Article 2: Institutional Failures in CCDM, Advocacy, Intervention, and the Missing Treaty Basis

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Introduction

In April 2026, the High Court of Australia handed down CCDM Holdings LLC v Republic of India [2026] HCA 9 ("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 "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").

A companion article has examined the doctrinal problems with the High Court's reasoning, including its treatment of State practice across the world's major enforcement jurisdictions and the role of India's commercial reservation to the New York Convention. This article turns to the institutional and procedural dimensions of the case. It examines the Solicitor-General's intervention and its structural consequences, the contrasting approach adopted by the Quebec Court of Appeal in the parallel Canadian proceedings, the High Court's failure to engage with the BIT as an independent waiver instrument, and the broader question of whether the Commonwealth and Australia's legal institutions are drawing on the right specialist expertise, including from sole practitioners and academics with proven practical and academic experience in international investment arbitration, to navigate cases at the intersection of public international law, treaty interpretation under the Vienna Convention on the Law of Treaties ("VCLT"), and international investment arbitration enforcement. The article also draws on the framework established by the International Centre for Settlement of Investment Disputes ("ICSID") Convention, which provides a self-contained enforcement mechanism distinct from the New York Convention pathway at issue in CCDM.

I. The Solicitor-General's Intervention: Role, Structure and the Three Issues

The Solicitor-General of the Commonwealth, Mr S.P. Donaghue KC, intervened not as an advocate for the appellants but in the Commonwealth's capacity as amicus curiae, assisting the Court on questions of public international law and treaty construction in which the Commonwealth has a direct institutional interest. This is appropriate as Australia is a contracting State to the New York Convention, and the proper construction of that Convention's relationship to foreign State immunity under the *Foreign States Immunities Act 1985* (Cth)[1] is a question of ongoing significance for Australia's treaty obligations and its

[1] Foreign State Immunities Act (1985) (Cth)

standing as a reliable arbitration jurisdiction. The Solicitor-General aligned with the appellants' position that the New York Convention applies to investment awards and that a State that ratifies it waives their immunity from adjudicative jurisdiction. However, when it came to the reciprocal effect of India's commercial reservation, he aligned with India. This structurally undermined the overall case for enforcement, even if the High Court did not specifically decide against enforcement on that basis. The Solicitor-General's argument that Australia should apply India's commercial reservation with reciprocal effect is discussed under Issue 3, below.

I(a) Issue 1: The Scope of the New York Convention

The Solicitor-General rightly submitted that the Court should interpret Article I(1) of the New York Convention, and in particular the question of whether States can be "persons" within that provision, in light of the very considerable State practice, despite only discussing the applicable US law, that had developed in applying the Convention to investor-State disputes. Article I(1) of the Convention refers to arbitral awards arising out of differences between "persons," whether physical or legal. India contended that sovereign States are not "persons" within the meaning of that provision, such that the Convention has no application to arbitral awards to which a State is a party. If that construction were accepted, the award made against India as a State respondent in the Mauritius-India BIT arbitration would fall entirely outside the scope of the Convention, and no contracting State would be obliged to recognise or enforce it under Article III. The Solicitor-General relied on Article 31(3)(b)[2] of the Vienna Convention on the Law of Treaties ("VCLT"), along with any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation. The subsequent practice he identified was the widespread and consistent application of the Convention to investor-State awards across multiple jurisdictions, although his submissions were confined to US authorities and did not canvass the relevant practice of the English, Singaporean, French, Swiss and Dutch courts. Such analysis would have bolstered his argument. In any event, he rightly submitted that it would be a "truly seismic event" if the Court were to hold that States can never be "persons" for Article I(1)[3]. He also rightly resisted India's submission that the Convention is limited to "private law disputes," noting that the attempt to confine the Convention to commercial matters had been expressly rejected at the drafting stage, with the commercial reservation mechanism provided as the alternative.

I(b) Issue 2: Waiver by Ratification

The Solicitor-General's primary submission on the waiver question was that a State's ratification of the New York Convention, in accepting the Article III obligation to recognise and enforce arbitral awards, constitutes a clear and unmistakable submission to the jurisdiction of other contracting States' courts in proceedings to recognise or enforce an award to which it is party. When Gordon J asked whether the mere signing or ratifying of the Convention is the waiver, the Solicitor-General confirmed that it was, but clarified that without an arbitration agreement there would be no award, and without an award one is not within the territory of Article I. Gageler CJ summarised the position as being that the waiver is in Article III and the award, with the written arbitration agreement, functioned as "just the mechanics." In my view, this is an unfortunate characterisation given that the BIT is the very source of the State's consent to arbitrate, and the New York Convention is actually the mechanics by which enforcement is sought. Generally, in the scenario of a Bilateral or Multilateral Investment Treaty providing for non-ICSID arbitration, both are required.

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[2] Vienna Convention on the Law of Treaties (Done at Vienna on 23 May 1969. Entered into Force on 27 January 1980) United Nations, Treaty Series, Vol. 1155, p.331 Article 31(3)(b)

[3] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) Article I(1)

India argued that the court could not assume jurisdiction without first verifying the substantive validity of the arbitration agreement. In contrast, the Solicitor-General contended that the court should only require a prima facie showing of an agreement at the immunity stage, reserving complex validity disputes for the subsequent enforcement phase under Article V. He acknowledged, however, that no ultimate appellate court anywhere in the world had previously ruled that ratification of the New York Convention results in waiver of foreign State immunity without considering the existence of an arbitration agreement, and that if the High Court accepted the proposition, it would be the first court in the world to do so. While that may be true, I disagree that anything more than a prima facie analysis of the validity of the arbitration agreement is required at the enforcement stage. The fact that the Hague Courts did not set aside the arbitration award should constitute sufficient evidence for the prima facie validity of the arbitration agreement.

I(c) Issue 3: The Reciprocal Effect of India's Commercial Reservation

On this third issue about the reciprocal effect of India’s commercial reservation, the Solicitor-General supported India’s case. He submitted that the effect of India's commercial reservation on other contracting States is governed by VCLT Article 21(1)(b)[4], which provides that a reservation "modifies those provisions to the same extent for that other party in its relations with the reserving State." This would mean that India will only apply the convention’s provisions to disputes which arise out of legal relationships considered commercial under Indian law. Indian Statute defines commercial dispute as “any dispute arising from ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile documents, including enforcement and interpretation of such documents, the export or import of merchandise or services, and such other disputes as may be notified by the central government.[5] Effectively this would mean that because India's Article III obligations have been limited so as not to apply to non-commercial awards, the same limitation would apply, on his analysis, to other contracting States' obligations vis-à-vis India. This would mean that Australia's Article III *obligations* regarding enforcement would not extend to non-commercial awards as against India. However, the majority approach across the globe is that the enforcing court determines what is categorised as commercial under their own domestic law and convention policy. So even if this is accepted, Australia should consider its own definition of non-commercial awards, and may draw inference from leading arbitration jurisdictions’ treatment of this issue. Another interpretation of the application of VCLT Article 21(1)(b)[6], is that India’s reservation would apply to ensure reciprocity as regards the execution stage, not the recognition or enforcement stage. However, when it comes to execution, this interpretation may not be necessary as there are already strict laws and State practice across a variety of jurisdictions, including in Australia, limiting execution against sovereign and diplomatic assets, as opposed to commercial assets. The potentially stronger interpretation that could have been applied in this case would be that, in any case, Australia is *entitled* to preclude enforcement but *not obliged* by VCLT Article 21(1)(b)[7].

The High Court did not preclude enforcement on the basis of India’s (and the Solicitor General’s) position on VCLT Article 21(1)(b)[8], however for the purposes of future decisions that are made on this basis I will suggest an appropriate approach for the purposes of Australia. As addressed above, ‘not obliged to enforce’ is not the same as being ‘precluded from enforcing’. Consequently, Australia would be open to refraining from enforcement but

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[4] Vienna Convention on the Law of Treaties (Done at Vienna on 23 May 1969. Entered into Force on 27 January 1980) United Nations, Treaty Series, Vol. 1155, p.331 Article 21(1)(b)
[5] Commercial Courts Act (2015) s 2(1)(c)
[6] Vienna Convention on the Law of Treaties (Done at Vienna on 23 May 1969. Entered into Force on 27 January 1980) United Nations, Treaty Series, Vol. 1155, p.331 Article 21(1)(b)
[7] Ibid
[8] Ibid 2

not precluded from enforcement. If it wishes to be a reliable arbitration jurisdiction then it should be minded to only refrain in exceptional circumstances. For example, this may result in precluding enforcement adjudication jurisdiction in circumstances of clear public policy concern. One public policy consideration may be whether there was alleged corruption in the arbitration agreement affecting validity but this would need to be examined at least at a prima facie level, and a court at the Seat, dismissing such allegations and, upholding the award should be enough to negate that argument.

Further, arguably there is a serious and overriding public policy concern with a country agreeing with a bilateral or multilateral investment treaty partner to submit investor disputes to ad hoc UNCITRAL or another non-ICSID mandated arbitral tribunal, should that same party intend to block enforcement in every New York Convention jurisdiction, relying on its commercial reservation and any so called reciprocal effect of it.

I(d) The Structural Problem:

If India's New York Convention Article III obligations are themselves narrowed by the reservation to exclude the enforcement of non-ICSID BIT-based investment awards, and if VCLT Article 21(1)(b)[9] translated India's reservation into a corresponding limitation on Australia's Article III obligations vis-à-vis India, then India would have misled any nation it concluded a bilateral investment treaty with containing a dispute resolution clause providing for ad hoc UNCITRAL or other non-ICSID arbitration, and Australia would be complicit in the harm resulting from such deceit in refusing enforcement in circumstances where the award had not been set aside and was otherwise regarded as valid in relevant courts around the world, with the exception of the London Commercial Court which had merely deferred this analysis. An outcome where a State could go around signing BITs without ICSID enforcement mechanisms (ie providing for ad hoc UNCITRAL arbitration), while being a signatory to the New York Convention, which provides this other route of enforcement, with *no intention* or apparent ability to enforce the non-ICSID BIT awards, cannot be allowed from a public policy perspective. Even if it were under various foreign jurisdictions, the international legal community must ensure procedural justice is served on any nation conducting negotiations where enforcement is precluded as this constitutes a failure to conduct negotiations in *good faith*. That should not be tolerated under investment arbitration principles or the broader rule of law internationally. This should be taken into account by enforcing jurisdictions.

II. How a Canadian Court Dealt with this Case

Canadian courts have adopted an approach to State immunity in investment arbitration that is both doctrinally coherent and grounded in the conception of arbitration as part of an integrated international system of adjudication. In Republic of India v CCDM Holdings[10], the Quebec Court of Appeal held that India had waived its immunity from recognition and enforcement proceedings by agreeing to arbitration under the Mauritius-India BIT. The Court located the waiver not through India’s ratification of the New York Convention, but in the treaty-based arbitration clause itself. And as I have argued is the right approach, the Quebec Court of Appeal treated the Convention as the procedural mechanism through which enforcement is pursued rather than the source of jurisdiction, which is in direct contrast to the inverse approach that appears to have been taken by the Australian High Court.

[9] Ibid

[10] Republic of India v. CCDM Holdings, [2024] QCCA 1620

Crucially, the Quebec Court reached that conclusion allowing enforcement, notwithstanding India's allegations of fraud and its reliance on parallel proceedings in The Hague. It did not engage in a granular analysis of those proceedings, nor did it treat their existence as determinative. Instead, it adopted the orthodox position that, absent a successful setting-aside at the seat, the award remains valid and enforceable. Unproven allegations and ongoing foreign proceedings were not permitted to displace jurisdiction or reopen the tribunal's findings. In doing so, the Court preserved the structural distinction between the supervisory role of the seat court and the function of enforcement courts, and refused to allow collateral challenges to undermine the enforceability of the award.

The Quebec Court also specifically noted the Hague proceedings to support its finding that there was a prima facie valid arbitration agreement.[11]

II(a) International System of Justice

The reasoning reflects a conception of arbitration that is notably absent from the High Court's analysis in *CCDM*.[12] Drawing on the academic work of Frédéric Bachand, the Court adopted the view that consent to arbitration is not merely submission to a private tribunal, but participation in an "international system of justice" in which arbitrators, arbitral tribunals and national courts and judges perform complementary functions (see Frédéric Bachand, writing in the context of the Devas enforcement proceedings before the Quebec Superior Court[13]). On this view, a State's consent to arbitration necessarily extends to the judicial processes required to give the resulting award practical effect. Arbitration is therefore not a self-contained private mechanism, but a hybrid adjudicative system in which enforcement is an integral and anticipated stage.

II(b) Further Comparative Review

That conception aligns with the doctrinal position already reflected across the major enforcement jurisdictions. US law has recognised that treaty-based consent to arbitration (eg through BITs) is capable of engaging the statutory arbitration exception, English precedent also suggests this (even if the point remains formally unresolved in *CC/Devas MauritiusLtd v Republic of India before the London Commercial Court*), [14] Singapore has treated such consent as a clear waiver of adjudicative immunity under its statutory framework, and French and Swiss law have long proceeded on the basis that agreement to arbitrate entails submission to the adjudicative processes necessary to render the award effective. In civil law jurisdictions in particular, such as Switzerland and France, arbitral awards, including those arising under bilateral investment treaties, are treated, for the purposes of foreign State immunity from adjudicative jurisdiction, as falling within the private/commercial (as opposed to public) sphere, such that State consent (eg via a valid BIT) operates as a waiver of immunity from recognition and enforcement proceedings before third-party courts, while leaving intact the distinct and more restrictive rules governing execution against State assets, which protect diplomatic or other public assets against execution at that later stage. Dutch courts, as courts of the seat, reinforce this structure by confining challenges to the supervisory jurisdiction, while leaving enforcement to proceed elsewhere in accordance with that underlying consent. Dutch foreign enforcement caselaw appears to also support the proposition that even a country with a commercial reservation to the New York Convention would not be able to avoid enforcement proceedings on the basis of that reservation.

The Canadian decision does not introduce a new principle. It confirms, in direct and practical terms, the principle already established across these jurisdictions, being that a State which agrees to arbitrate investment disputes under a treaty cannot invoke sovereign immunity to

[11] Republic of India v. CCDM Holdings, [2024] QCCA 1620
[12] CCDM Holdings LLC v Republic of India [2026] HCA 9 (n 1)
[13] CC/Devas (Mauritius) Ltd. v. Republic of India, 2022 QCCS 4785, at paras. 64–70.
[14] CC/Devas (Mauritius) Ltd v Republic of India (n 16)

resist recognition and enforcement of the resulting award, absent a successful annulment at the seat.

The contrast with the position adopted in Australia is stark. The High Court's reasoning in *CCDM*[15] risks fragmenting what is designed to operate as a unified system. As a matter of public policy, it cannot be correct that a State may enter into bilateral investment treaties promising binding arbitration under the UNCITRAL Rules, participate in that process, and yet invoke sovereign immunity to resist enforcement in third-party courts where the award has not been set aside. Such an approach undermines the reliability of treaty-based arbitration and the integrity of the broader international system of justice to which States have, by design, agreed to submit.

III. The BIT: The Missing Critical Element

The High Court did not engage with the BIT as an independent waiver instrument because it argued that would go beyond the grounds of appeal and raise unexamined issues.

In a private commercial dispute between two private parties, that is an entirely orthodox judicial response. In a case of this nature, however, the High Court should have invited submissions on whether there was, prima facie, a valid BIT. A BIT ordinarily (even in UNCITRAL/non-ICSID investment disputes as established using a comparative analysis of key arbitration jurisdictions around the world) provides the foundation for adjudicative jurisdiction and waiver.

The High Court of Australia is not an ordinary trial court. It is Australia's final court of appeal. When the High Court decides a question of public international law, such as the scope of foreign State immunity and the proper construction of an international convention, it is making Australian law on that question for every case that follows. It is determining Australia's posture in the community of nations.

In that context, the adversarial principle has limits. The High Court has consistently recognised that it retains a discretion to raise points of its own motion where the interests of justice require it, particularly on questions of law that are decisive and where the other party would not be prejudiced. The cases establishing this principle, *Suttor v Gundowda Pty Ltd* [16] and *Coulton v Holcombe*[17], would be known or surface quickly to practitioners in this field.

The Mauritius-India BIT was not a novel or hidden document. It was the founding instrument of the entire proceedings. Its existence, its terms, and its relevance to the waiver argument were obvious to any reader of the case who is across basic principles of the international system of Investor-State Dispute Settlement ("ISDS"). The question of whether India's agreement to arbitrate under the BIT constituted a waiver of immunity under section 10(3) of the *Foreign States Immunities Act 1985* (Cth)[18] is a pure question of statutory construction, especially given the existing Quebec precedent applicable by direct comparison along with the Hague Court's decision that the underlying award would not be set aside due to alleged invalidity. That is precisely the kind of question the High Court should raise of its own motion when the proper statement of Australian law requires it.

The fact that the Court expressly noted the BIT was not raised as an independent waiver instrument, while simultaneously declining to engage with it on that basis, is a troubling feature of this judgment. The Court saw and expressly identified the argument. And then it declined to assess it because the parties had not framed the case that way. Beech-Jones J put directly to CCDM's counsel that the submission or waiver of sovereign immunity might be

[15] CCDM Holdings LLC v Republic of India [2026] HCA 9 (n 1)
[16] *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418
[17] *Coulton v Holcombe* (1986) 162 CLR 1
[18] Foreign States Immunities Act 1985 (Cth) s 10(3)

found in the bilateral treaty rather than the New York Convention. Mr Walker responded that the BIT was "part of the setting" and that it "renders it almost impossible to understand how in the sequence of treaties a State volunteering to be bound by such an arbitration obligation could deny its amenability to jurisdiction of enforcement later," but did not press the BIT as the independent ground. For a final court of appeal deciding a question of public international law significance, the Court's decision not to then engage with that point of its own motion is not an example of appropriate judicial restraint. Rather, it demonstrates a level of abdication.

The correct approach was clear. The Court should have either invited the parties and the Solicitor-General to make further submissions on the BIT as an independent waiver instrument, or addressed it in any event, given its decisive relevance and the fact that it was raised, at least in passing, by members of the bench themselves during oral argument.

IV. Was the Commonwealth Intervention Adequate?

The Commonwealth has within it, and available to it, significant expertise in international arbitration and public international law. The Office of International Law within the Attorney-General's Department, the Australian Government Solicitor, and the network of academic and practitioner experts available for consultation are substantial resources. The question is whether that expertise was properly deployed in this intervention.

The concern raised by *CCDM* is not about personal capability. The outgoing Solicitor-General who intervened, Mr S.P. Donaghue KC, and the newly appointed Solicitor-General who now takes on this role are barristers of first rank and formidable reputations. But the concern is whether the Commonwealth's processes for developing the legal arguments in interventions of this kind are drawing on the right expertise: specifically, practitioners with real and/or academic experience in ISDS. It is entirely understandable that traditionally they have referred to public law or constitutional law generalists.

The transcripts reveal an intervention that was well-constructed in its VCLT architecture, but that was fatally anchored to US practice alone regarding enforcement, did not lead with the BIT as the primary waiver instrument, and did not present the Court with the full hierarchy of enforcement seat practice across the contracting parties.

Investment arbitration enforcement is a specialised field. The nuances of the adjudicative immunity and execution immunity distinction, the diversity in some areas and consistency in others of major enforcement seat practice, the VCLT interpretive framework as applied to the New York Convention, and the specific statutory mechanics of sections 10 and 17 of the *Foreign States Immunities Act*[19] 1985 (Cth) in the context of BIT-based arbitration are not matters that flow naturally from a public law or constitutional law background, however distinguished. They require immersion in the international investment arbitration world, in the case law of the English Commercial Court, the Singapore Court of Appeal, the French Cour de cassation and the Swiss Federal Supreme Court, which is not universally shared even at the most senior levels of the Australian legal profession.

The consequence of an underpowered intervention in a case like *CCDM* is not merely whether the Commonwealth's arguments fail; it is that the Court is deprived of the best available legal analysis, and hands down a flawed or, at best, incomplete decision. That then results in Australia's law on a critically important enforcement question being set back, potentially for years. That does not provide optimal value for the taxpayer.

As previously stated, the Solicitor-General does need to intervene in cases like this. The Commonwealth's interest in the proper construction of its treaty obligations is real and important. But the taxpayer should derive value from an intervention where arguments hold

[19] Foreign State Immunities Act (1985) (Cth) s 10 and s 17

weight not just from a legal perspective, but also from a broader public policy perspective. This would require the involvement and deference to a wider pool of individuals with investment arbitration exposure, both academic and practical, including sole practitioners. The Commonwealth may wish to consider how it builds its expert advisory base for cases of this kind.

V. Securing the Right Expertise for the Commonwealth and the High Court Bench

Investment arbitration enforcement is a specialised field. The intersection of public international law, treaty interpretation under the VCLT, customary international law on State immunity, and the domestic statutory framework for recognition and enforcement of foreign awards is not familiar territory for every judge, however brilliant and learned in their own fields. The High Court of Australia, as currently constituted, has a formidable intellectual record across constitutional law, common law, equity and statutory construction. Its engagement with international commercial and investment arbitration, however, has been relatively limited.

The decision in *CCDM*[20] raises the question of whether, not only the Solicitor-General appearing as amicus curia, but also whether the Court had, in deciding this case, the benefit of sufficient specialist knowledge of international investment arbitration practice, including the enforcement jurisprudence of the world's major arbitration seats.

The judgment's non-engagement with the BIT, despite members of the bench raising it during oral argument, suggests a court that may not have been entirely comfortable navigating the terrain between the adversarial constraints of appellate procedure and the demands of public international law cases where the stakes extend beyond the parties.

None of this is a criticism of individual judicial intelligence or diligence. It highlights an observation about the importance of specialist knowledge in specialist fields, and about the role that well-resourced, specialist advocacy plays in helping courts navigate unfamiliar terrain. When the advocacy is underpowered, courts can make mistakes overtly or by omission.

Australia's position in the international investment arbitration world is arguably weaker than it was before *CCDM* was decided. Investment award creditors may think twice before seeking recognition in Australia against State award debtors, particularly when dealing with a non-ICSID investment award in circumstances where a State party to the BIT has made a commercial reservation to the New York Convention. Sovereign State respondents in investment arbitrations with assets in Australia will also note the decision with interest as a conservative take on the commercial reservation of the New York Convention as regards immunity from such enforcement. The institutional lessons of CCDM are clear: specialist cases require specialist expertise, both in the advocacy before the Court and in the Commonwealth's intervention. The integrity of Australia's standing as a credible, rule-of-law arbitration jurisdiction depends on it.

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[20] CCDM Holdings LLC v Republic of India [2026] HCA 9 (n 1)

respondents, and third parties, in investment and commercial arbitration proceedings and advisory engagements to governments and corporates on treaty-based disputes and enforcement strategy. And she welcomes arbitration and mediation appointments in international commercial arbitration and international investment arbitration, and commercial arbitration.