Neutral Citation Number: [2024] EWCA Civ 1257

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION (COMMERCIAL COURT)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 October 2024

Before:
SIR JULIAN FLAUX CHANCELLOR OF THE HIGH COURT
LORD JUSTICE NEWEY
and
LORD JUSTICE PHILLIPS

Case No: CA-2023-001556

MR JUSTICE FRASER
[2023] EWHC 1226 (Comm)

Between:

(1) INFRASTRUCTURE SERVICES LUXEMBOURG S.À.R.L. **(2) ENERGIA TERMOSOLAR B.V.**	**Claimants/ Respondents**
- and -	
THE KINGDOM OF SPAIN	**Defendant/ Appellant**

- -
- -

Patrick Green KC, Andrew Stafford KC and **Richard Clarke**
(instructed by **Kobre & Kim (UK) LLP**) for the **Claimants/Respondents**
Tariq Baloch and **Cameron Miles** (instructed by **Simmons & Simmons LLP**)
for the **Defendant/Appellant**

Case No: CA-2024-000258

MRS JUSTICE DIAS DBE
[2024] EWHC 58 (Comm)

And between:

(1) BORDER TIMBERS LIMITED **(2) HANGANI DEVELOPMENT CO. (PRIVATE) LIMITED**	**Claimants/ Respondents**
- and –	
REPUBLIC OF ZIMBABWE	**Defendant/ Appellant**

- -
- -

Christopher Harris KC, Dominic Kennelly, and **Catherine Drummond**
(instructed by **Baker & McKenzie**) for the **Claimants/Respondents**
Salim Moollan KC, Benedict Tompkins and **Andris Rudzitis**
(instructed by **Gresham Legal**) for the **Defendant/Appellant**

Hearing dates: 17 – 20 June 2024
- -

Approved Judgment

This judgment was handed down remotely at 2 pm on 22 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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Lord Justice Phillips:

1. The 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("the Convention") established the International Centre for Settlement of Investment Disputes ("ICSID") and provided for the conciliation or arbitration of legal disputes arising directly out of investments between a contracting state and a national of another contracting state.

2. The question on these appeals is whether foreign states, the subject of adverse arbitration awards rendered pursuant to the provisions of the Convention, can rely on state immunity to set aside the registration of those awards in the High Court under the Arbitration (International Investment Disputes) Act 1966 ("the 1966 Act"). The 1966 Act is the legislation by which the United Kingdom gave effect to its obligation to make the provisions of the Convention effective in its territories.

3. In his judgment in *Infrastructure Services Luxembourg SARL and another v The Kingdom of Spain* dated 24 May 2023, Fraser J answered that question in the negative. By order dated 25 May 2023 he dismissed Spain's application to set aside the order of Cockerill J dated 29 June 2021 ordering registration of the award of the arbitral tribunal in ICSID Case No. ARB/13/31 (as rectified), as if it had been a judgment of the High Court. By that award, originally issued on 15 June 2018 and rectified on 29 January 2019, Spain is required to pay the claimants ("the ISL claimants") compensation of €101m.

4. Dias J reached the same conclusion, but for entirely different reasons, in her judgment in *Border Timbers Limited and another v Republic of Zimbabwe* dated 19 January 2024. By order of the same date she dismissed Zimbabwe's application to set aside the order of Cockerill J dated 8 October 2021 registering the award of the arbitral tribunal in ICSID Case No. ARB/10/25. By that award, rendered on 28 July 2015, Zimbabwe is required to reinstate properties to the claimants ("the Border claimants") and pay US$29,263,498, or, in default of reinstatement, pay US$124,041,223. In either event Zimbabwe is to pay a further US$1m in moral damages.

5. Spain and Zimbabwe now appeal those decisions, with permission granted by Males LJ in the case of Spain, and by Dias J herself in the case of Zimbabwe. The appeals were heard together.

The central issues in the appeals

6. Spain and Zimbabwe's contention is that neither the Convention nor the 1966 Act deprives foreign states of their general immunity from the adjudicative jurisdiction of the courts of the United Kingdom conferred by section 1(1) of the State Immunity Act 1978 ("the SIA") which provides:

> "A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act."

7. Further, they contend that the provisions of the Convention (and in particular article 54) do not constitute a prior written agreement by them to submit to the jurisdiction of the courts of the United Kingdom in respect of proceedings on an ICSID arbitration award within the meaning of the exception from state immunity set out in section 2 of the SIA.

8. Spain and Zimbabwe argue that the exception to state immunity which does permit registration of an ICSID arbitration award against a foreign state is that provided by section 9 of the SIA, removing immunity where a foreign state has agreed in writing to submit a dispute to arbitration. But Spain and Zimbabwe contend that they are entitled to challenge, and the English courts must determine afresh, the validity of the reference to arbitration and the jurisdiction of the arbitral tribunal, and therefore the applicability of section 9, on an application to set aside registration. Both Spain and Zimbabwe dispute the validity of the arbitration proceedings against them (and the resultant award), although on very different grounds:

    i) Spain submits that its agreement to arbitrate with the ISL claimants, found in article 26 of the Energy Charter Treaty ("ECT"), which in turn provides for ICSID arbitration, has been disapplied as between EU member states following the CJEU's decisions in *Slovak Republic v Achmea BV*, Case C-284/16 ECLI:EU:C:2018:158 and *Republic of Moldova v Komstroy LLC* Case C-741/19 ECLI:EU:C:2021:655. Spain argues that those decisions have effect not only as a matter of "domestic" EU law but also, as a matter of international law, to delineate the manner in which EU States deal (amongst themselves) with the perceived conflict between the ECT's reference of disputes to ICSID arbitration on the one hand, and the primacy of the CJEU under the TFEU on the other. As the ISL claimants are incorporated in EU member states (Luxembourg and the Netherlands respectively), Spain contends that article 26 is therefore disapplied.

    ii) Zimbabwe does not challenge the validity of the relevant arbitration agreement to be found in article 10 of a bilateral investment treaty between Zimbabwe and Switzerland, but denies that its dispute with the Border claimants falls within that article.

9. Fraser J rejected each of the above contentions advanced by Spain. His primary finding, based firmly on his reading of the decision of the Supreme Court in *Micula & Ors v Romania (European Commission intervening)* [2020] UKSC 5, [2020] 1 WLR 1033, was that the Convention, as given effect in this jurisdiction by the 1966 Act, precluded Spain raising any "defence" under the SIA to the recognition of an ICSID arbitration award. In the alternative, if the SIA was engaged, Fraser J found that Spain did not have immunity because (i) article 54 of the Convention constituted a submission to the jurisdiction for the purposes of the exception in section 2 of the SIA; and/or (ii) it was not open to Spain to dispute that it had agreed to arbitration within section 9 of the SIA. Spain appeals each of those findings.

10. Dias J, contrary to the submissions of both the Border claimants and Zimbabwe, held that section 1(1) of the SIA had no application to the registration of an ICSID arbitration award because such registration was an essentially automatic ministerial act, not involving any adjudicative step on the part of the English courts in respect of which immunity could arise. She held that questions of immunity would only arise if

the judgment creditor sought to execute the registered award against the property of the state: section 13(2)(b) of the SIA. Had she found that registration did engage section 1(1) of the SIA, Dias J would have found (contrary to Fraser J's judgment) that (i) article 54 of the Convention was not a sufficiently clear and unequivocal submission to the jurisdiction for the purposes of section 2 of the SIA; and (ii) the exception in section 9 is only engaged if the court is itself satisfied that there was a valid reference to arbitration.

11. Zimbabwe appealed Dias J's primary finding that registration of an ICSID arbitration award was not an adjudicative act, an appeal that the Border claimants do not resist. The Border claimants instead, by way of Respondent's Notice, seek to uphold Dias J's order by challenging her findings in respect of section 2 and section 9 of the SIA and also on the basis of a new argument, namely, that Zimbabwe did not have immunity from the adjudicative jurisdiction because section 23(3) of the SIA excluded from the scope of section 1(1) "matters that occurred before the date of the coming into force of [the SIA]", arguing that the Convention and the 1966 Act were such "matters".

12. The appeals therefore give rise to three central issues:

    i) whether section 1(1) of the SIA applies, in principle, to the registration of ICSID arbitration awards against a foreign state under the 1966 Act.

    ii) if section 1(1) does apply, whether the exception to state immunity in section 2 of the SIA is necessarily engaged because states, in signing the Convention, have agreed in writing to submit to the jurisdiction in relation to the enforcement of ICSID arbitration awards.

    iii) if section 1(1) does apply, and a state has not submitted to the jurisdiction by the very fact of being a party to the Convention, whether a foreign state is estopped or otherwise prevented from asserting the invalidity of the underlying award, with the result that the exception in section 9 of SIA is necessarily satisfied.

13. If its appeal fails on state immunity grounds, Zimbabwe seeks an order that its application to set aside registration of the award nonetheless be remitted to the Commercial Court so that it might raise other "exceptional" defences.

The key provisions

The Convention

14. The Convention was opened for signature in Washington on 18 March 1965. It entered into force for the United Kingdom in January 1967, for Zimbabwe in June 1994 and for Spain in September 1994.

15. The Preamble to the Convention recites the following:

> "The Contracting States
>
> *Considering* the need for international cooperation for economic development, and the role of private international investment therein;

> *Bearing in mind* the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States;
>
> *Recognizing* that while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases;
>
> *Attaching particular importance* to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire;
>
> *Desiring* to establish such facilities under the auspices of the International Bank for Reconstruction and Development;
>
> *Recognizing* that mutual consent by the parties to submit such disputes to conciliation or to arbitration through such facilities constitutes a binding agreement which requires in particular that due consideration be given to any recommendation of conciliators, and that any arbitral award be complied with; and
>
> *Declaring* that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration,
>
> *Have agreed* as follows…"

16. Article 25 defines ICSID's jurisdiction as follows:

> "The jurisdiction of [ICSID] shall extend to any legal dispute arising directly out of an investment, between a Contracting State…and a national of another Contracting State, which the parties to the dispute consent in writing to submit to [ICSID]. When the parties have given their consent, no party may withdraw its consent unilaterally."

17. As Dias J explained at [12], it is accordingly clear that the Convention does not itself constitute an agreement to arbitrate but merely provides a framework for the resolution of such disputes as the parties may agree in writing to submit to ICSID. A separate agreement to arbitrate is therefore required, commonly to be found (as in these cases) in a Bilateral Investment Treaty ("BIT") between two states, or a Multilateral Investment Treaty between several states, together with the arbitral claimant's acceptance of the offer to arbitrate contained in the relevant treaty.

18. Article 27 provides that no Contracting State shall give diplomatic protection or bring an international claim in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to ICSID arbitration unless the other Contracting State has failed to comply with the award rendered in such dispute.

19. Article 36 provides for any Contracting State or any national of a Contracting State to address a request for arbitration to the ICSID Secretary-General. Articles 37 to 40 provide for the constitution of the arbitral tribunal ("the Tribunal") following such request.

20. Article 41(1) provides that the Tribunal shall be the judge of its own competence and article 52 provides that either party may request annulment of the award (including on grounds of lack or excess of jurisdiction) and sets out a procedure for determining such request.

21. The key provisions for the purposes of these appeals are those relating to recognition and enforcement of an ICSID award:

> "Article 53
>
> (1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention….
>
> Article 54
>
> (1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State…
>
> (2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.
>
> (3) Execution of the award shall be governed by the laws concerning the execution of the judgments in force in the State in whose territories such execution is sought.
>
> Article 55
>
> Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution."

22. Article 64 provides that any dispute arising between Contracting States concerning the interpretation or application of the Convention which is not settled by negotiation shall be referred to the International Court of Justice, unless the States concerned agree to another method of settlement.

23. Article 69 provides that each Contracting State shall take such legislative or other measures as may be necessary to make the provisions of the Convention effective in its territories.

The 1966 Act

24. Dias J explained at [15] that:

> "This is the statute by which the [Convention] was implemented in English law. It was therefore common ground before me that it must be interpreted in the context of the [Convention] and that the presumed intention of parliament was to comply with the United Kingdom's treaty obligations thereunder. It is nonetheless important to note that although the Convention is scheduled to the Act, that does *not* mean that it is itself a part of English law. On the contrary, it is trite law that international treaties do not have direct effect in English law save to the extent that they are specifically enacted or incorporated. The position is simply that the statute will be construed in a way which is consonant with the Convention and, so far as possible, with the United Kingdom's other international obligations, including those relating to state immunity."

25. Section 1 of the 1966 Act provides as follows:

> "**Registration of Convention awards**
>
> (1) This section has effect as respects awards rendered pursuant to the Convention…
>
> (2) A person seeking recognition or enforcement of such an award shall be entitled to have the award registered in the High Court subject to proof of the prescribed matters and to the other provisions of this Act.
>
> …
>
> (4) In addition to the pecuniary obligations imposed by the award, the award shall be registered for the reasonable costs of and incidental to registration.
>
> …
>
> (6) The power to make rules of court under section 84 of the Senior Courts Act 1981 shall include power –
>
> (a) to prescribe the procedure for applying for registration under this section, and to require an applicant to give prior notice of his intention to other parties,
>
> (b) to prescribe the matters to be proved on the application and the manner of proof, and in particular to require the applicant to furnish a copy of the award certified pursuant to the Convention,

> (c) to provide for the service of notice of registration of the award by the applicant on other parties,
>
> and in this and the next following section "prescribed" means prescribed by rules of court.
>
> …"

26. Section 2 provides:

> "**Effect of registration**
>
> (1) Subject to the provisions of this Act, an award registered under section 1 above shall, as respects the pecuniary obligations which it imposes, be of the same force and effect for the purposes of execution as if it had been a judgment of the High Court given when the award was rendered pursuant to the Convention and entered on the date of registration under this Act, and, so far as relates to such pecuniary obligations –
>
> (a) proceedings may be taken on the award,
>
> (b) the sum for which the award is registered shall carry interest,
>
> (c) the High Court shall have the same control over the execution of the award,
>
> as if the award had been such a judgment of the High Court."

The Rules

27. Following the implementation of the 1966 Act, RSC Order 73 was amended to provide for registration of ICSID awards in the High Court under section 1 of that Act. The new rule 9 provided for ICSID awards to be registered by the same procedure as set out in RSC Order 71 for the registration of foreign judgments under Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933, with certain modifications. In particular, the requirements of Order 71 rule 7(3)(c) and (d), that the judgment debtor be notified of its right to apply to have registration of a judgment set aside and the period for so doing, were disapplied. Further, the provisions in Order 71 rule 9 for the judgment debtor to make such an application were not adopted in relation to the registration of ICSID awards. Instead, Order 73 rule 9(6) required the Court to stay execution of the award (on its own motion or on an application by the judgment debtor) where the enforcement of the award had been stayed pursuant to the Convention, and granted a power to stay the award if an application had been made pursuant to the Convention which might result in a stay. Order 73 rule 9(7) provided for the judgment debtor to make such an application.

28. The above provisions are now effectively replicated in CPR Part 62 rule 21. The rules still do not require notification to the judgment debtor of a right to apply to set aside registration, nor do they provide for a stay of execution pending such application: it is apparent that the reference in CPR Part 62.21(2)(e) (as it stood at the time of the hearing) to the incorporation of the latter requirement (in Part 74.9(2)) was an error –

the reference has since been changed to reflect that the provision referred to is Part 74.9(3).

The SIA

29. Dias J helpfully summarised the background to the SIA at [8]:

> "... Prior to 1978, England was almost alone in continuing to adopt a pure, absolute doctrine of state immunity in all cases: *I Congreso del Partido,* [1983] AC 244 at 261. Any waiver had to be declared in the face of the court, for example by pleading a defence to a claim: *Mighell v Sultan of Johore,* [1894] 1 QB 149. Moreover, an agreement to arbitrate did not amount to a submission to the jurisdiction: *Duff Development Co. Ltd v Government of Kelantan,* [1924] AC 797."

30. The SIA placed the law relating to state immunity on a statutory footing, replacing the common law rules with the following provisions, among others:

> "**1. General immunity from jurisdiction.**
>
> (1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.
>
> (2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question.
>
> **2. Submission to jurisdiction.**
>
> (1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom.
>
> (2) A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement; but a provision in any agreement that it is to be governed by the law of the United Kingdom is not to be regarded as a submission…
>
> …
>
> **9. Arbitrations.**
>
> (1) Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration.
>
> (2) This section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between States.

…

13. Other procedural privileges.

…

(2) Subject to subsections (3) and (4) below –

(a) relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property; and

(b) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale. …

(3) Subsections (2) and (2A) above do not prevent the giving of any relief or the issue of any process with the written consent of the State concerned; and any such consent (which may be contained in a prior agreement) may be expressed so as to apply to a limited extent or generally; but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection.

…

17. Interpretation of Part I.

…

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

23. Short title, repeals, commencement and extent.

…

(3) Subject to subsection (4) below, Parts 1 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 before that date."

31. Section 16 sets out "Excluded Matters", which the SIA does not affect or to which it does not apply. For present purposes the relevant aspect is that the section makes no reference to the Convention or the 1966 Act.

32. In *Alcom Ltd. v Republic of Columbia & others* [1984] AC 580 Lord Diplock explained at p.600 B-E that the approach of the SIA was comprehensive, placing the general principle of absolute sovereign immunity on a statutory footing, but making it subject to wide-ranging exceptions:

> "The State Immunity Act 1978, whose long title states as its first purpose to make *new* provision with respect to proceedings in the United Kingdom by or against other states, purports in Part I to deal comprehensively with the jurisdiction of courts of law in the United Kingdom both (1) to adjudicate upon claims against foreign states ("adjudicative jurisdiction"); and (2) to enforce by legal process ("enforcement jurisdiction") judgments pronounced and orders made in the exercise of their adjudicative jurisdiction. But, although comprehensive, the Act in its approach to these two aspects of the jurisdiction exercised by courts of law does not adopt the straightforward dichotomy between acta jure imperii and acta jure gestionis that had become familiar doctrine in public international law… Instead, as respects foreign states themselves the Act starts by restating in statutory form in section 1(1) the general principle of absolute sovereign immunity, but makes the principle subject to wide-ranging exceptions for which the subsequent sections in Part I of the Act (sections 2-17) provide."

33. In *Benkharbouche v Embassy of the Republic of Sudan* [2017] UKSC 62, [2019] AC 777 Lord Sumption JSC, whilst rejecting the suggestion that, as a matter of customary international law, immunity of states was absolute (though subject to exceptions), nevertheless recognised at [39] the comprehensive nature of the SIA on questions of state immunity:

> "No one doubts that as a matter of domestic law, Part 1 of the State Immunity Act 1978 is a complete code. If the case does not fall within one of the exceptions to section 1, the state is immune."

34. Spain, Zimbabwe and the ISL claimants each referred to a passage from Hansard recording the debate on the State Immunity Bill in Standing Committee D of the House of Lords on 18 May 1978 (although the ISL claimants did not accept that the extract satisfied the test in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 for admissibility). Clause 9 of the Bill under discussion contained the exception duly enacted as section 9 of the SIA as set out above, but limited to arbitrations "in or according to the law of the United Kingdom". The Solicitor-General moved an amendment to remove those additional words, one of the reasons being article 54 of the Convention. The Solicitor-General stated at p.10:

> "That convention deals with arbitration to which States are parties. There would thus appear to be a treaty obligation upon us to permit awards made under the convention to be enforced against such property, and by deleting the reference to the United Kingdom or its

law the amendment will ensure that a State has no immunity in respect of enforcement proceedings for any arbitral award."

Does section 1(1) of the SIA apply to registration of an ICSID award?

Is registration of an ICSID award an adjudicative act?

35. Dias J stated at [101] that, in the course of considering her judgment it occurred to her that, as the application to register an ICSID award did not have to be served, there was an argument that the application did not require Zimbabwe to be "impleaded" with the result that the doctrine of sovereign immunity was not engaged at all at that stage. In further written submissions invited by the judge neither side supported that argument, but Dias J nonetheless held it to be correct for the following reasons:

> "105. The classic statement of the doctrine of state immunity is that of Lord Atkin in *The Cristina,* [1938] AC 485 at 490:
>
> *"the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings, whether the proceedings involve process against his person or seek to recover from him specific property or damages."*
>
> 106. However, in the case of applications to register ICSID awards, I have reached the conclusion that the foreign state is not impleaded unless and until the order granting registration is served on it, and that the doctrine of state immunity has no application at the anterior stage of registration. This is for the following reasons:
>
> (a) In contrast to the position under the [Administration of Justice Act 1920] no exercise of the court's adjudicative jurisdiction is required when registering an ICSID award. As previously stated, section 1(2) of the 1966 Act confers an entitlement on the applicant to have the award registered which is unqualified save in respect of purely procedural requirements.
>
> (b) Accordingly, on an application for registration, the court is being asked to perform an essentially ministerial act in compliance with the UK's international obligations under the ICSID Convention. This does not involve the initiation of any substantive steps against the state, since the application is only for recognition and enforcement…of an award which is the result of a prior adjudicative process.
>
> (c) It is undoubtedly the case that service of the order granting recognition must be made on the state, but it is only at that stage that the state is formally impleaded and the jurisdiction of the English court formally invoked against the state. It is therefore only at that stage that the doctrine of sovereign immunity becomes engaged.

(d) The distinction between the application for registration, of which it is only necessary to give notice, and the resulting order, which must be formally served, is expressly drawn in section 1(6) of the 1966 Act itself.

(e) Once served with an order, a state may apply (as is the right of any litigant where an order is made without notice) to have the order set aside. However, the only grounds on which it may do so are if the order made has strayed beyond mere recognition and enforcement or if there was a failure to make full and frank disclosure. It is *not* open to it to do so on the grounds that the order should not have been made on the merits because, for example, it was entitled to claim state immunity.

(f) In this respect, it is telling that the provisions of Part 74 which permit an application to set aside the registration are expressly *not* applied to ICSID awards whereas they are preserved in relation to the enforcement of non-ICSID awards under Part 62.18 and in relation to the registration of foreign judgments by Part 74.

(g) The state may, of course, assert immunity in relation to any further steps that the judgment creditor may seek to take to execute the award.

107. This analysis seems to me to be confirmed by the decision of the Supreme Court in *General Dynamics United Kingdom v Libya* (supra) at [43]-[44] that (emphasis added):

"[*43] The exercise of jurisdiction by the courts of one state over another state is an act of sovereignty. The institution of such proceedings necessarily requires that the defendant state should be given notice of the proceedings.* ***The service of process on a state in itself involves an exercise of sovereignty and gives rise to particular sensibilities****...*

[44] In the particular context of enforcement of arbitration awards against a state, an application may be made to the court without notice (with or without issuing an arbitration claim form), in accordance with CPR r 62.18(1), for permission to enforce. Although the court may order service of the arbitration claim form (CPR r 62.18(2)) this is not usually required. However, under CPR r 62.18(7) the resulting order giving permission to enforce must be served on the defendant state which may then apply under CPR r 62.18(9) to set aside the order. If the order giving permission were not served, the defendant state may well be unaware of the enforcement proceedings ***and may not have the opportunity to assert immunity from enforcement before an attempt is made to attach or to seize the state's assets within the jurisdiction….***"

108. As I read the first passage, the view of the Supreme Court is that it is the *service of process* on a state which involves an exercise of

sovereignty. This can be contrasted with the mere notification of the application for registration which is all that is required under section 1(6) of the 1966 Act and CPR Part 62.21. As for the second passage, the concern of the court was that a state should have the opportunity to assert immunity before any attempt is made to execute against its assets. However, that opportunity is adequately secured by requiring service of the order for registration.

109. I therefore respectfully disagree with the view of Fraser J in *Infrastructure Services Luxembourg Sarl v Spain (supra)* at [20] and [56] that the mere recognition and enforcement of an ICSID award involves the exercise of the court's adjudicative jurisdiction. The court's jurisdiction to make the order derives directly from the 1966 Act and involves no exercise of discretion or adjudication at all but merely gives effect to the applicant's statutory entitlement.

110. It follows in my judgment that the question of sovereign immunity does not arise in relation to an application to register an ICSID award. It is therefore not open to Zimbabwe to apply to set it aside on that basis, although it may of course claim immunity in relation to any further steps towards execution…

111. I accept that this is a novel approach for which there is no direct authority. However, to my mind, it has the following positive merits:

(a) It gives full force and effect to the United Kingdom's international obligations under the ICSID Convention to recognise and enforce ICSID awards;

(b) It recognises the self-contained nature of the ICSID regime with its internal appellate review process;

(c) It gives full weight to statements of the highest authority that, provided the enforcing court is satisfied of the authenticity of the award, it is not entitled to review either the substance of the award or the jurisdiction of the tribunal or to refuse recognition or enforcement (save possibly in the exceptional and extraordinary circumstances contemplated in *Micula*);

(d) It does no violence to the principles of state immunity because an order for recognition and enforcement goes no further than recognising the award as binding – something which the state in question has already undertaken to do under the Convention. In particular, it does not involve taking any substantive steps against the state and no adjudicative jurisdiction is asserted over the state or its assets as such;

(e) It also enables a principled distinction to be drawn between applications to enforce ICSID awards, which are not served and where the award cannot be reviewed, and applications to enforce awards under the New York Convention, which not only do

> potentially require service but, more importantly, expressly require the court to exercise its adjudicative jurisdiction in determining that none of the defences to recognition and enforcement applies. The potentially far-reaching consequences which would otherwise ensue for enforcement of awards under the New York Convention are thus avoided altogether and the well-established case law in this field, such as *Svenska Petroleum Exploration AB v Lithuania, Tatneft* and *General Dynamics*, is left intact.

36. As already stated above, the Border claimants did not resist Zimbabwe's challenge to the above finding, nor did the ISL claimants adopt or support Dias J's reasoning or conclusion. It is nevertheless necessary to explain, briefly, why Dias J's novel approach is, in my judgment, misconceived.

37. Contrary to Dias J's view, registration of an award as a judgment of the court is not merely a ministerial or administrative act. It requires a judge (not an official) to be satisfied to the requisite standard as to the proof of authenticity and the "other evidential requirements" of the 1966 Act (and CPR Part 62.21) to which Dias J referred in [104]. The fact that the decision to register may be straightforward if the evidence is deemed to be in order does not undermine the adjudicative nature of the judicial task of assessing that evidence, and none of the authorities identified by Dias J offers support for her view in that regard. On the contrary, in *AIC Limited v Nigeria* [2003] EWHC 1357 (QB) Stanley Burton J held that registration of a judgment under the Administration of Justice Act 1920 did involve the exercise by the court of its jurisdiction and that "even if the registration of a judgment were a purely administrative act, I should hold that it is subject to the immunity conferred by section 1 [of the SIA]."

38. In my judgment there could not be a clearer case of the English court exercising its adjudicative jurisdiction over a foreign state than entering judgment against that state on the basis of a decision that the requirements of a United Kingdom statute had been met. It is undoubtedly an "act of sovereignty" as that phrase was used by the Supreme Court in *General Dynamics*, and thereby (subject to the further arguments considered below) engages the general immunity afforded by section 1(1) of the SIA. It is true that the foreign state may not yet have been served with the proceedings, but the court is required by section 1(2) to give effect to the immunity even though the state does not appear. The fact that service on a state will usually be the first exercise of sovereignty does not mean that an earlier entry of judgment is not such an exercise.

39. I would add that, once it is accepted that section 1(1) of the SIA applies (or may apply), the decision to register a judgment necessarily involves a further adjudicative determination, namely, whether the state has general immunity and if so whether registration of the award falls within one of the exceptions to such immunity. In my judgment that demonstrates the fallacy of treating the straightforward nature of the application to register an ICSID award as determinative of whether the state has general immunity: the nature of the application to some extent depends on the answer to that very question.

Does section 23 of the SIA exclude its application to ICSID awards and the 1966 Act?

40. Section 23(3) itself provides examples of "matters" occurring before the date of the coming into force of the SIA, such that proceedings relating to them would not attract immunity. These are (a) prior agreements (to submit to the jurisdiction or to permit execution against property) and (b) commercial transactions, employment contracts or arbitration agreements.

41. In my judgment the phrase "matters" cannot be stretched to refer to the Convention or the 1966 Act. Apart from the fact that the term "matters" does not readily encompass treaties or legislation as a matter of language or usage, if the intention was to exclude a treaty or a statute from the ambit of the SIA, that could and would have been done expressly in section 16, which at section 16(3) excluded "proceedings to which section 17(6) of the Nuclear Installations Act 1965 applies".

42. For those reasons I see no merit in the Border claimants' new argument as to why the SIA does not apply to registration of ICSID awards.

Is section 1(1) of the SIA inapplicable to the registration of ICSID awards under the 1966 Act as a matter of binding authority or otherwise of statutory interpretation?

Fraser J's judgment

43. Fraser J emphasised at [68] that there was direct and binding Supreme Court authority on the operation both of the Convention and the 1966 Act, including the recognition of an ICSID award in the United Kingdom, referring to *Micula*. Given the centrality of that decision to Frasers J's reasoning and conclusion that state immunity did not arise at all as an issue in the registration of an ICSID award, it is necessary to set it out in some detail, as did the judge.

44. At [69] to [70] Fraser J set out the facts of and issues in *Micula*. In summary, in the early 2000s the claimants invested in Romania pursuant to a state investment incentive scheme. Prior to its accession to the EU in 2007, Romania was informed that the incentive scheme was contrary to EU state aid rules, so repealed the majority of the incentives. As a result the claimants filed a request for ICSID arbitration under a BIT between Romania and Sweden. In 2013 the ICSID tribunal rendered an award in favour of the claimants. Following an investigation, the EU Commission issued a Final Decision prohibiting Romania meeting the award. In that context, Romania (supported by the Commission) applied for a stay of enforcement of the award pending the claimants' application to the General Court of the European Union to annul the Commission's decision. A stay was ordered by the High Court in 2017 and was continued by the Court of Appeal in 2018. By the time the claimant's appeal reached the Supreme Court in October 2019 the GCEU had annulled the Commission's Final Decision, but an appeal by the Commission to the CJEU was still pending.

45. The Supreme Court allowed the claimants' appeal, holding that a stay of an ICSID award could be granted if it was just to do so, but only if the stay was temporary and consistent with the English court's duty under articles 53 and 54 of the Convention to recognise and enforce an ICSID award. A stay pending the decision of the CJEU on the validity of the Commission's Final Decision was outside the power of the High Court under section 2(1) of the 1966 Act. The Supreme Court was not precluded from so holding by the EU duty of sincere cooperation as the existence and scope of

obligations under treaties prior to the relevant EU treaties (to which the UK was then party) were not reserved to the courts of the EU.

46. The unanimous decision of the Supreme Court as to the proper approach to the Convention and the 1966 Act was explained by Lord Lloyd-Jones and Lord Sales JJSC as follows:

> "68. The provisions of the 1966 Act must be interpreted in the context of the ICSID Convention and it should be presumed that Parliament, in enacting that legislation, intended that it should conform with the United Kingdom's treaty obligations. It is a notable feature of the scheme of the ICSID Convention that once the authenticity of an award is established, a domestic court before which recognition is sought may not re-examine the award on its merits. Similarly, a domestic court may not refuse to enforce an authenticated ICSID award on grounds of national or international public policy. In this respect, the ICSID Convention differs significantly from the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. The position is stated in this way by Professor Schreuer in his commentary on article 54(1):
>
> > "The system of review under the Convention is self-contained and does not permit any external review. This principle also extends to the stage of recognition and enforcement of ICSID awards. A domestic court or authority before which recognition and enforcement is sought is restricted to ascertaining the award's authenticity. It may not re-examine the ICSID tribunal's jurisdiction. It may not re-examine the award on the merits. Nor may it examine the fairness and propriety of the proceedings before the ICSID tribunal. This is in contrast to non-ICSID awards, including Additional Facility awards, which may be reviewed under domestic law and applicable treaties. In particular, the New York Convention gives a detailed list of grounds on which recognition and enforcement may be refused …" (Christoph H Schreuer, *The ICSID Convention: A Commentary*, 2nd ed (2009), p 1139, para 81)
> >
> > "The Convention's drafting history shows that domestic authorities charged with recognition and enforcement have no discretion to review the award once its authenticity has been established. Not even the *ordre public* (public policy) of the forum may furnish a ground for refusal. The finality of awards would also exclude any examination of their compliance with international public policy or international law in general. The observance of international law is the task of the arbitral tribunal in application of article 42 of the Convention subject to a possible control by an ad hoc committee … Nor would there be any room for the application of the Act of State doctrine in connection with the recognition and enforcement of an ICSID award …" (Schreuer, pp 1140-1141, para 85)

69. Contracting States may not refuse recognition or enforcement of an award on grounds covered by the challenge provisions in the Convention itself (articles 50-52). Nor may they do so on grounds based on any general doctrine of *ordre public*, since in the drafting process the decision was taken not to follow the model of the New York Convention. However, although it is recognised that this is the general position under the Convention, it is arguable that article 54(1), by framing the relevant obligation as to enforcement as an obligation to treat an award under the Convention as if it were a final judgment of a local court, allows certain other defences to enforcement which are available in local law in relation to such a final judgment to be raised.

70. The principle that arbitration awards under the ICSID Convention should be enforceable in the courts of all Contracting States and with the same status as a final judgment of the local courts in those States, as eventually set out in article 54(1), was a feature from an early stage in the drafting of the Convention. Mr Aron Broches, General Counsel of the World Bank at the time who chaired the regional consultative meetings ("the Regional Consultative Meetings") that occurred as part of the Convention's drafting, explained to delegates that by virtue of this formula Contracting States would be entitled to apply their local law of sovereign or state immunity with regard to the enforcement of awards, and thereby avoid or minimise possible embarrassment at having to enforce awards against other friendly Contracting States. Accordingly, it was made clear that article 54(1) had the substantive effect of introducing to some degree a principle of equivalence between a Convention award and a local final judgment as regards the possibility of applying defences in respect of enforcement……

71. In his report on the Regional Consultative Meetings, Mr Broches referred to certain comments that had dealt with the effect of what was then draft section 15 (which became article 54(1)) on existing law with respect to sovereign immunity. Mr Broches "explained that the drafters had no intention to change that law. By providing that the award could be enforced as if it were a final judgment of a local court, section 15 implicitly imported the limitation on enforcement which in most countries existed with respect to enforcement of court decisions against Sovereigns. However, this point might be made explicit in order to allay the fears expressed by several delegations"….. Mr Broches again indicated that this was the intended effect of what became article 54(1), but that it could be made completely clear to allay concerns).

72. Accordingly, the provision which eventually became article 55 was included in what was designated as the First Draft of the Convention and was retained in the final version of the Convention (*History*, vol I, 254; vol II-1, Doc 43 (11 September 1964) "Draft Convention: Working Paper for the Legal Committee", p 636). The official Report of the Executive Directors on the Convention

> confirmed that this provision was introduced for the avoidance of doubt (as its text indicates)…. The law of State immunity varies from State to State, and the Convention made no attempt to harmonise it. As Professor Schreuer points out in his commentary on article 54, persons seeking to enforce arbitration awards made pursuant to the Convention will tend to choose to do so in those jurisdictions which have the least generous rules of State immunity for the protection of the assets of other Contracting States (Schreuer, p 1124, para 27).
>
> 73. The fact that the specific qualification of the obligation to enforce an award like a final court judgment relating to state immunity was expressly dealt with in article 55 for the avoidance of doubt indicates that article 54(1) was itself understood to have the effect of allowing the possibility of certain other defences to enforcement if national law recognised them in respect of final judgments of local courts.
>
> 74. The travaux préparatoires also indicate that it was accepted that further defences available in national law in relation to enforcement of court judgments could be available in exceptional circumstances by virtue of the formulation of the obligation in article 54(1)…."
>
> …
>
> 77. Articles 50(2), 51(4) and 52(5) make specific provision for staying enforcement of an award in certain specific situations, none of which applies here. Section 2(2) of the 1966 Act and CPR 62.21(5) make corresponding provision in domestic law for the grant of a stay in such situations. These stays pursuant to the Convention are available only in the context of interpretation, revision and annulment of awards addressed by those articles. In the present case, Romania has already exercised and exhausted its right under article 52 of ICSID to seek annulment of the Award. The ICSID *ad hoc* Committee upheld the Award on 26 February 2016.
>
> 78. However, in light of the wording of articles 54(1) and 55 and the travaux préparatoires reviewed above, it is arguable that there is scope for some additional defences against enforcement, in certain exceptional or extraordinary circumstances which are not defined, if national law recognises them in respect of final judgments of national courts and they do not directly overlap with those grounds of challenge to an award which are specifically allocated to Convention organs under articles 50 to 52 of the Convention."

47. Lord Lloyd-Jones and Lord Sales rejected Romania's argument that EU law was in conflict with and effectively overrode the obligations in the Convention, in the following terms:

> "84….The grant of a stay in these circumstances was not consistent with the ICSID Convention, on their interpretation of it, under which the United Kingdom and its courts had a duty to recognise and

enforce the Award. This was not a limited stay of execution on procedural grounds, but a prohibition on enforcement of the Award on substantive grounds until the GCEU had ruled on the apparent conflict between the ICSID Convention and the EU Treaties. Effect was given to the Commission Decision until such time as the GCEU might pronounce upon it. The logic of the position adopted by Arden and Leggatt LJJ was that if the GCEU upheld the Commission Decision, the stay would continue indefinitely (and the same would be true if the CJEU allows the Commission's appeal against the decision of the GCEU). But the grounds of objection raised by the Commission, even if upheld before the EU courts, were not valid grounds of objection to the Award or its enforcement under the ICSID Convention, as interpreted by Arden and Leggatt LJJ. The principle laid down in article 53(1) that awards are binding on the parties and are not subject to any appeal or other remedy except those provided under the Convention and reflected in article 54 (on their interpretation of it) was disregarded. In substance, the Court of Appeal made use of powers to stay execution granted by domestic law in order to thwart enforcement of an award which had become enforceable under the ICSID Convention.

85. On the other hand, if article 54(1) incorporates the principle of equivalence, in line with Hamblen LJ's interpretation, it remains the case that Romania's submission in answer to the Claimants' cross-appeal cannot succeed. This is because article 351 TFEU has the effect that any obligation on the UK courts to give effect to a decision such as the Commission Decision pursuant to the duty of sincere co-operation which might arise under the Treaties in other circumstances does not arise in this case. The discussion below of Original Ground 4 of the cross-appeal, explains that the United Kingdom owes relevant obligations to non-EU member states under the ICSID Convention, a treaty to which the United Kingdom was party before it became a member state. By virtue of article 351 TFEU this means that the obligations on the United Kingdom arising from the ICSID Convention are "not … affected by the provisions of the Treaties".

86. Leaving aside the Treaties, in the circumstances of the present case the English courts are obliged under article 54(1) of the ICSID Convention to give effect to the Award in favour of the Claimants and this is not a case in which any of the exceptional possible types of defence to enforcement contemplated by Mr Broches and Professor Schreuer arise. Leaving the Treaties out of the analysis, if the Award were a final judgment of an English court it would be enforced without question. Similarly, on Hamblen LJ's interpretation of article 54(1) involving the principle of equivalence, it must follow that the Award would be enforced in the same way. Article 351 TFEU means that this obligation cannot be affected by anything in the Treaties, which are the foundation for the legal effect of Commission rulings and for the obligation of sincere co-operation on which Romania seeks to rely. Romania's attempt to pray in aid the obligation of

> sincere co-operation is an attempt to pull itself up by its own bootstraps. It cannot make out the necessary foundation for its argument, since it cannot show that the obligation of sincere co-operation has any application at all.
>
> 87. Finally, in this regard, we should refer to the submission on behalf of Romania that to the extent that there is any uncertainty as to the meaning of the relevant provisions of the ICSID Convention and the 1966 Act, this court is bound by EU law to interpret them so far as possible in accordance with EU law in order to comply with the EU principle of effectiveness…This is another bootstraps argument on behalf of Romania. The first step in the analysis should be to ask whether the United Kingdom has relevant obligations arising from the ICSID Convention which, by operation of article 351 TFEU, preclude the application of the Treaties. As explained below in relation to Cross-Appeal Original Ground 3 (paras 101-108), on a proper interpretation of the ICSID Convention, the United Kingdom clearly does have such obligations. Therefore, the Treaties do not have any relevant effect and this court is not bound by EU law to interpret the Convention in the manner for which Romania contends. In any event, the proper interpretation of the Convention is given by principles of international law applicable to all Contracting States and it cannot be affected by EU law."

48. In view of the decision in *Micula*, and after reviewing the decision of Jacobs J in *Union Fenosa Gas SA v Arab Republic of Egypt* [2020] EWHC 1723 (Comm), Fraser J stated:

> "79.…The availability of defences to a foreign state faced with an application to register an arbitral award under the ICSID Convention is far narrower than those that would be available if an award were being enforced under the New York Convention. ICSID is a separate and stand-alone international convention, with signatories far more numerous than the Member States of the EU. The 1966 Act is separate legislation dealing specifically with such awards. ***Micula*** makes it clear that for an additional defence to be available to a state, it must "not directly overlap with those grounds of challenge to an award which are specifically allocated to Convention organs under articles 50 to 52 of the Convention." Jurisdiction of the tribunal, and matters covered in the annulment application, are plainly within such areas allocated to such organs. They are exclusively allocated under the ICSID Convention to ICSID itself. Therefore Spain has no ability to deploy such defences in this application…".

49. After also considering and rejecting the relevance of EU law to article 26 of the ECT as a matter of international law, and further holding that the jurisdiction of the ICSID tribunal was in any event a matter reserved to the tribunal under the Convention and therefore could not be re-opened as a matter of domestic law, Fraser J stated:

> "89. Having therefore considered what I consider to be the over-arching submissions of Spain on the impact of EU law upon its other, pre-existing treaty obligations under the ICSID Convention and the ECT, I can turn to consider the specifics of the challenges to jurisdiction on this application. One therefore turns to consider whether the grounds deployed by Spain here fall into the category of what the Supreme Court described as "scope for some additional defences against enforcement, in certain exceptional or extraordinary circumstances which are not defined, if national law recognises them in respect of final judgments of national courts" (to quote from the Supreme Court in ***Micula***). They must also not "directly overlap with those grounds of challenge to an award" specifically allocated to Convention organs.
>
> 90. The only defence that I consider could potentially fall into that category, even arguably, would be one based upon the State Immunity Act 1978, if such a defence were available. Lack of a written agreement to arbitrate, and validity of the award, are both within the grounds of challenge allocated to Convention organs. The Supreme Court could not possibly be referring to defences being "additional", as well as having to arise in both "exceptional or extraordinary circumstances", if they had as their subject matter challenges to jurisdiction raised before and considered (and rejected) by the ICSID arbitral tribunal and the ICSID Committee. In case I am wrong about that, I will address those briefly in any event."

50. I agree with Spain that it appears from the above that Fraser J held that section 1(1) of the SIA simply does not apply to recognition proceedings for ICSID awards (as opposed to proceedings for execution). That seems to be confirmed by the judge's written reasons for refusing permission to appeal, in which he makes clear his view that the ratio of *Micula* has that consequence.

51. The difficulty, however, is that state immunity was not an issue in *Micula*. Romania did not challenge the registration of the ICSID award on state immunity or any other grounds, the issue being whether there was power, given the Convention and the 1966 Act, to grant a stay of enforcement of the award after registration. Lord Lloyd-Jones and Lord Sales did refer in passing to state immunity, primarily in relation to immunity from execution (and the express provision preserving such immunity in article 55 of the Convention), but did not consider whether section 1(1) of the SIA applied to the registration of ICSID awards, let alone decide the point. The reference to article 54 of the Convention permitting "exceptional defences" to registration of an award cannot sensibly be understood to encompass state immunity: state immunity is a barrier to the court assuming jurisdiction, not a defence to a claim over which the court does have jurisdiction. Neither is it implicit in the decision that there is no general state immunity in relation to registration of ICSID awards; unless there is a challenge to the underlying agreement to arbitrate (and there is no suggestion that Romania challenged the validity of that contained in the relevant BIT), registration of the resultant award will necessarily fall within the exception in section 9 of the SIA.

52. In reaching his conclusion, Fraser J did not address the House of Lords and Supreme Court authorities that described the SIA as a "complete code", re-stating absolute

immunity subject to wide exceptions, nor did he explain the mechanism by which it came to be disapplied (or what becomes of the mandatory provisions in section 12 of the SIA in relation to service of proceedings on a foreign state). Not only did the decision in *Micula* not supply an answer to those questions, but it did not even purport to address them.

The ISL claimants' argument

53. The ISL claimants did not support Fraser J's view that *Micula* was binding authority on the issues on this appeal, stating only that the Supreme Court's interpretation of the Convention "is of assistance".

54. Indeed, the ISL claimants' stance in relation to the applicability of section 1(1) of the SIA was equivocal at best. In its skeleton argument in response to Spain's appeal, its submission on the issue was as follows:

> "State immunity only applies under s.1(1) in so far as the so-called exceptions do not apply. Thus, on any view, it does not apply by reason of the answers to [the appeal in relation to section 2 and section 9]. But, for all the reasons above, it has no practical application to the registration of an ICSID award under the 1966 Act. Whichever way one construes the statutes together, the answer is the same. For example, the SIA is a complete code for impleading States to be read harmoniously with the preceding 1966 Act, such that s.2(2) and/or s.9 apply. Or the 1966 Act provides a separate and distinct (prior) regime with which the SIA (by deliberate design) does not interfere. The Respondents accept that there is a number of distinct ways of characterising how these two statutes interrelate, but in result, they reveal nothing more than distinctions without a difference. The Judge was fundamentally right to decide as he did. If the Judge was wrong on the short point, the Respondents submit that both, or at least one of the exceptions in s.2(2) and s.9, plainly apply…."

55. The ISL claimants therefore did not advance a primary case that section 1(1) SIA was somehow disapplied, but rather submitted that it had no "practical" application because on any view at least one of the exceptions in sections 2 and section 9 plainly did apply. I do not find that "rolled-up" approach helpful in resolving the issues on the appeals, as Spain and Zimbabwe challenge not only the disapplication of section 1(1), but also the application of the exceptions if there is general immunity. In my judgment it is essential to follow a logical approach and determine first and foremost whether there is general immunity and, if so, whether the section 2 exception is engaged and, if not, whether the section 9 exception applies. A broad-brush approach of saying that, one way or another there is no immunity, is not appropriate.

56. The ISL claimants' argument as to why section 1(1) of the SIA might not apply was as follows:

    i) The only sensible interpretation of the 1966 Act as and when enacted (some 12 years prior to the SIA) is that the right of Contracting States to the Convention to object to the jurisdiction of the courts was abrogated, on the basis that the states had agreed amongst themselves, by article 54, to submit to the

jurisdiction of the Contracting State in which enforcement was sought. Spain and Zimbabwe's argument, that registration was only permissible if a state effectively consented to registration by submitting to the jurisdiction in the face of the court, was directly contrary to the clear right to register and abbreviated procedure provided by the 1966 Act and given effect in the Rules.

ii) The SIA did not repeal the 1966 Act, and accordingly the two separate statutes should be read "harmoniously": the SIA should be read as not interfering with the separate and distinct (prior) regime under the 1966 Act.

57. The difficulty with that argument, as the ISL claimants themselves expressly accept, is that the SIA is a complete code, does not exclude the "regime" under the 1966 Act from its scope (as could have been the case had it been intended), and can be read harmoniously with that regime by virtue of the exceptions to general immunity where states have submitted to the jurisdiction or agreed to arbitrate, both of which exceptions the ISL claimants contend (in the alternative) are automatically engaged when a state is party to the Convention and subject to an award pursuant to its terms and procedures.

58. In my judgment there is no reason why the express statutory general immunity, subject to exceptions, conferred by section 1(1) of the SIA, does not arise in the case of registering an ICSID award against a Contracting State. The key question is whether one of the exceptions to such general immunity is engaged. To the extent that any confirmation is needed as to the correctness of that conclusion, the Solicitor-General's remarks in relation to the Bill make it plain that the legislative intent was that the SIA would apply but that registration of ICSID awards would be capable of passing through one of the exceptions.

Have Contracting States submitted to the jurisdiction for the purposes of section 2 of the SIA by virtue of article 54 of the Convention?

59. On a straightforward reading of article 54(1) of the Convention, each Contracting State has agreed with all other Contracting States that each will enforce ICSID awards, in the context that a Contracting State will necessarily be a party to each award. On its face, this appears to be an agreement by each of Spain and Zimbabwe that the United Kingdom has jurisdiction to enforce ICSID awards against those states. Section 17(2) of the SIA provides that a prior written agreement may be found in a treaty, convention or other international agreement.

60. The courts of Australia, New Zealand, the United States, France and Malaysia have all interpreted article 54 as a waiver of adjudicative immunity by each Contracting State and, where domestically relevant, a submission to the jurisdiction. That is of considerable persuasive force, as explained by Lord Hope in *Islam v Secretary of State for the Home Department* [1999] 2 AC 629, 657A-B:

> "As a general rule it is desirable that international treaties should be interpreted by the courts of all the states uniformly. So, if it could be said that a uniform interpretation of this phrase was to be found in the authorities, I would regard it as appropriate that we should follow it."

61. That is particularly so in relation to the decision of the High Court of Australia ("the HCA") in proceedings between the ISL claimants and Spain in relation to the very same award as is in issue before us, applying a statutory provision in effectively the same terms as section 2(2) of the SIA, reported at [2023] HCA 11. That decision, and Spain and Zimbabwe's arguments as to why it should not be followed in this jurisdiction, are considered in detail below.

62. The one exception to the broad international consensus is to be found in the *ex tempore* decision of Walbank J in the BVI High Court in *Tethyan Copper Company Pty Limited v Pakistan* (Claim No. BVIHC (Com) 2020/0196, 27 April 2021. At [51] Walbank J stated that article 54 imposes no more than an obligation on Contracting States to allow recognition and enforcement in their own courts, so cannot constitute a waiver of immunity before the courts of another Contracting State. I will also return to that decision below.

63. In oral argument on these appeals, Spain and Zimbabwe did not seriously dispute that article 54 could be read, purely as a matter of language, as a mutual agreement by Contracting States to submit to each other's jurisdiction. They contended, however, that such reading would be mistaken and contrary to principle because, they submitted:

    i) it is apparent (and confirmed by the *travaux préparatoires* to the Convention) that the Contracting States did not intend to waive their state immunity, whether by article 54 or otherwise, and that the article should accordingly not be read as a submission to the jurisdiction.

    ii) in any event, an agreement to submit to the jurisdiction must be express, whereas any agreement contained in article 54 is implicit and, in any event, insufficiently precise.

    iii) further, interpreting article 54 as a submission to the jurisdiction would have to be read across and applied to the similar wording in article III of the New York Convention, contrary to its presently accepted interpretation and with unfortunate consequences.

64. Fraser J noted at [93] and [94] that Spain advanced the first two lines of argument referred to above, but he rejected them in the following terms:

> "95. This argument is misplaced, and entirely ignores, in my judgment, both the content and effect of the ICSID Convention, the terms of the 1966 Act and also the ratio of *Micula*. The terms of the 1966 Act are clear, and the ICSID Convention itself is a schedule to the Act. It is not necessary to consider what was, and what was not, discussed in Parliament or in what terms. Further, if Spain were correct, it would mean that section 1(1) of the 1966 Act could only apply to awards in which the United Kingdom was a party. That is not a sensible interpretation of the statute, and would – if correct – be categorised as an absurd result. It is plainly not correct. In my judgment, Article 54 of the ICSID Convention falls within "prior written agreement" for the purposes of the 1978 Act…"

65. Fraser J also recorded at [114] that the decision of the High of Court Australia had been handed down since the hearing before him, stating at [116] that he characterised it as separate free-standing support in the highest appellate court of another common law jurisdiction for the analysis he had undertaken.

66. Dias J also referred to the decision of the High Court of Australia, and at [63] agreed with the conclusion of that court that the article 54 contained an express and not merely implied waiver of immunity. However, she went on to hold at [68] that:

> "…section 2 [of the SIA] is drafted with reference to specific proceedings before a specific court and accordingly requires any submission to be in respect of the jurisdiction which is actually being exercised in those proceedings. A waiver of immunity unrelated to any identifiable proceedings is therefore not synonymous with a submission to the jurisdiction under section 2, even though the two may overlap, for example when a state waives its immunity by submitting to the jurisdiction in respect of a particular action."

67. After referring to the decision in *Svenska Petroleum Exploraion AB v Lithuania (No 2)* [2006] EWCA Civ 1529, [2007] QB 886 as support for distinguishing between a general waiver of immunity and the requirement of section 2 of the SIA, Dias J concluded at [72] that article 54 was not a sufficiently clear and unequivocal submission to the English courts for the purposes of recognition and enforcement of the award against Zimbabwe, noting that her decision departed from the view taken by Fraser J.

68. Dias J also expressed the view at [20]-[21] that regarding article 54 of the Convention as a submission to the jurisdiction might logically result in the same consequence for the "materially identical obligation" in article III of the New York Convention, which would "represent a seismic development".

The proper interpretation of article 54

69. There was no dispute that the Convention is to be interpreted in accordance with the customary international law treaty interpretation rules codified in articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties ("the VCLT"). Article 31(1) provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Article 31(2) confirms that the context includes its preamble and annexes.

70. Article 32 provides that:

> "Recourse may be had to supplementary means of interpretation, including preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> a) Leave the meaning ambiguous or obscure; or

b) Leads to a result which is manifestly absurd or unreasonable."

71. Zimbabwe (supported by Spain), argued that, properly interpreted, there was no intention evinced in the Convention that Contracting States would be subject to domestic legal proceedings in respect of adverse ICSID awards, and so no provision for Contracting States to waive immunity or submit to any jurisdiction, whether in article 54 or otherwise. The purpose of the Convention was to enable states to enforce awards against investors in other Contracting States, and so provided for mutual recognition and enforcement of such awards. The assumption was that states would honour adverse awards, but that if they did not do so that would trigger the default provisions of article 27 of the Convention: the investor could receive protection from its home state and that state could make an international claim against the defaulting state to the International Court of Justice under article 64. In contrast, as investors are not party to the Convention and not subject to diplomatic sanction, domestic enforcement is necessary.

72. Thus Zimbabwe submitted that the decision in *Tethyan* was correct in holding that the only obligation imposed by article 54 was to recognise awards in the jurisdiction of the Contracting State (and all other jurisdictions had misinterpreted that article), and that was its only effect.

73. Further, Zimbabwe contended, the above interpretation is confirmed (or if there is an ambiguity, resolved in Zimbabwe's and Spain's favour) by references in the *travaux*, which may be summarised as follows:

i) Recognition from the outset that article 54 was equivalent to (though more restrictive than) article III of the New York Convention: a provision requiring States to enforce awards, but not affecting state immunity;

ii) References by representatives and by the Chairman on the Consultative Meetings, prior to the addition of article 54(3) and article 55 dealing with execution, that the intention was not to modify the existing law on state immunity;

iii) That article 55 was included for the avoidance of doubt, given that article 54(3) made execution a matter of domestic law: no such clarification was needed in relation to article 54(2) given that it was governed by international law;

iv) References confirming that the purpose of article 54 was to secure the compliance with awards by the investor who was not a party to the Convention.

74. These arguments, which had been advanced by Spain in proceedings to enforce the award against it in Australia, were considered in detail and rejected by the HCA. The HCA stressed that the Convention used the terms "recognize" "enforce" and "execute" to denote three distinct processes:

> "43… The obligation to "recognize" is expressed to apply to the entirety of "an award rendered pursuant to this Convention" and to be no more than an obligation to recognise the award "as binding". The

> obligation to "enforce" is expressed to apply only to "the pecuniary obligations imposed by [the] award" and to go no further than to oblige the Contracting State to enforce those pecuniary obligations within its territories "as if [the award] were a final judgment of a court in that State"….
>
> 44. The further distinction between "recognition" and "enforcement", on the one hand, and "execution", on the other hand, is then drawn out in Arts 53-54 and Art 55. This is seen in the provision by Art 54(3) that execution is a matter to be governed by the domestic law of the Contracting State, and by Art 55 that none of the international obligations imposed by Art 54 extend so far as to derogate from the domestic law of the Contracting State concerning State immunity or foreign State immunity from execution. In particular, Art 55 spells out that the obligation to "enforce" the pecuniary obligations imposed by an award as if the award were a final judgment of a court in the Contracting State stops short of an obligation to ensure their execution. Whether or not enforcement against a State party to an award can lead to execution is left entirely to be determined under the domestic law of the Contracting State concerning State immunity or foreign State immunity from execution."

75. The HCA then reviewed the *travaux* in some detail, in the light of the above distinction:

> "49. Following the preparation of a working paper on the ICSID Convention by Mr [Aron] Broches [General Counsel of the World Bank, described as "the principal architect of the Convention] and his team, a meeting was held on 20 September 1963 to receive comments from the Executive Directors. The minutes of the meeting record Mr Broches' explanation that it was "desirable to have a very clear provision ... which required that each Contracting State recognize an award of a tribunal as binding and enforce it within its territories as if that award were a final judgment of the courts of that State". Mr Broches saw clarity, and "quite a step forward", in: (i) requiring recognition, namely that "each Contracting State recognize an award of a tribunal as binding"; (ii) requiring enforcement, namely that each Contracting State "enforce [an award] within its territories as if that award were a final judgment of the courts in that State"; (iii) recognising that "[i]n general" forced execution "would not be possible" where the term "execution" was used to describe "seizing [the foreign State's] property and selling it in forced execution".
>
> 50. The provision as framed to give effect to the approach Mr Broches outlined ultimately became Art 54 of the ICSID Convention. As it appeared in the Preliminary Draft, which was the subject of the consultative meetings in Addis Ababa, Santiago, Geneva and Bangkok, the precursor to Art 54 simply provided that "[e]ach Contracting State shall recognize an award ... as binding and enforce it within its territories as if it were a final judgment of the courts of that State".

51. Referring to the provision as then appearing in the Preliminary Draft, in introductory remarks at the commencement of each consultative meeting, Mr Broches said that he "wished to make it clear that where, as in most countries, the law of State [i]mmunity from execution would prevent enforcement against a State as opposed to execution against a private party, the Convention would leave that law unaffected" and that "[a]ll the Convention would do would be to place an arbitral award rendered pursuant to it on the same footing as a final judgment of the national [c]ourts". He spelt out the result: "[i]f such judgment could be enforced under the domestic law in question, so could the award; if that judgment could not be so enforced, neither could the award".

52. In a discussion at the Santiago meeting on the impact of the provision as appearing in the Preliminary Draft on State immunity, Mr Broches volunteered that the insertion of a further provision might be warranted to make the position "completely clear" and noted that it had "been suggested that it might be useful to distinguish between recognition of awards as binding and their execution" . Picking up on that language at the Geneva meeting, and referring back to the Santiago meeting, Mr Broches noted that the view had been expressed that the provision as appearing in the Preliminary Draft "would force a modification in State practice and law on the question of a State's immunity from execution". He said that he thought that view was "unfounded", but added that "an express proviso removing any doubt as to the intent of the section might be inserted".

53. When subsequently explaining the language of the provision as then appearing in the Preliminary Draft at the Bangkok meeting, Mr Broches spoke with more precision. He said that it "dealt with two problems". He said that the first was the obligation of each Contracting State "to recognize an award ... as binding". He added that "the intent of the provision" in that first respect might have been better reflected if the word "accept" had been used in place of "recognize" given that "[w]hat was contemplated in [that] part of the sentence was the force of the award as [a] res judicata ... defence in resisting an action ... in the ordinary courts of a State, on a matter already determined in arbitral proceedings" under the ICSID Convention. He said that the second part was the obligation of each Contracting State "to enforce the award within [its] territories". He added that "the intent of the provision" in that second respect "might be better expressed if the words 'recognize ... and enforce it' were substituted by 'recognize as enforceable'".

54. In a report summarising the issues which had been raised in relation to the Preliminary Draft during the consultative meetings, Mr Broches referred to issues having been raised about the effect of the provision on State immunity. He explained that "[b]y providing that the award could be enforced as if it were a final judgment of a local court", the provision "implicitly imported the limitation on

> enforcement which in most countries existed with respect to enforcement of court decisions against Sovereigns". "However", he added, "this point might be made explicit in order to allay the fears expressed by several delegations".
>
> 55. The fears concerning State immunity to which Mr Broches referred were allayed by the insertion into the Revised Draft of the provision which was soon to become Art 55 of the ICSID Convention. Picking up on the suggestion concerning terminology which had been noted at the Geneva meeting, the provision expressed the intended preservation of State immunity in terms of "immunity ... from execution".
>
> 56. In the subsequent deliberation of the legal committee in Washington, the principle of enforcement which was to be embodied in Art 54 of the ICSID Convention – requiring an award to be equated with a final decision – "survived [an] onslaught" of opposition. The draft of Art 54 underwent a measure of refinement, including by the limitation of the obligation of enforcement in Art 54(1) to the enforcement of pecuniary obligations and by the insertion of what would become Art 54(3), which also picked up on the language of "execution". Article 55, which Mr Broches described at a meeting of the legal committee in December 1964 as a mere "clarification", emerged substantially unaltered.
>
> 57. Mr Broches provided a succinct summary of the result in a memorandum to the Executive Directors on 19 January 1965. He wrote;
>
> > "Article 54 requires Contracting States to equate an award rendered pursuant to the Convention with a final judgment of its own courts. It does not require them to go beyond that and to undertake forcible execution of awards rendered pursuant to the Convention in cases in which final judgments could not be executed. In order to leave no doubt on this point Article 55 provides that nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution."
>
> 58. Those remarks were reproduced in the accompanying Report of the Executive Directors on the ICSID Convention when it was published on 18 March 1965 and submitted to governments by the World Bank."

76. The HCA then explained the reasons for rejecting the arguments advanced by Spain (and articulated in these appeals by Zimbabwe), referring to the textual difficulties with the submission, the object and purpose of the Convention and further extracts from the *travaux*:

"69. Spain's submission requires the text of Arts 53-55 to be read in a contorted manner. In light of the effect of the provision in Art 53 that awards shall be "binding" on Contracting States, together with the preservation in Art 55 of immunity from execution only (subject to the laws of Contracting States), it would distort the terms of Art 54(1) to require separate conduct that amounted to a waiver of immunity before an award could be recognised and enforced against a foreign State. On Spain's interpretation, Art 55 would also be inaccurate, because Art 54(1) would then preserve to a Contracting State a much greater immunity than merely immunity from execution subject to the laws of the Contracting State.

70. Spain submitted that since Arts 53 and 54(2) make no reference to execution, and since Art 54(3) leaves execution (and any immunity from execution) to be governed by the laws of the jurisdiction in which execution is sought, Art 55 would be redundant or surplus on the interpretation we prefer. This possible surplusage of Art 55 is, however, a consequence of the plain meaning of "execution" in Art 55 which, as explained above, must be adopted as a matter of text, principle, context, and purpose. The view that Art 55 has no independent work to do, other than reinforcement of the limits in Arts 53 and 54, is also supported by the *travaux préparatoires* to the ICSID Convention, to which reference has already been made.

71 The textual difficulties with Spain's primary submission are compounded when the ordinary meaning of Art 54(1) is understood, as the Vienna Convention on the Law of Treaties requires, in light of its object and purpose, which includes mitigating sovereign risk. Although Spain correctly submitted that the main reason for the inclusion of Art 54 was to ensure that Contracting States were able to obtain effective remedies against private investors, this was to ensure parity with the obligations of the Contracting States because it was otherwise assumed that participating nation states would abide by arbitral outcomes. This assumption is most explicit in the provision in Art 53(1), restating customary international law that each party, that is each Contracting State, "shall abide by and comply with the terms of the award", except to the extent to which the terms are stayed. In that sense, Art 53 is the "primary provision".

72. The assumption of parity was also recorded in the summary record of proceedings of the consultative meeting held at Santiago, where Mr Broches observed that the provision that became Art 54 "was intended to protect the interests of the host States which while they were themselves internationally bound to comply with the award, might want an effective assurance that the private party would be compelled to do the same". Again, following the last consultative meeting in Bangkok, a Chairman's Report prepared by Mr Broches referred to Art 54 as "establishing equality not only of rights, but also of obligations, between State[s] and investors". All of the drafts leading to the ICSID Convention thus referred "to recognition and

> enforcement against the parties in equal terms, without distinguishing between investors and host States". Giving effect to that purpose, the terms of Art 54 do "not distinguish between the recognition and enforcement of awards against investors, on the one side, and against host States, on the other".”

77. In my judgment it is appropriate to follow the HCA’s reasoning and conclusion on this issue, not merely because it is the highly persuasive opinion of the highest court in Australia considering the very same award between the same parties, but because it is, with respect, plainly right.

78. First and foremost, the text of article 54 refers to awards being recognised and enforced, without qualification. It is impossible to read those words as referring only to awards against investors and excluding all awards against states. Had that outcome been intended, it could easily have been stated, but no hint of it appears in the text and to interpret the article in that way would require a dramatic re-writing. Further, article 55, preserving state immunity from execution, only makes sense (and has any purpose) if article 54 requires recognition and enforcement against states. If states were excluded altogether from the scope of article 54, no question of execution would arise.

79. It is also clear, as a matter of language, that a Contracting State does not merely agree, by article 54, that it will recognise and enforce awards in its own jurisdiction, but also that awards to which it is party will be recognised and enforced in other Contracting States as though a final judgment: Lord Lloyd -Jones and Lord Sales in *Micula* stated at [105] that articles 53, 54 and 69 “provide a strong indication that a Contracting State which has an obligation under the Convention in relation to an award owes those obligations to all other states party to the Convention as well as to any party to the award”. Article 55 makes plain that that agreement does not extend to waiving immunity from execution of any such judgment.

80. The above straightforward reading of the text is supported, rather than undermined, by the clear object and purpose of the Convention, as evidenced by the Preamble. The importance of private international investment is the starting point. There is a recognition that disputes would usually be subject to national legal processes, but then recognition that mutual consent to arbitration through ICSID constitutes a binding agreement which requires that any award be complied with. Inherent in those recitals is the need to encourage private international investment, a concern to mitigate sovereign risk and a mutuality as to the binding effect of an award.

81. It follows, in my judgment, that the arguments advanced by Spain and Zimbabwe invite us to stray far from the ordinary meaning of the words used in the Convention and to subvert rather than apply its object and purpose.

82. Given that there is, in my view, no ambiguity or absurdity in the above interpretation, the *travaux* can only be used to confirm that meaning. In my judgment such confirmation is readily to be found. As the lengthy analysis by the HCA demonstrates (and is further confirmed by the analysis in *Micula* at [68] to [76]), throughout the preparatory stages the overarching intention was that awards (including awards against states) would be treated in each Contracting State as final judgments and enforced as such. The concern was that such process was not interpreted as removing

state immunity against execution if such immunity was otherwise conferred by domestic law: hence the introduction of the "for the avoidance of doubt" provision in article 55.

83. There is one further reason to reject Spain and Zimbabwe's arguments on this issue. As I understand it, they both accept that an ICSID award against a Contracting State, based on a valid reference to arbitration, can be registered in this jurisdiction by reason of section 9 of the SIA. That acceptance seems difficult to reconcile with the contention that ICSID awards against states are not registerable at all under article 54 (or, therefore, the 1966 Act).

Does article 54 contain an express and sufficiently clear submission to the jurisdiction?

84. Spain and Zimbabwe contended that the wording of article 54 is insufficient to satisfy the requirements of "a prior written agreement" for the purposes of section 2(2) of the SIA. They relied upon *R v Bow Street Metropolitan Stipendiary magistrate; Ex parte Pinochet Ugarte (No 3)* [1999] UKHL 17, [2000] 1 AC 147, in which the House of Lords considered sovereign immunity from extradition for crimes including torture in the context of the Torture Convention. At p.215A Lord Goff of Chieveley accepted the proposition that waiver of state immunity by treaty must always be express. At 216H to 217D Lord Goff considered the submission to the jurisdiction provisions contained in sections 2 and 9 of the SIA:

> "…Section 2(2) recognises that a state may submit to the jurisdiction by a prior written agreement, which I read as referring to an express agreement to submit. There is no suggestion in the Act that an implied agreement to submit would be sufficient, except in so far as an actual submission to the jurisdiction of a court of this country, may be regarded as an implied waiver of immunity; but my reading of the Act leads me to understand that such a submission to the jurisdiction is here regarded as an express rather than an implied waiver of immunity or agreement to submit to the jurisdiction. This is consistent with Part III of the Act, which by section 20 provides that, subject to the provisions of that section and to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to a sovereign or other head of state. Among the articles of the Vienna Convention on Diplomatic Relations so rendered applicable by section 2 of the Act of 1964 is article 32 concerned with waiver of immunity, paragraph 2 of which provides that such waiver must always be express, which I read as including an actual submission to the jurisdiction, as well as an express agreement in advance to submit. Once again, there is no provision for an implied agreement.
>
> In the light of the foregoing it appears to me to be clear that, in accordance both with international law, and with the law of this country which on this point reflects international law, a state's waiver of its immunity by treaty must, as Dr Collins submitted, always be express. Indeed, if this was not so, there could well be international chaos as the courts of different state parties to a treaty reach different conclusions on the question whether a waiver of immunity was to be implied."

85. Lord Saville of Newdigate, at p.267F addressed the same question in the following terms:

> "It is also said that any waiver by states of immunities must be express, or at least unequivocal. I would not dissent from this as a general proposition, but it seems to me that the express and unequivocal terms of the Torture Convention fulfil any such requirement. To my mind these terms demonstrate that the states who have become parties have clearly and unambiguously agreed that official torture should now be dealt with in a way which would otherwise amount to an interference in their sovereignty."

86. At p.268C Lord Millett stated that state immunity "may be asserted or waived by the state, but where it is waived by treaty or convention the waiver must be express."

87. Based in particular on Lord Goff's dictum, Spain and Zimbabwe argued that even if article 54 could be read as an agreement to submit to the jurisdiction (and thereby waive state immunity), such an agreement involved a process of implication, there being no express reference to either submission or to waiver.

88. The HCA considered the very same argument, in the context of section 10(2) of the Foreign States Immunities Act 1985, which provides:

> "A foreign state may submit to the jurisdiction at any time, whether by agreement or otherwise, but a foreign State shall not be taken to have so submitted by reason only that it is a party to an agreement the proper law of which is the law of Australia."

89. The HCA first recognised at [19] that it was a principle of international law that waiver of immunity in an international agreement must be express, and saw that principle reflected in speeches of Lord Goff and Lord Millett in *Pinochet*. The HCA then addressed the meaning of the requirement that waiver of immunity be express as follows:

> "23. There is some ambiguity about what these numerous statements mean by their insistence that a waiver of immunity in a treaty be "express". Part of the difficulty is a lack of clarity in legal discourse generally about what is meant by "express" meaning. Properly understood, express meaning can include implications, which constitute the unexpressed content of a statement or term and which are identified by inference.
>
> 24. An express term of an agreement involves words that are "openly uttered" either orally or in writing. The meaning of an express term is derived primarily from the content of the words expressed. It contrasts with an implied term, the meaning of which is derived primarily by inference from the conduct of the parties to the agreement and the circumstances in light of the express terms. There can sometimes be difficulty in distinguishing between the two types of terms, because often the imprecision of language means that inferences are required to understand an express term. Even the words

> of the most carefully drafted international instrument are built upon a foundation of presuppositions and necessary implicatures and explicatures. The international authorities that insist upon express waiver of immunity in a treaty should not be understood as denying the ordinary and natural role of implications in elucidating the meaning of the express words of the treaty.
>
> 25. The insistence that the waiver be "express" should be understood as requiring only that the expression of waiver be derived from the express words of the international agreement, whether as an express term or as a term implied for reasons including necessity. For instance, Lord Goff's statement in *Pinochet [No 3]* that consent must be "express" was based on his acceptance of the submissions of Dr Collins, including that "[a] term can only be [recognised as] implied [in] a treaty for necessity, not to give the treaty maximum effect"…
>
> 26. In this sense, the insistence by international authority that a waiver of immunity in an international agreement must be "express" is an insistence that any inference of a waiver of immunity must be drawn with great care when interpreting the express words of that agreement in context. It does not deny that implications are almost invariably contained in any (expressed) words of a treaty. As senior counsel for Spain rightly put the point in oral submissions: "[T]here must be implications that surround every textual passage. The question is: what are those implications, and what level of clarity about the implication is required?" Accordingly, if an international agreement does not expressly use the word "waiver", the inference that an express term involves a waiver of immunity will only be drawn if the implication is clear from the words used and the context. In words quoted by Lord Goff in *Pinochet [No 3]* from the International Law Commission's commentary upon (what were then) the draft articles on jurisdictional immunities of States and their property, there is "no room" to recognise an implication of "consent of an unwilling state which has not expressed its consent in a clear and recognisable manner". And as Rehnquist CJ said, delivering the opinion of the Supreme Court of the *United States in Argentine Republic v Amerada Hess Shipping Corp*, a foreign State will not waive its immunity merely "by signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States". This reflects the "political principle that those who are independent and autonomous cannot, except by consent, exercise authority over, or establish an external source of authority over, others of independent and autonomous status".”

90. In the light of that analysis, the HCA rejected Spain’s contentions in the following terms:

> “27. Against this background of international law, there is no basis to interpret s 10(2) of the *Foreign States Immunities Act* as requiring a novel approach to interpretation that would exclude the possibility of

> a waiver of immunity being evidenced by implications inferred from the express words of a treaty in their context and in light of their purpose.
>
> 28. A high level of clarity and necessity are required before inferring that a foreign State has waived its immunity in a treaty because it is so unusual, and the consequence is so significant. Hence, s 10(2) makes clear that the mere fact that a State "is a party to an agreement the proper law of which is the law of Australia" is not sufficient to waive immunity from jurisdiction. But s 10(2) expressly refers to submission (and thus waiver) "by agreement".
>
> 29. For these reasons, and contrary to Spain's submissions, s 10(2) of the *Foreign States Immunities Act* aligns with the approach taken to waiver of immunity in the United States, where the general immunity of a foreign State from jurisdiction does not apply if the foreign State "waived its immunity either explicitly or by implication", and where it has been accepted that words said to evidence waiver by implication must be "construed narrowly", as well as that waiver "is rarely accomplished by implication" and only arises where "the waiver was unmistakeable". The waiver in s 10(2) is unmistakable."

91. Spain and Zimbabwe sought to distinguish the decision of the HCA on a number of grounds. First, it was contended that the relevant statutory regime in Australia is different because, although section 10(2) of the Foreign States Immunities 1985 Act is similar in terms to section 2(2) of the SIA, the 1985 Act does not contain an equivalent of section 9 of the SIA, the relevant exception in the 1985 Act being more narrowly confined to arbitrations in relation to commercial disputes. Spain and Zimbabwe argued that this difference may account for the HCA taking a broader view of the scope of section 10(2) than would otherwise have been the case. In common with Dias J at [56], I see no merit in that contention. The HCA was interpreting section 10(2) in the light of international law principles, without reference to the scope of other exceptions to state immunity in the 1985 Act. There is no basis for inferring that the HCA's conclusion was in some way reached "under pressure" by reason of the irrelevant and unspoken consideration that another exception to immunity was not available to the ISL claimants.

92. Second, it was argued that the HCA ultimately accepted and applied the law as it applies in the United States, namely, that waiver of state immunity in a treaty can be implied, a position which does not accord with the well-established law in this jurisdiction that waiver must be express. Again, I see no merit in that argument. The HCA made it plain that it was applying the international law principle that waiver must be express, as recognised in *Pinochet.* The HCA's elucidation of what "express" agreement means is in my judgment entirely consistent with the English law distinction between an express agreement and one which is merely implied. If the express words used amount, on their proper construction, to an unequivocal agreement by the state to submit to the jurisdiction, that is sufficient to satisfy section 2(2) of the SIA, even if the words "submit" and "waiver" are not used.

93. This conclusion is consistent with the decision of the Supreme Court in *NML Capital Ltd. v Republic of Argentina* [2011] UKSC 31, [2011] 2 AC 495. The case concerned

bonds which were governed by the law of New York (which applies a narrow construction in favour of the state to the construction of a term which is alleged to waive state immunity). The bonds contained the following provision (the first of two paragraphs dealing with enforcement) as to the enforcement of a judgment of the New York court:

> "…[the judgment] shall be conclusive and binding upon [Argentina] and may be enforced in any specified court or in any other courts to the jurisdiction of which the republic is or may be subject (the 'other courts') by a suit upon such judgment."

94. Lord Phillips of Worth Matravers PSC held at [59] that that provision, which refers to neither waiver nor submission expressly:

> "… was both an agreement to waive immunity and an express agreement that the New York judgment could be sued on in any country that, sate immunity apart, would have jurisdiction. England is such a country, by reason of what, at the material time, was CPR r 6.20(9). The provision in the first paragraph constituted a submission to the jurisdiction of the English courts."

95. Spain and Zimbabwe point to the fact that the bonds also contained (in the second paragraph) a far wider and express waiver of immunity, but Lord Phillips made it plain that the paragraphs both jointly and severally, amounted to an agreement to submit to the jurisdiction. Further, Lord Collins of Mapesbury (with whom Lord Walker of Gestingthorpe JSC agreed) stated at [128] that the first paragraph "was the clearest possible waiver of immunity because Argentina was or might be subject to the jurisdiction of the English court…". That waiver was "confirmed" by the second paragraph ([129)].

96. In my judgment the wording of article 54 of the Convention is just as clearly an agreement by Contracting States, including Spain and Zimbabwe, to waive immunity and submit to the jurisdiction of the courts of the United Kingdom (being those of another Contracting State), sufficient for section 2(2) of the SIA. That was also the decision of the HCA, considering, in effect, the very same issue.

97. I would add that I do not consider that the decision in *Svenska Petroleum* supports a different interpretation. Although there was a general waiver of state immunity by Lithuania in that case, the operative provision was an agreement to refer disputes to ICC arbitration. There was no agreement that Lithuania could be sued, or the award enforced, in any jurisdiction. The Court of Appeal's *obiter* view that there was no submission to the jurisdiction for the purposes of section 2 of the SIA (as opposed to section 9) is hardly surprising.

98. As mentioned above, Dias J accepted that article 54 was an express waiver of immunity, but held that it was insufficiently particularised as to parties and the dispute to amount to an agreement to submit to the jurisdiction. However, given that section 17(2) of the SIA provides that references to an agreement include references to a treaty or convention, I find that hard to follow. Such a treaty or convention will often be made between multiple states and will provide for events many years into the future. Provisions for submission to the jurisdiction of contracting parties in such

treaties and conventions will necessarily not identify the parties to the dispute or any other details. Yet they are expressly recognised as agreements for the purpose of section 2(2) of the SIA.

The effect of (and on) article III of the New York Convention

99. The 1958 New York Convention applies to the recognition and enforcement of arbitration awards made in the territory of states other than the state in which recognition and enforcement are sought. Article III provides:

> "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."

100. Section 101 of the Arbitration Act 1996 provides for New York Convention awards to be enforced in this jurisdiction, with leave of the court, as a judgment or order of the court to the same effect. But unlike the 1966 Act, there are provisions in section 103 of the 1996 Act allowing for refusal of recognition or enforcement on various grounds, including in 103(3) the ground of public policy.

101. Zimbabwe argued that the reading of article 54 of the Convention as a submission to the jurisdiction by Contracting States would necessarily result in the same conclusion being reached in respect of article III of the New York Convention in the case of awards against contracting states. Zimbabwe argues that this is contrary to the "well-established" position in English law that article III does not constitute a waiver of adjudicative state immunity and would have a far-reaching effect.

102. In my judgment the argument carries little force, and certainly cannot out-weigh the reasons for interpreting article 54 as a submission to the jurisdiction for the purposes of section 2(2) of the SIA set out above, reasons which have found favour in numerous states which are also party to the New York Convention. As the Border claimants submitted, there is no requirement in the VCLT that, in interpreting one treaty, regard must be had to the effect of a potential read-across to a second treaty dealing with a different though related subject-matter. Further:

i) it is by no means clear that interpreting article 54 as a submission to the jurisdiction for the purposes of section 2(2) of the SIA would necessarily result in article III also being so interpreted. The two provisions are not worded identically, article III referring to the award being enforced "in accordance with the rules of procedure of the territory where the award is relied upon". As state immunity is regarded as a procedural bar as a matter of international law, it may be that article III preserves state immunity on its own terms. Further, whereas the Convention is necessarily dealing with awards to which a Contracting State is party, that is far from the case in relation to the New York Convention. The conclusion that article 54 contains an "unmistakeable" agreement by states that awards against them would be enforced may not be so

obvious in respect of article III. We did not hear full argument on those issues and are certainly not in a position to decide them.

ii) although Zimbabwe asserts that it is "well-established" that article III does not amount to a submission to the jurisdiction for the purpose of section 2(2) of the SIA, the point does not appear to have been argued before, let alone decided by the English courts. It was common ground that article III has been held to contain a submission to the jurisdiction by a state in Australia in *CCDM Holdings v India (No.3)* [2023] FCA 1266.

iii) it is unclear why the consequences would be dramatic if article III is also held to be a submission to the jurisdiction. Such submission would arise by virtue of section 9 of the SIA in any event if the award resulted from a valid agreement to arbitrate. Even if the state is deemed to have submitted to the jurisdiction by reason of article III, it may still contest the validity of the arbitration agreement (and hence the enforcement of the award) under section 103(2) of the 1996 Act.

Conclusion on section 2 of the SIA

103. It follows from the above that, in my judgment, Contracting States have submitted to the jurisdiction by virtue of article 54 of the Convention and therefore may not oppose the registration of ICSID awards against them on the grounds of state immunity.

The exception in section 9 of the SIA

104. If I am right in reaching the above conclusion, it is unnecessary to consider whether the exception to general adjudicative state immunity in section 9 of the SIA is also engaged automatically in the case of ICSID awards, or specifically in the case of Spain and Zimbabwe.

105. In my judgment, however, it is difficult to interpret section 9 of the SIA other than as imposing a duty on the court to satisfy itself that the state in question has in fact agreed in writing to submit the dispute in question to arbitration. I do not see a legal basis, whether issue estoppel (as suggested by the Border claimants) or statutory interpretation (as suggested by the ISL claimants) which would justify the court in abrogating that duty and considering itself bound by the determination of the ICSID tribunal as to its own jurisdiction in that regard. Whereas the Convention, through article 54, supplies the prior written agreement to submit to the jurisdiction for the purposes of section 2(2), the Convention does not contain the relevant arbitration agreement and its processes cannot give rise to a valid arbitration agreement for the purposes of section 9 if none exists.

106. That leaves the question of the validity of the respective arbitration agreements, a particularly complex issue in the case of Spain and its challenge to the validity of article 26 of the ECT as a matter of international law, an issue I do not propose to embark upon in this judgment, since in the light of my conclusion in relation to section 2(2) it is unnecessary to decide whether the exception in section 9 applies and anything this Court said would be *obiter*. I did not understand the Border claimants to have put in issue Zimbabwe's challenge to the validity of the reference under the relevant BIT by way of its Respondent's Notice.

Zimbabwe's alternative defences to registration

107. Zimbabwe made it plain from the outset that, if it lost its challenge on state immunity grounds, it would oppose the enforcement of the ICSID award "on further grounds". It is suggested that these would come within the class of exceptional matters which were recognised in *Micula* as remaining open by reason of the award being treated like any other final judgment.

108. On 27 January 2023 Jacobs J made an order directing that a hearing be listed to determine the jurisdictional immunity issues in the matter. That was the hearing which came before Dias J and has resulted in this appeal. Jacobs J expressly recorded that this was subject to Zimbabwe's reservation as to non-immunity grounds.

109. It therefore seems that such grounds have not been adjudicated upon, remain at large, and therefore Zimbabwe is right to say that its application to set aside the registration order should not have been dismissed but should have been the subject of further directions. I say nothing about the merit of the non-immunity defences.

Conclusion

110. I would dismiss both appeals, save that I would remit Zimbabwe's application to set aside to the Commercial Court for directions as to determination of its non-immunity defences.

Lord Justice Newey

111. I agree.

Sir Julian Flaux Chancellor of the High Court

112. I also agree.