law, drawing the classic distinction between *acta jure imperii*, acts of a sovereign nature, for which immunity is preserved, and *acta jure gestionis*, acts of a commercial or private law nature, for which it is not. The Swiss Federal Act on Private International Law (PILA), Art 194[30], incorporates the New York Convention as the domestic framework for the recognition and enforcement of foreign arbitral awards. The Swiss Federal Supreme Court applies foreign State immunity as a matter of customary international law at the recognition and enforcement stage, and has consistently held that where a State has agreed to investment treaty arbitration, whether under ICSID, UNCITRAL, or institutional rules, it has submitted to a process engaging the *jure gestionis* sphere and cannot invoke immunity to resist recognition of the resulting award.

The analysis changes at the point of execution. The Swiss Debt Enforcement and Bankruptcy Act (SchKG)[31] governs the attachment and realisation of assets. Swiss courts apply customary international law to determine whether specific assets are immune from attachment. Assets used for sovereign or governmental functions (*jure imperii*) retain immunity from execution; assets used commercially (*jure gestionis*) do not. These are fundamentally different proceedings from the recognition and enforcement application, and a different body of law applies to them.

The tensions in Swiss practice, and the most litigated questions in Swiss investment arbitration enforcement, arise precisely at this execution stage, particularly in respect of

[28] Creighton Ltd v Government of Qatar 181 F.3d 118 (D.C. Cir. 1999)
[29] Loi Sapin II (Law No. 2016/1691)
[30] The Swiss Federal Act on Private International Law (1987) Article 194
[31] The Swiss Debt Enforcement and Bankruptcy Act (2025)

central bank assets and sovereign wealth fund assets. *The NML Capital v Argentina*[32] line of cases before the Swiss Federal Supreme Court addressed the attachability of Argentine sovereign assets in Switzerland and is a leading authority on the execution immunity question, not on the recognition and enforcement (adjudicative jurisdiction) question.

The High Court in the Australian CCDM proceedings appears to have applied a rationale that might be considered arguable or acceptable if the subject dealt with the latter stage of execution, as opposed to enforcement which is the earlier adjudicative stage. Such a potential confused or conflation of these two stages, treating execution immunity authorities as though they bear on adjudicative immunity at the recognition stage, creates misplaced doctrinal confusion, and stands in stark contrast to the Swiss framework, which makes the distinction especially clear.

Under Swiss law and the broader civil law tradition, investment treaty arbitration is treated as arising from a commercial relationship for both the restrictive immunity analysis and the classification of the underlying dispute. The investor's claim is for compensation arising from the State's treatment of a private commercial investment. The award is therefore commercial in character under Swiss law.

India's classification of BIT-based arbitration awards as non-commercial under Indian law, upheld by two Indian High Courts and deployed by India in these proceedings, is, by the standards of the Swiss position, an anomalous and technically highly contestable classification that reflects a domestic legal characterisation without support in the mainstream of international enforcement practice.

III(e) The Netherlands

The Hague in the Netherlands was the seat of the CCDM arbitration, under Article 16(1) of the UNCITRAL Rules[33] and the terms of appointment in the arbitration.

The Netherlands is also, as a matter of practice, one of the most frequently selected seats for ad hoc UNCITRAL investment arbitrations administered by or linked to the Permanent Court of Arbitration. As a result, its courts have developed a body of practice on the enforcement of investment arbitration awards that is sophisticated and also of direct comparative and situational relevance.

Like many local statutes, Dutch law draws a structural distinction between proceedings at the seat known as the supervisory jurisdiction, and separate foreign enforcement proceedings. Regarding the former, Dutch courts at the seat have jurisdiction to entertain challenges to the award under Articles 1064a and 1065 of the Wetboek van Burgerlijke Rechtsvordering (Rv)[34], the Dutch Code of Civil Procedure concerning the validity of the award as a matter of Dutch arbitration law. As a matter of practicality, if the award was annulled at the seat, this would preclude its enforcement elsewhere in the world. While the flip side (if an award was challenged at the seat but that challenge was not successful in getting it set aside) should in theory generally result in recognition and enforcement of the award in foreign jurisdictions, this is not always the case as is visible in the Australian context of the CCDM proceedings.

In the CCDM litigation, India unsuccessfully pursued setting-aside proceedings before the Dutch courts in relation to the underlying award, alleging fraud and challenging the jurisdiction of the arbitral tribunal. On 3 February 2026, the Supreme Court of the Netherlands (Hoge Raad) dismissed India’s final appeal to have the award annulled and set aside.[35] These proceedings started in parallel with the enforcement proceedings in Australia,

[32] The NML Capital v Argentina ATF 134 III 122 / 7B.2/2007

[33] UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, Article 16(1)

[34] Code of Civil Procedure, the Wetboek van Burgerlijke Rechtsvordering, Articles 1064a and 1065

[35] Republic of India v CCDM Holdings, LLC, ECLI:NL:HR:2023:139

Canada, the United Kingdom and elsewhere. Now there are still proceedings on foot challenging the quantum awards in the Hague, but that is a separate matter to setting aside the underlying merits award.

In relation to the separate substantive question of whether Dutch courts would strip India of immunity from jurisdiction in enforcement proceedings relating to an ad hoc UNCITRAL investment arbitration award, the answer that Dutch law and practice supplies is clear and consistent with the broader European norm. Dutch courts apply the restrictive theory of sovereign immunity as a matter of customary international law, as codified and reflected in Dutch case law and in the Netherlands' international obligations, including the European Convention on State Immunity 1972 (Basle Convention)[36]. The central principle is that a foreign State that has agreed to arbitrate, whether under a bilateral investment treaty, a multilateral investment treaty, or a direct arbitration agreement, has submitted itself to a process of a private or commercial law character and cannot invoke immunity to resist proceedings in which the resulting award is sought to be enforced. This position is well established in Dutch practice and is consistent with the conclusions of the Dutch Supreme Court (Hoge Raad) in cases addressing the immunity of foreign States in the context of agreed dispute resolution mechanisms.

The leading Dutch authority most directly relevant to the scenario presented by CCDM, being awards made under a bilateral investment treaty that provides for ad hoc UNCITRAL arbitration, is the line of Yukos-related proceedings before the Dutch courts. The three Yukos awards, made under the Energy Charter Treaty[37] via ad hoc UNCITRAL arbitration seated in the Netherlands, were the subject of extensive Dutch court proceedings touching on both the validity of the awards and, in the enforcement and execution of assets context, the immunity of the Russian Federation. The Hague District Court, the Hague Court of Appeal and ultimately the Dutch Supreme Court all engaged with the awards and, in the enforcement and execution phase, with the immunity question. Whilst the Yukos litigation in the Netherlands turned substantially on the setting-aside question (which the Supreme Court ultimately resolved in favour of the investors, reinstating the awards after the Court of Appeal had set them aside), the underlying immunity analysis that Dutch courts applied in the enforcement and execution context confirmed the restrictive theory such that a State that has agreed to investment treaty arbitration has entered a sphere of activity that is not sovereign in character, and cannot invoke immunity to resist the adjudicative proceedings that give the resulting award domestic legal force.

On the specific question of whether India would have been found to have waived adjudicative jurisdiction before Dutch courts in enforcement proceedings relating to the CCDM Quantum Award, the answer is almost certainly yes, on the basis of the Mauritius-India BIT's arbitration clause. The BIT provided the written agreement to arbitrate. The award was made pursuant to that agreement. Dutch courts, applying the restrictive theory, would treat India's entry into the BIT and its agreement to submit investment disputes to UNCITRAL arbitration as a waiver of immunity from the adjudicative proceedings necessary to enforce the resulting award.

This is ultimately a similar conclusion to that reached by the English Commercial Court in the CCDM proceedings before Blair J, which, while declining to hold that New York Convention ratification alone was sufficient for a waiver of immunity to exist, such proceedings left entirely open (and indeed implicitly supported) the proposition that India's specific agreement to arbitrate under the BIT would have been sufficient.

It is notable that neither the parties nor the Solicitor-General, in the Australian CCDM proceedings, directed the High Court to Dutch enforcement practice, despite the Netherlands being the seat of the arbitration and despite Dutch courts having the most direct supervisory

[36] European Convention on State Immunity (Adopted 16 May 1972, entered into force 11 June 1976) ETS No 74
[37] The International Energy Charter (n 21)

relationship with the award. That omission, along with the omission to consider other key jurisdictions like Switzerland or France, and particularly the omission to specifically rely on or at least interrogate any doubts in relation to the underlying arbitration agreement, deprived the Court of the most relevant information to the inquiry, weakened the persuasiveness of the outcome and undermined its comparative value.

Further, for contextual reference, on the same facts as the CCDM proceedings, a Dutch enforcement court would have no basis to apply India's commercial reservation to limit its own Article III obligations, both because the Netherlands made no such reservation and because, as the analysis in Section IV of this article makes clear, the inward-looking character of India's reservation means it operates on India's own enforcement obligations in Indian courts, not on the obligations of a non-reserving seat State or non-seat enforcement forum.

III(f) The United States

The Foreign Sovereign Immunities Act 1976 (FSIA)[38] provides two structurally distinct routes by which a foreign State may be deprived of immunity in US courts in the context of arbitration. The first is the waiver exception under 28 USC §1605(a)(1)[39], which removes immunity where the foreign State has waived it expressly or by implication. The second is the arbitration exception under 28 USC §1605(a)(6)[40]. The arbitration exception specifically applies to actions for confirming or enforcing awards governed by international treaties in force in the US, such as the New York Convention.

Enforcement under the New York Convention of arbitral awards arising from ad hoc UNCITRAL arbitrations conducted pursuant to bilateral or multilateral investment treaties (like the arbitral award in the Australian CCDM case) is typically analysed under the arbitration exception in §1605(a)(6)[41]. US courts addressed this scenario in *NextEra Energy Global Holdings BV v Kingdom of Spain*[42], where the DC Circuit considered the enforcement of an award arising from an UNCITRAL arbitration commenced under the Energy Charter Treaty, the second, non-ICSID pathway available under that multilateral instrument.

The court grounded jurisdiction under the arbitration exception in §1605(a)(6)[43]. The analysis reflects what has been described as a "double consent" structure, namely the State's consent to arbitrate investment disputes under the treaty's arbitration clause, together with its acceptance of an international enforcement regime through treaty ratification. The jurisdictional anchor was the arbitration agreement contained in the treaty, not the mere fact of ratification of the New York Convention.

In *Zhongshan Fucheng Industrial Investment Co Ltd v Federal Republic of Nigeria*[44], the DC Circuit addressed the enforcement of an award arising from an ad hoc UNCITRAL arbitration commenced under the China-Nigeria BIT. The court proceeded under §1605(a)(6)[45], holding that the BIT's arbitration clause constituted the "agreement to arbitrate" within the meaning of the provision, and that the resulting award was governed by the New York Convention as regarded recognition and enforcement. Nigeria's objections to jurisdiction were assessed by reference to the existence and scope of the arbitration agreement in the BIT, rather than by reference to the New York Convention alone.

The consistent pattern in these cases is that where a State has agreed to ad hoc UNCITRAL arbitration under a BIT or multilateral investment treaty, and the resulting award is brought

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[38] Foreign Sovereign Immunities Act (1976)
[39] Foreign Sovereign Immunities Act (1976) 28 USC §1605(a)(1)
[40] Foreign Sovereign Immunities Act (1976) 28 USC §1605(a)(6)
[41] Ibid
[42] NextEra Energy Global Holdings BV v Kingdom of Spain, No. 23-7060 (DC Cir. 2024)
[43] FSIA (1976) (n 36)
[44] Zhongshan Fucheng Industrial Investment Co Ltd v Federal Republic of Nigeria, No. 20-7096 (DC Cir. 2023)
[45] FSIA (1976) §1605(a)(6) (n 38)

for enforcement under the New York Convention, US courts treat the treaty's arbitration clause as the operative jurisdictional foundation, while the Convention provides the international framework satisfying the statutory requirement under s1605(a)(6)[46]. The two are complementary, rather than alternative, but the immunity analysis turns on the State's specific agreement to arbitrate within that treaty framework (ie the agreement to arbitrate which may be found in the Bilateral or Multilateral Investment Treaty), rather than on the abstract question of whether Convention ratification alone displaces immunity.

III(g) The Consistent Principle

Strip away the local statutory architecture, and a single, coherent principle emerges across all six of the world's most significant investment arbitration enforcement jurisdictions. This principle is that a State that specifically agrees to arbitrate an investment dispute, whether in a BIT, a multilateral treaty, or an arbitration agreement, waives its immunity from the adjudicative proceedings necessary to recognise and enforce the resulting award. Immunity from execution against specific sovereign assets is a separate question. But there is no serious doctrinal support in any of these jurisdictions for the proposition that a State can agree to arbitrate based on an arbitration agreement, sit through the arbitration, lose, and then successfully invoke immunity to prevent a court from even recognising the award. This is particularly the case where the arbitration agreement has incurred unsuccessful attempts in the courts of the Seat to have it annulled or set aside because of alleged invalidity. Those decisions can and should be considered as regards any doubts regarding validity of the arbitration awards, particularly in absence of evidence supporting invalidity.

That is, however, what the High Court of Australia has now effectively permitted by its omission to deal with what should have been the primary grounds for Australia’s adjudicative jurisdiction, being the BIT itself, which establishes the arbitration agreement.

IV. India's Commercial Reservation: What It Is and Why It Should Not Have Driven the Case

India made both reservations available under Article I(3) of the New York Convention[47] upon ratification in 1960. The first, the reciprocity reservation, declared that India would apply the Convention only to awards made in the territory of another contracting State. The second, the commercial reservation, declared that India would 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 India. Australia, the Netherlands and Mauritius made no such reservation. India put to the Court two decisions from the High Court of India[48], from the State of Gujarat and New Delhi, both holding that a bilateral investment treaty is non-commercial under Indian law. On India's own characterisation, an investment award arising from a BIT breach would fall outside its commercial reservation.

The Full Court of the Federal Court treated India's commercial reservation as having a reciprocal, bidirectional effect. The Full Court reasoned that because India had declared it would apply the Convention only to commercial differences, other contracting States' obligations to enforce awards against India were correspondingly narrowed to the same commercial category. The Full Court thereby transformed a unilateral, inward-looking limitation on India's own Convention obligations into a bilateral restriction affecting the enforcement obligations of non-reserving States, including Australia.

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[46] Ibid

[47] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) Article I(3)

[48] Union of India v. Vodafone Group PLC United Kingdom & Anr CS(OS) 383/2017, decision dated 7 May 2018, (Delhi High Court); Union of India v. ZTE Corporation, (2017) SCC Online Guj 2341 (Gujarat High Court).

This is an "oddity" and a "novelty" in relation to the New York Convention, as the reservation speaks to what India is obliged to enforce in its own courts, and says nothing about what Australia, as a non-reserving State, is entitled or obliged to do in its own courts.

The critical analytical distinction that the Full Court's reasoning side-stepped, and that the High Court ultimately did not seek to resolve, is that even if India's reservation narrowed its State's Article III enforcement obligations, this would not constitute a bar to the adjudicative jurisdiction of a non-reserving enforcement forum ie Australia.

These are two entirely different legal questions. The first is a question about the scope of a substantive treaty obligation, namely, what category of awards India is obliged to enforce in Indian courts. The second is a question about whether a foreign State has waived its immunity from the jurisdiction of an Australian court in proceedings to recognise and enforce an award against it.

A State may have waived adjudicative immunity entirely, by an express agreement to arbitrate, and yet separately invoke a reservation to argue that the resulting award falls outside the class of awards that give rise to its substantive enforcement obligation locally.

However in any case, 'Not obliged to enforce' is not the same as being 'precluded from enforcing', and it is emphatically not the same as 'India retains immunity from foreign enforcement proceedings'. The modification goes to the scope of Australia's duty to enforce, not to the existence of its adjudicative jurisdiction.

This distinction matters for the structure of the case. Once ratification of the New York Convention was framed as the source of India's waiver of immunity, India's commercial reservation became a powerful and ultimately decisive vulnerability, even if its application, as argued above, was an overreach.

Had the case been framed instead around India's specific, express agreement to arbitrate under the Mauritius-India Bilateral Investment Treaty as the primary waiver instrument, the commercial reservation would have been largely irrelevant to the immunity analysis. Is it possible that both parties had too much to lose by opening this examination in Australia? Even if so, is it conscionable for the High Court to leave this main issue to the side in creating a widely applicable precedent? Or would the High Court have been better to do what the London Commercial Court did and defer consideration of those issues, signalling that the precedent was incomplete and should not be relied upon in circumstances where parties are signatories to the New York Convention and are seeking enforcement of an arbitral award produced under a BIT pursuant to UNCITRAL rules?

In any case, a sovereign that agrees in writing to arbitrate a defined class of disputes under a bilateral treaty should not be able to re-immunise itself by invoking a general reservation to a multilateral convention that serves merely as the procedural vehicle for enforcement of the resulting award. The commercial reservation debate was, in this sense, a symptom of a mis-framed case rather than a genuine doctrinal obstacle. I would suggest that this case is not in line with the parties' investment arbitration agreement and in a way that actually undermines investment arbitration certainty as a pathway for justice.

V. Conclusion

The High Court's decision in CCDM Holdings LLC v Republic of India represents a significant departure from the established enforcement practice of every major investment arbitration jurisdiction examined in this article. Across England and Wales, Singapore, France, Switzerland, the Netherlands and the United States, the consistent principle is that a State which specifically agrees to arbitrate investment disputes under a bilateral or multilateral investment treaty waives its immunity from the adjudicative proceedings necessary to recognise and enforce the resulting award. The distinction between adjudicative immunity and execution immunity is well established and doctrinally coherent across these jurisdictions. India's commercial reservation to the New York Convention, properly understood, operates as a unilateral limitation on India's own enforcement obligations in Indian courts, and should not have been permitted to function as a bilateral restriction on the enforcement obligations of non-reserving States such as Australia. The doctrinal difficulties in CCDM are, in substantial part, a consequence of the case having been framed around the New York Convention as the source of the immunity waiver, rather than around the Mauritius-India Bilateral Investment Treaty itself. A companion article examines the institutional and procedural dimensions of the case including the role of the Solicitor-General's intervention, the contrasting approach of the Canadian courts, the High Court's non-engagement with the Bilateral Investment Treaty as an independent waiver instrument on the sole basis that it had not been expressly pleaded despite its obvious relevance, and the broader question of whether the Commonwealth and Australia's legal institutions are drawing from wider specialist expertise in international investment arbitration, including from sole practitioners and academics with proven experience in this field.

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