

Appeal Ref: CA-2025-001365

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
Sir William Blair, sitting as a Judge of the High Court

Claim CL-2021-000253

B E T W E E N:

(1) CC/DEVAS (MAURITIUS) LTD.

(2) DEVAS EMPLOYEES MAURITIUS PRIVATE LIMITED

(3) TELCOM DEVAS MAURITIUS LIMITED

(4) CCDM HOLDINGS LLC

(5) DEVAS EMPLOYEES FUND US LLC

(6) TELCOM DEVAS LLC

The Appellants (being the 4th - 6th Claimants)

-and-

THE REPUBLIC OF INDIA

Respondent

APPELLANTS' SUPPLEMENTARY SKELETON ARGUMENT

8 August 2025

A INTRODUCTION

1. This Supplementary Skeleton Argument is submitted on behalf of the Fourth to Sixth Claimants (**the Appellants**) in support of the Appellants' appeal (**the Appeal**) against the Judgment dated 17 April 2025 (**the Judgment**) and Order dated 16 May 2025 (**the Order**) of Sir William Blair sitting as a Judge of the High Court (**the Judge**). This Supplemental Skeleton Argument supplements the principal Skeleton Argument dated 5 June 2025 submitted by the Appellants in support of the Appeal.
2. This Supplementary Skeleton responds to (i) India's appeal against the Order based on s.23(3)(a) of the State Immunity Act 1978 (**India's Appeal**); (ii) a number of new points raised in the Schedule to the Respondent's Notice dated 19 June 2025 (**RN**) (which runs to 10 pages) and then further expanded upon in the Respondent's skeleton argument dated 3 July 2025, which the Appellants have not yet had the opportunity to address.
3. Except where stated otherwise, capitalised terms in this Skeleton have the meanings assigned to them in the Appellants' Skeleton Argument dated 5 June 2025.

B INDIA'S APPEAL

4. India argues that, even if it is correct that by Article III of the NYC Contracting States have consented to the English Court recognising and enforcing awards against them, India has still not submitted to the adjudicative jurisdiction of the English Court by "*prior written agreement*" within the meaning of s.2(2) SIA on the basis that: (i) s.23(3)(a) SIA provides, *inter alia*, that s.2(2) SIA does not apply "*to any prior agreement ... entered into before*" the date of coming into force of the SIA; and (ii) both India and the UK ratified or acceded to the NYC prior to the SIA coming into force.¹
5. This argument was raised for the first time in India's Skeleton Argument before the Judge (without any advance notice) and rejected by the Judge.² It is misconceived for the following three reasons:
 - (a) S.23(3)(a) SIA does not apply to treaties as has already been held by the Court of Appeal in *Infrastructure Services*. Indeed, treaties have been expressly excluded from s.23(3)(a) by s.17(2) of the SIA. This is unsurprising given that otherwise in the case of multilateral treaties such as the NYC, involving different States acceding to

¹ RN at para 6; India's Skeleton Argument at paras 65-72.

² Judgment at [101].

the treaty (or ratifying it) at different points in time, it would lead to the non-uniform treatment of States, which would be anomalous.

- (b) If, contrary to (a), s.23(3)(a) SIA applied to treaties (and therefore the NYC) the relevant “*matter*” in respect of which proceedings have been commenced is neither the NYC nor India’s ratification of it, but the Awards (that post-date the SIA by many decades) that the Appellants obtained conferring rights under the NYC to obtain recognition and enforcement and invoke India’s consent under Article III of the NYC. Again, it would be a strained construction of “*matter*” to interpret it as a reference to a treaty (as has already been held in *Infrastructure Services*) and would again lead to the non-uniform treatment of different States under the same treaty.
- (c) If contrary to (a) and (b), India’s consent under Article III of the NYC was caught by s.23(3)(a) SIA, this would still make no difference. In that hypothesis Part I of the SIA (including s.1 and s.9) is disapplied and the question of immunity would have to be determined by reference to the common law. However, the common law position would be the position today (though it would make no difference if it was the position in 1978) which would entail the principle of restrictive immunity and include the principle that a State can submit to the jurisdiction of the English courts ‘by prior written agreement’, including Article III of the NYC. In other words, the argument does not in fact assist India.

B.1 SECTION 23(3) SIA DOES NOT APPLY TO TREATIES

6. First, the starting point is s.17(2) SIA, which provides:

“In sections 2(2) and 13(3) above references to an agreement include references to a treaty, convention or other international agreement.” (Emphasis supplied)

7. In other words, s.17(2) provides for an extended definition of “agreement” to include not just written agreements (*i.e.*, contracts) but also treaties, conventions and other international agreements in respect of ss.2(2) and 13(3) but not s.23. Thus, s.23 is concerned with a sub-set of agreements falling within the definition applicable to ss.2(2) and 13(3) and does not extend to treaties.
8. Second, the above point is reinforced by the drafting and scheme of s.23(3) of the SIA. Section 23(3) provides as follows (emphases added):

“(3) Subject to subsection (4) below, Parts I and II of this Act do not apply to proceedings in respect of matters that occurred before the date of the coming into force of this Act and, in particular—

*(a) sections 2(2) and 13(3) do not apply to any prior **agreement**, and*

(b) sections 3, 4 and 9 do not apply to any transaction, contract or arbitration agreement,

entered into before that date.”

9. There are a number of features in respect of the drafting of s.23(3)(a) that reinforce its non-application to treaties.
10. *First*, s.23(3)(a) uses the word “*agreement*” independently of ss.2(2) and 13(2). Put another way, s.23(3)(a) does not provide that the SIA does not apply to *any* agreement falling within ss.2(2) or 13(3). Rather, it provides that ss.2(2) and 13(3) do not apply to any prior ‘agreement’, which agreement as defined in s.23 does not include the extended definition contained in s.17(2) and therefore excludes treaties.
11. *Second*, s.23(3)(a) uses the word “*agreement*” in conjunction with the words “*entered into*”, with the term “*entered into*” not used in either s.2(2) or s.13(3). This omission is, as a matter of legislative intent, presumed to be deliberate: *Masarir v Kingdom of Saudi Arabia* [2022] EWHC 2199 at [67]-[69]. The term “*entered into*” is, as a matter of ordinary and natural construction,³ a reference to a contract. It is a strained and artificial construction to seek to extend it to an international treaty. States become bound by treaties by ratification, accession, exchange of signatures. States do not enter into treaties but agree to become bound by them through one of the identified means, with the treaty itself coming into force on a date specified.⁴ Thus, Article 11 of the VCLT provides:

“The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.”

12. Similarly, the NYC itself provides by Articles IX and VIII that States agree to be bound by the NYC either by signing the NYC (prior to 31 December 1968) or, thereafter, through ratification or accession. Thus, the use of the term “*entered into*” in s.23 and its omission from ss.2(2) and 13(3) reinforces the fact that s.23 applies to a narrower category of

³ On the principles of statutory interpretation see *R (O) v SSHD* [2023]AC 255 at [28]-[31]; *Shehabi v The Kingdom of Bahrain* [2024] EWCA Civ. 1158 at [20]; *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed. 2020 at paras 11.1, 11.9.

⁴ See for example BITs that the UK has become bound by: UK-Zimbabwe BIT at Article 13 providing for the BIT to enter into force on the exchange of instruments of ratification; UK-Romania BIT at Article 12 providing for the BIT to enter into force 30 days after notification of the completion of constitutional formalities.

agreements than ss.2(2) and 13(3) by excluding treaties. See further: (i) s.3(1) which uses the term “*entered into*” in the context of a commercial transaction; and (ii) s.18, which refers to “*State party*” to the European Convention on State immunity (and uses the term “*entered into*” only in the context of entering into a settlement agreement).

13. *Third*, s.23(3) SIA provides that Parts 1 and 2 of the SIA do not apply “to ***proceedings*** in respect of ***matters*** that occurred before the date of the coming into force of this Act”. As Philips LJ held in *Infrastructure Services* at [41], the term “*matters*” referred to in s.23(3) SIA “*does not readily encompass treaties ... as a matter of language or usage...*”. This was in turn adopted in the Judgment (under appeal) at [101]. The Appellants respectfully adopt that. Indeed, in the context of a treaty, the proceedings are not brought “*in respect of the treaty*” but pursuant to the treaty and in respect of rights conferred by the treaty. Thus, in this case, the subject matter of the proceedings is not the NYC but the Awards, which confer on the Appellants the right to apply for recognition and enforcement of the Awards pursuant to the terms of the NYC.
14. Third, s.16(1) SIA expressly excludes from the application of the SIA, two specific treaties enacted into English law being the Vienna Convention on Diplomatic Relations (given effect by the Diplomatic Privileges Act 1964) and the Vienna Convention on Consular Relations (given effect by the Consular Relations Act 1968). Further, s.16(3) excludes from the ambit of the SIA s.17(6) of the Nuclear Installations Act 1965, which gives effect to various international conventions (to which the UK is a party) on civil liability for nuclear occurrences (Dicey, Morris & Collins, *The Conflict of Laws*, 16th ed., at 15-076).
15. Each of these enactments pre-date the entry into force of the SIA. If s.23 had the effect of disapplying the SIA in respect of such enactments, then s.16 would have been unnecessary, which is contrary to the ordinary presumption that the legislature does nothing in vain: *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed. 2020 (***Bennion***) at 13.6. This was a further point relied upon by the Court of Appeal in *Infrastructure Services* at [41] in concluding that treaties fall outside of s.23.
16. Fourth, the consequences of India’s interpretation further reinforce the Appellants’ interpretation because it leads to illogical and anomalous outcomes that make no sense. See *Bennion* at 11.6-11.7, 13.1-13.5. In particular, on India’s interpretation, the application of ss.2(2) and 13(3) of the SIA would be dependent upon when a particular Contracting State ratifies or accedes to the treaty in question, with the result that there is a non-uniform application of the SIA to the very same treaty and even though the treaty was intended to

remain in force for decades and beyond (as illustrated by the NYC). This cannot have been intended by the legislature.

17. Fifth, if contrary to the Appellants' case it is necessary to go beyond the statutory wording, then it is submitted that the legislative debates support the Appellants' construction and are admissible under the rule in *Pepper v Hart* (see *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed. 2020 at 24.11). In particular, the House of Lords debate leading to the amendment to the SIA to introduce what was to become s.23(3)(a) indicates that the proponents of the provision wished to exclude from the ambit of the SIA contracts negotiated between States and private law parties entered into prior to the date of the SIA at a time when it was assumed (in fact wrongly) that undertakings of States to waive immunity could not be enforced and because it was thought that to give retrospective effect under the SIA to such contracts would have a negative effect on the reputation of the City of London. There was thus no discussion of international treaties negotiated at state level and international treaties did not fall within the expressed concern. It is further to be noted that the Lord Chancellor, in responding to the proposed amendment noted that even at common law there might well not be any immunity given the commercial character of such contracts. (See Hansard, HL Deb 28 June 1978 vol 394 cc 322-325). See in particular:

*“Furthermore—and this is one of the most important points in my argument for putting forward this Amendment—it could be detrimental to the good name of legal advisers who, when the agreements were drawn up, could say with safety, and indeed in truth, that this clause has no legal effect because in the United Kingdom the rule of absolute immunity obtains. If Section 2, or Clause 2 as it is now, is retained in 3A of the Commons Amendments, this would not only no longer be true but would have a retrospective effect on those **written agreements which had been entered into between either an individual or a body corporate and a foreign State**; and I am quite certain that your Lordships would agree that this would have a most undesirable effect. There are very large sums involved in **agreements which have been negotiated between authorities and corporations in the City of London and foreign States**. Based on the good name of Britain, and as the law stood at the time the agreements were made, it was always assumed that undertakings of States to waive immunity could never be enforced. **The purpose of this Amendment is to remove any retrospective effect of this Bill, when it comes into force, on those written agreements.**”* (per Baroness Elles, emphasis added)

18. This view was echoed by the Solicitor-General in a subsequent Commons debate: HC Deb 5 July 1978 vol 953 cc 616-620.
19. India's contrary construction assumes without analysis that the reference to “*agreement*” in s.23(3)(a) extends to a treaty and thereby fails to grapple with any of the above issues of

interpretation. Indeed, it asserts without analysis that “*agreement*” must include a treaty given the terms of s.17(2)⁵ without addressing the fact that s.17(2) expressly does not apply to s.23. It thus seeks to bring unnaturally within s.23(3)(a) what India itself terms to be India’s ‘ratification’ of the NYC, which it then nevertheless contends to be the date that the treaty was “*entered into*”.⁶

20. As to other points raised by India, the Appellants submit as follows.
21. First, India seeks to distinguish *Infrastructure Services*⁷ on the basis that the timing point in *Infrastructure Services* arose in the context of the investor seeking to argue that the SIA did not apply to the ICSID Convention at all, rather than the State arguing that the SIA did not apply to the specific State’s accession to the ICSID Convention (and therefore its consent to Article 54 of the ICSID Convention). However, this is a distinction without a difference. The point remains that s. 23(3)(a) SIA does not extend to treaties (see also Judgment, at [101]).
22. Second, India seeks to rely on a statement in Dickinson, *State Immunity: Selected Materials and Commentary*, 2004, at § 4.020 which expresses the view that in order for a party to rely on waiver of state immunity by treaty, “*the treaty etc. must have been entered into on or after 22 November 1978.*”⁸ However, no analysis to support that view is provided and it therefore does not advance India’s position beyond the question of interpretation before the Court.

B.2 IN ANY EVENT THE RELEVANT “*MATTER*” IS THE AWARDS THAT POST-DATE THE ENACTMENT OF THE SIA

23. If, contrary to the Appellants’ position, treaties (and therefore the NYC) fall within the scope of s.23(3)(a), then it is submitted that for the purposes of s.23(3)(a) the relevant “*matter*” is the rendering of the Awards (many decades post the enactment of the SIA) as a result of which the Appellants are entitled to pursue recognition and enforcement proceedings pursuant to the NYC and rely upon Article III of the NYC.
24. Thus, the specific subject matter in respect of which an application for recognition and enforcement can be made (and therefore proceedings brought) is an award involving identifiable parties and an identifiable award capable of satisfying the requirements of the NYC. At the time the Awards were rendered, India had on a standing basis consented

⁵ India’s Skeleton Argument at para 72(1)(b).

⁶ India’s Skeleton Argument at para 72(2)(b).

⁷ India’s Skeleton Argument at para 72(1)(a).

⁸ India’s Skeleton Argument at para 68.

(pursuant to Article III of the NYC) to the English Courts recognising and enforcing any award to which the NYC applies (including therefore the Awards).

25. In this regard, the consent given by the State when ratifying or acceding to the NYC, is analogous to the standing consent in an investment treaty to arbitrate a class of potential disputes with a class of potential claimants (*Republic of Ecuador v Occidental* [2006] QB 432 at [32] - [33]; Douglas, *The International Law of Investment Claims* (2010) (*Douglas*) at [674]). In other words, it is a standing consent to recognise and enforce awards (and accept their recognition and enforcement) as and when they materialise and which can be invoked once the particular award in question has been rendered.
26. Put another way, and as stated earlier, the proceedings are not brought in respect of the NYC but in respect of the Awards rendered. This interpretation (consistently with the Appellants' primary interpretation) also avoids the anomalous outcome of the SIA being applied inconsistently across States. Instead, it simply turns on the date of the award being a bright line date, similar to the date of a contract.
27. Although India suggests that there is no authority for what it describes to be a "*novel proposition*",⁹ India fails to grapple with the fact that treaties confer rights on individuals that arise at a date subsequent to the consent given by the signatory state parties by way of ratification or accession. Again, and contrary to India's case, there is nothing inconsistent with this analysis and India's consent under Article III being a submission to adjudicative jurisdiction. A private party cannot take advantage of that standing consent until it has an award in its favour, but the standing consent given can be relied upon once an award has been rendered. Thus, India's consent under Article III by definition applies to any award rendered under the NYC for such time as the NYC remains in force and India's ratification of the NYC remains unrevoked (which it is entitled to do pursuant to Article XIII of the NYC).
28. Further, India's position is internally inconsistent and incoherent. It accepts that the arbitration agreement in the BIT pursuant to which the Awards were rendered post-dates the SIA and therefore s.9 applies, but contends that the enforcement of the Awards pursuant to that arbitration agreement is in respect of a "*matter*" that pre-dates the Awards such that s.2 does not apply, even though the proceedings are in respect of a single cause of action for recognition and enforcement of the Awards.

⁹ India's Skeleton Argument at para 72(2).

B.3 THE COMMON LAW POSITION

29. If contrary to the above, India's consent under Article III of the NYC to the English Courts recognising and enforcing the Awards was caught by s.23(3)(a) SIA, the effect would be that Parts 1 and 2 of the SIA are disapplied according to the express wording of the provision and the question of whether Article III constitutes a waiver of adjudicative jurisdiction would have to be determined by reference to the common law. See *Sengupta v Republic of India* [1983] I.C.R. 221, at pages 224-225 where in the context of an employment contract entered into prior to the SIA, the Court held that s.23(3) operates to exclude the operation of s.1 SIA noting that the contrary construction would lead to a state enjoying greater immunity than it enjoyed under the common law, which made no sense. See further Dickinson, *State Immunity: Selected Materials and Commentary*, 2004, at § 4.148.
30. India's contrary position (advanced by way of footnote)¹⁰ that s.1 SIA would still apply (and thus confer immunity) is thus incompatible with the language of s.23(3)(a), which by its terms disapplies the entirety of Parts 1 and 2 and therefore s.1 SIA.
31. As to the common law position, India wrongly asserts that the position at common law is one of absolute immunity. That is not the position at common law. Although it is fair to say that it has been sometimes (wrongly) assumed that the pre-SIA common law position was that waiver of immunity could not be done expressly by way of written agreement but only 'in the face of the court', this was in fact not the position then (either at common law or internationally) and is not the applicable position today (being the position to be applied on this hypothesis).
32. The Court of Appeal is invited to adopt the analysis of Lord Collins in *NML Capital v Argentina* [2011] 2 AC 495 at [120]-[125] (by reference to *Kaban v Pakistan Federation* [1951] 2 KB 1003 (**Kahan**); *Duff Development Co Ltd v Government of Kelantan* [1924] AC 797 (**Duff**); and *Mighell v Sultan of Johore* [1894] 1 QB 149, as well Cohn, *Waiver of Immunity* (1958) 34 BYIL 260) observing that: (i) the suggestion in *Duff* was obiter; (ii) *Duff* and *Kaban* had overlooked the fact that submission in the face of the court was not the only mode by which a sovereign could submit; and (iii) the proposition that waiver had to be declared in the face of the court was peculiar and unjustified. See also Fox & Webb, *The Law of State Immunity*, 3rd ed., 2013, pp. 187, 379-380; Lawrence Collins, *Captain Duff, the Sultan of Kelantan and their legacy in the law of state immunity and international arbitration*, Arbitration Int.

¹⁰ India's Skeleton Argument at para 71 and footnote 56.

2021, 37(2), 463-481 at pages 474, 477; Mann, 1991, 107 LQR 362 at 364. If necessary, the Appellants will ask the Court to find that the earlier decision in *Kahan v Pakistan Federation* [1951] 2 KB 1003 was *per incuriam*.

33. Further and in any event, the position under customary international law is not (and never was) one of absolute immunity but restrictive immunity, with immunity only applying to acts in the exercise of sovereign authority and with a State perfectly able to waive its state immunity: *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2019] AC 777 (*Benkharbouche*) at [17], [18], [50]-[52]. There is no principled basis why the common law would not follow the international law position. See further Article 7(1) of the UN Convention on Jurisdiction Immunities of States and Their Property (2004) (referenced in *Benkharbouche*), which expressly provides for submitting to adjudicative jurisdiction through express agreement in a treaty. Although not yet in force,¹¹ the Convention is treated as the most authoritative statement available on the current international understanding on the limits of state immunity in civil cases and is expected to contribute to the codification and development of international law: *Benkharbouche* at [32]. Indeed, given that Article 54 of the ICSID Convention is an express agreement to waive state immunity, there can be no doubt that as a matter of international law, one can waive state immunity through a treaty.
34. Accordingly, regardless of whether one applies the common law or s.2(2) SIA, the outcome is the same: by its ratification of the NYC and its consent under Article III to the English Court recognising and enforcing the Awards, India has submitted to the adjudicative jurisdiction of the English Courts and is not entitled to immunity in respect of these enforcement proceedings.

C RESPONDENT'S NOTICE POINTS

35. This Section succinctly addresses new points raised in the Respondent's Notice and Respondent's Skeleton that the Appellants have not had an opportunity to address in their Skeleton Argument of 5 June 2025.

C.1 ARTICLE 31(3) OF THE VCLT

36. India contends that pursuant to Article 31(3)(c) of the VCLT the interpretation of the NYC must take account of the international law rules that: (i) State immunity is procedural;

¹¹ There are presently 28 signatory states (including the UK) and 25 states have ratified it. By Article 30 it requires 30 States to ratify it to come into force. See also Art 32 of Vienna Convention on Diplomatic Relations (1961); Art 45 Vienna Convention on Consular Relations (1963); Article 41 Convention on Special Missions (1961); Article 2 of the European Convention of State Immunity (1972).

(ii) State immunity is a fundamental principle of the international legal order which States are obliged to give effect to; and that (iii) waiver of immunity must be express.¹²

37. There are number of fundamental problems with this contention.
38. First, Article 31(3)(c) of the VCLT refers to taking into account “*relevant*” rules of international law: *Dörr*, at pp. 609-610, [102]–[103]. The fact that state immunity is, as a matter of international law, an international rule of procedure does not answer the question of whether it has any relevance to the interpretation of Article III. That depends upon whether the reference in Article III of the NYC to “*rules of procedure of the territory where the award is relied upon*” is, on its proper interpretation, concerned with domestic rules incidental to and facilitative of recognition and enforcement under the NYC, or with international rules of procedure. As Lord Sumption observed in *Benkebarbouche* at [18], state immunity, though characterised as procedural as a matter of international law, is not procedural in the sense that the organisation and practices of the court are procedural. As the Appellants have submitted, this latter type of procedural rule is what Article III is concerned with. It is therefore circular and self-fulfilling to contend that Article 31(3)(c) of the VCLT requires that the reference to “*rules of procedure*” in Article III of the NYC must include any and every rule of international law that is classified as a rule of procedure as a matter of international law.
39. Second, Article 31(3)(c) of the VCLT brings with it the fact that the terms of a treaty can be interpreted in light of another treaty especially where the latter deals with a similar object or addresses the same legal situation: *Dörr*, at pp. 605-606, [96]-[97]. It follows that consideration is to be given to Article 54 of the ICSID Convention and the fact that in *Infrastructure Services* this provision was treated as waiver for the purposes of s.2 of the SIA.¹³ Thus, the question that the Court will need to grapple with is whether and, if so, on what basis Article 54 of the ICSID Convention is to be distinguished from Article III of the NYC, with the Appellants’ submitting that there is no material distinction (with the consent to recognition and enforcement under the ICSID Convention being similarly subject to each Contracting State implementing rules of procedure to give effect to that obligation).
40. Third, India is proceeding on the basis that state immunity is absolute as a matter of international law, which is wrong as set out above. In other words, to the extent that the

¹² RN at para 3(2); India’s Skeleton Argument at paras 28, 40.

¹³ India is not a party to the ICSID Convention. However, there are multiple State signatories the ICSID Convention who are signatories to the NYC Convention and therefore it remains relevant to interpretation.

international law of state immunity has any relevance to the interpretation of Article III of the NYC, there is nothing inconsistent with the international law of state immunity with Contracting States consenting to waive state immunity, as exemplified by Article 54 of the ICSID Convention.

41. Fourth, India seeks to revisit the test for waiver of state immunity that has already been authoritatively established in *Infrastructure Services* and there is no basis to depart from it.

C.2 INDIA'S RELIANCE UPON *BASFAR V WONG* UNDERMINES ITS CASE

42. India asserts, by reference to *Basfar v Wong* [2023] AC 33 (*Basfar*) at [64]-[67], that the Court is entitled, in interpreting Article III of the NYC, to have regard to the circumstances that existed at the time the NYC is being applied (dynamic interpretation).¹⁴ India seeks to rely upon *Basfar* to support the Judge's erroneous reliance upon an alleged broader commercial context at [83]—[85] of the Judgment and the fact that express waivers of immunity can be negotiated in commercial agreements.¹⁵ However, India's reliance upon *Basfar* for the introduction of this alleged broader context is misconceived and exposes the error of approach by the Judge. *Basfar* stands for the propositions that: (i) developments in international law since the conclusion of a treaty are to be taken into account in interpreting a treaty (see [66]-[67]); and (ii) the meaning of specific words used in a treaty can evolve over time and may be interpreted in light of the circumstances prevailing at the time of the treaty's application (see [64]-[65]). As to this:

- (a) The developments in international law are: (i) the one identified by Lord Sumption in *Benkebarbouche* at [50]-[52] being the recognition that the international law of immunity was far more restrictive than had been assumed by some States and was never one of absolute immunity; (ii) the fact that as a matter of international law parties can waive immunity through agreement in a treaty; and (iii) the language of Article 54 of the ICSID Convention has been held to constitute a waiver of sovereign immunity. See further *Dörr* at page 612, [108].
- (b) The Judge, with respect, was not relying upon developments of international law, but what he considered to be a commercial context that there was another route to waiver of state immunity. This is neither a relevant aid to interpretation nor can it inform the question of whether Article III constitutes a waiver of immunity because it does not answer the question of whether Article III satisfies s.2 SIA.

¹⁴ India's Skeleton Argument at para 28.

¹⁵ RN at para 3(9); India's Skeleton Argument at paras 55-56.

Indeed, the alleged commercial context relied on by the Judge did not pertain to the interpretation or meaning of specific words in Article III of the NYC and does not grapple with the position under international law.

- (c) *Basfar* fundamentally contradicts India's attempts to interpret Article III against an alleged context of absolute immunity that in fact never existed and certainly does not exist today at the relevant point in time of interpretation.
- (d) *Basfar* reinforces the fact that regard should be had to Article 54 of the ICSID Convention and its interpretation, given that it represents a position taken in international law under a similarly worded treaty raising a similar issue.

C.3 INDIA'S CONTENTION THAT THE NYC IS LIMITED TO 'PRIVATE LAW' AWARDS

- 43. India contends that the NYC applies to States only in relation to 'private law' disputes (which India does not define) and therefore 'private law' awards, contending that the text of the NYC is ambiguous and that therefore resort should be had to the *travaux préparatoires*, which are alleged to support its contention.¹⁶ There are a number of fundamental problems with this contention.
- 44. First, there is no ambiguity in the scope of Article I(1) of the NYC. It provides, without any limitation, that the NYC applies to arbitral awards made in the territory of any State other than the State where recognition and enforcement is sought. In other words, the only limitation imposed is that the award should be seated within a (foreign) national law: *i.e.*, it has a *lex loci arbitri* and is subject to a national supervisory jurisdiction (as contemplated by Articles V and VI), as opposed to a denationalised award (which may sometimes be agreed in arbitration between States¹⁷). See *Van Den Berg* at pages 28-43.
- 45. Further, and reinforcing the above, under the NYC, Contracting States have the option under Article 1(3) of the NYC to limit enforcement in their territory to disputes considered to be "*commercial*". On India's analysis that reservation is redundant, contrary to basic principles of treaty interpretation and in particular the principle of *effet utile* (effective interpretation). See *GPF GP v Poland* [2018] 1 Lloyd's Rep 410 at [53]-[55].
- 46. Accordingly, there is no basis for recourse to the *travaux* under Article 32 of the VCLT on the grounds of alleged ambiguity. See further *CCDM Holdings, LLC & Ors v The Republic*

¹⁶ RN at para 4; India's Skeleton Argument at paras 57-58.

¹⁷ Take by way of example those BITs that have a separate dispute resolution mechanism for investor-State disputes as opposed to State-State disputes with the latter not subject to a *lex loci arbitri*.

of India (No 3) [2023] FCA 1266 where the Federal Court of Australia held at [86]¹⁸ that the language of Articles I-III was too broad and general to permit a construction whereby the Convention would apply to States only where the awards were private law disputes.

47. Second, there is no scope for trying to reinterpret Article 1(1) of the NYC in this jurisdiction given the terms of ss.100(1) and (2) of the Arbitration Act 1996 (“**1996 Act**”) and the Court of Appeal’s decision in *Republic of Ecuador v Occidental* [2006] QB 432. Sections 100(1) and (2) define a NYC award as being an award made pursuant to an arbitration agreement, which then cross-refers to the definition of such an agreement in Part 1 of the 1996 Act. In the *Republic of Ecuador*, the Court has held that an arbitration agreement in a BIT satisfies that definition and *a fortiori* a BIT award is a NYC award for the purposes of s.100 of the 1996 Act. There is no basis for India to seek to have this Court decline to follow its earlier ruling in *Republic of Ecuador*.
48. Third, there have been at least 30 BIT awards that have been recognised and enforced under the NYC: *CCDM Holdings, LLC & Ors v The Republic of India (No 3)* [2023] FCA 1266 at [86]–[93]. This constitutes subsequent practice in the application of the treaty within the meaning of Article 31(3)(b) of the VCLT. See further *Dörr*, at pp. 601-603, [87]–[91] making the point that such practice has to be accepted by all the parties to the treaty even if only some of the parties have participated in it. Prior to this case, India never raised any objection with respect to the application of the NYC. Indeed, on the contrary, and adding to state practice, India in numerous BITs has expressly acknowledged that BIT awards fall within the NYC as arising out of a commercial relationship and therefore falling within its commercial reservation: see India’s investment treaties with Belarus (Article 27.5), the Kyrgyz Republic (Article 27.5), and the UAE (Article 28.5).
49. Fourth, it is not accepted that a BIT award falls outside of whatever definition of “*private law*” that India is seeking to advance. A BIT award arises out of a dispute concerning a commercial investment in the State’s territory and therefore arises out of that commercial relationship, even if it may incidentally give rise to questions as to the use of regulatory or other power by the State. See the analysis of *Douglas* at pages 116-118, [228]–[230] (more generally, at pages 115–120).
50. Fifth, the *travaux*, if relevant (which is not accepted for the reasons given above), provide no assistance to India. See the detailed analysis of the *travaux* by the Federal Court of

¹⁸ There was no disagreement with this conclusion in the decision of the Full Federal Court: *The Republic of India v CCDM Holdings, LLC* [2025] FCAFC 2.

Australia in *CCDM Holdings, LLC & Ors v The Republic of India (No 3)* [2023] FCA 1266 (having already rejected India’s contentions as a matter of treaty interpretation) at [63]-[86] concluding that: (i) the preparatory work indicates there was a consensus not to express any limitation in Article I to the effect that the Convention would apply only to commercial disputes; (ii) the Conference leading to the finalisation of the NYC indicates that there was a primary focus on the use of arbitration for the settlement of private law disputes, not that it was intended to be limited to such disputes. See further, *Van den Berg* at pages 12, 98-99 (and earlier at pages 90-92), 279.¹⁹ India relies upon a 1978 article by Lionello Capelli-Perciballi in support of its contrary position.²⁰ However, Mr Capelli-Perciballi, with respect, fails to apply a textual interpretation (addressing the points set out above) and then proceeds to provide a superficial analysis of the *travaux* and an alleged analogy with State-to-State arbitration where a State may be acting *iure imperii* (and there may be no seat of arbitration) as the basis for his proposed limitation of the NYC to so-called ‘private law disputes’. India also relies on commentary by: (i) Hans Bagner (who simply refers the Capelli-Perciballi article, without further analysis of the point); and (ii) Daniel Girsberger & Nathalie Voser (who, in turn, simply refer to Bagner’s work, again without further analysis of the point).²¹ However, none of this is supported by either the text of the NYC or its *travaux*, and nor is there any suggestion that BIT awards (*i.e.*, investment awards) fall within this professed distinction, as India has itself acknowledged in numerous BITs. Indeed, there is no basis for asserting that a BIT Award rendered against a State and in favour of an investor constitutes an act *iure imperii*.

C.4 INDIA’S RELIANCE UPON ITS COMMERCIAL RESERVATION

51. The Appellants do not repeat the matters addressed at paragraphs 85 to 92 of their Skeleton Argument dated 5 June 2025 but confine themselves to addressing the new points taken by India without prejudice to the fact that India’s commercial reservation has no application in this jurisdiction and therefore its case falls at the first hurdle.
52. First, India contends that the burden rested on the Appellants to establish that the BIT Awards are within the scope of India’s reservation, and that the Appellants have not adduced Indian law evidence on India’s commercial reservation and whether or not this

¹⁹ India’s reliance upon *Van den Berg* in support of its position is wrong.

²⁰ India’s Skeleton Argument at para 59.

²¹ India’s Skeleton Argument, footnote 46. India also relies on a further article by Sanders, in which the author opines that the NYC would not apply where “*the State acts in a way not compared with private business*”. Since this opinion is expressed without analysis, it does not take matters further.

extends to BIT awards.²² This is wrong and is inconsistent with the way in which the s.2 SIA Question was formulated by Sir Nigel Teare (sitting as a Judge of the High Court) by his Order of 23 October 2024, following a 1-day CMC. The commercial reservation was an afterthought raised by India for the first time in its Skeleton Argument before the Judge below. In particular:

- (a) The s.2 SIA Question as formulated proceeded on the expressly stated basis that Article III entitled the English Court to recognise and enforce the Awards (*i.e.*, the Awards in question) and the question was whether India's ratification of the NYC satisfied s.2 of the SIA. This reflected the fact that at that time, India had not raised any commercial reservation point that on its case would mean that even if India's consent under Article III satisfied s.2 of the SIA, this would still not apply to the Awards in question because they allegedly fell within India's reservation.
- (b) It is unsurprising that the s.2 SIA Question was formulated as set out above. In the lead up to the CMC, including the exchange of copious evidence (including foreign law evidence), both parties were in agreement that the s.2 SIA Question was a pure point of law not requiring any foreign law evidence.²³ India did contend that Indian law evidence was required on other issues but not the s.2 SIA Question.

53. Accordingly, on any view: (i) English law is to be applied in default of the pleading of Indian law: *Brownlie v FS Cairo (Nile Plaza) LLC* [2022] AC 995 at headnote (2) and [115]-[116]; and (ii) India is invoking its commercial reservation and bears the burden (to the extent relevant).

54. Second, India relies upon the fact that an investor's claim under a BIT is governed substantively by public international law as therefore taking it outside the realm of a commercial dispute.²⁴ This is wrong because:

- (a) The primary relationship between the investor and the State is one of investing and the exercise of regulatory functions is incidental to that primary relationship: *United Mexican States v Metalclad* (2001) 5 ICSID Rep 236 (endorsed by *Douglas* at pages 116-118, [228]-[230] (more generally, at pages 115-120)).

²² RN at para 5(2); India's Skeleton Argument at para 64(1).

²³ Fourth Witness Statement of Douglas James Watson, 24 January 2024, ¶ 18.1; Witness Statement of Pavini Emiko Singh, 6 March 2024, ¶ 20; India's skeleton argument dated 7 October 2024 for the hearing before Sir Nigel Teare, ¶ 44.

²⁴ RN, para 5(3)(b); India's Skeleton Argument at para 64(3).

- (b) The seat of the award remains anchored in a *lex loci arbitri* and subject to supervisory jurisdiction of the courts of the seat (in this case the Dutch Courts) not public international law: *Republic of Ecuador v Occidental* [2006] QB 432 and *Douglas* at [230].
55. Third, India's own treatment of BIT awards as falling within its commercial reservation in its international treaties (as set out earlier) constitutes relevant interpretative evidence within Article 31(3)(b) of the VCLT, confirming that BIT Awards fall within its commercial reservation contained in Article I of the NYC.
56. Fourth, Article 11(1) of the BIT (giving rise to the Awards) provides that India agrees that any obligation under international law that it has undertaken whether general or specific entitling investments of an investor to more favourable treatment than under the BIT shall prevail. Applying the principles of interpretation contained in Article 31 of the VCLT there can be no doubt that Article 11(1) thereby imports the clarification contained in later treaties that BIT awards fall within its commercial reservation and thereby enjoy the benefit of enforcement in India. India suggests that this provision should not be interpreted as incorporating a dispute resolution provision from another treaty.²⁵ However, what is being incorporated is not the arbitration clause but India's recognition and thus obligation that BIT Awards are commercial for the purposes of its commercial reservation under the NYC. India provides no interpretative explanation for why this is not the effect of Article 11(1).
57. Fifth, India contends that the "*difference*?" underlying the Awards arose from a decision of the Indian Cabinet Committee on Security, taken in pursuit of national interests, to terminate the Devas Contract (defined in the Judgment at [13]) and thus did not arise out of a "*commercial relationship*".²⁶ That is misconceived. The primary relationship between the Claimants and India was commercial, arising from the Claimants' investments pursuant to a commercial contract (Judgment, [12]-[15]). The fact that the termination of the Devas Contract was by way of governmental action does not change this (see Judgment [95]).

D CONCLUSION

58. For the above reasons and those contained in the Appellants' Skeleton Argument of 5 June 2025, the Court is requested to uphold the Appellants' Appeal and dismiss India's Appeal.

²⁵ India's Skeleton Argument at para 64(6).

²⁶ India's Skeleton Argument at para 64(4).

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Dated 8 August 2025