Arbitration International, 2024, **XX**, 1–26
https://doi.org/10.1093/arbint/aiae053
Advance access publication 14 March 2025
Article

Enforcement of ICSID awards and state immunity: should immunity trump all? Analysis of the English Court of Appeal's *ISL / Border Timbers* conjoined judgment, advocating for a domestic teleological interpretation

Katherine Reece Thomas[*], Doğan Gültutan[†]

ABSTRACT

International investment arbitration is arguably the most important means of international dispute settlement and has significant state immunity dimensions. It has all but replaced diplomatic protection as a means of redress for foreign investors. The delocalization of investment disputes by means of investment arbitration has meant that investors have not had to resort to domestic law or courts to settle their disputes against host states. The system works well so long as awards are honoured, but if domestic law processes become involved state immunity can stand in the way of execution and enforcement. A recent English case has highlighted certain state immunity-related complications that could stand in the way of enforcement. This article focuses on the recent English Court of Appeal decision in *Border Timbers / ISL*, in which it was recently decided that ICSID member states cannot resist the registration of ICSID awards by invoking principles of state immunity, adopting a teleological construction of the UK State Immunity Act 1978. The ruling ensures adherence to the UK's treaty obligations, as well as avoiding the re-politicization of investment disputes.

1. INTRODUCTION

Arbitration, particularly international investment arbitration ('IIA'), is arguably becoming the most important means of international dispute settlement and has significant state immunity

[*] Associate Professor, The City Law School, City St George's, University of London; Visiting Associate Professor and Fellow, University of Notre Dame (USA) in England.
[†] Lecturer, The City Law School, City St George's, University of London; Partner, Head of International Arbitration, Greymore. Dr Doğan Gültutan hereby discloses that he was part of the legal team at Baker & McKenzie LLP (London), which represented the claimant investors in the *Border Timbers* case, at both the first instance and appellate levels. Dr Gültutan has since (before the judgment was handed down) left the firm. Dr Gültutan has obtained the firm's written consent to this publication, not that it was strictly necessary given that its contents are part of the public record.

dimensions.[1] IIA usually involves an investor (company or individual) seeking a remedy in respect of its investment against the respondent (host) state by means of arbitration. It has come into being since the last half of the 20th century and has now replaced diplomatic protection as a means of redress for claimants alleging harm caused to them or their investment in a foreign state.[2]

The emergence of state-to-state investment treaties providing for direct investor–state arbitration and the adoption of the International Convention for the Settlement of Investment Disputes (the 'ICSID Convention') in 1965 are the two most important factors driving IIA.[3] With the entry into force in 1966 of the ICSID Convention and the establishment of the International Centre for Settlement of Investment Disputes ('ICSID') under the auspices of the World Bank, mechanisms have been put in place facilitating investor–state dispute settlement ('ISDS') by arbitration under the many bilateral investment treaties ('BITs'; 'BIT' in the singular) and multilateral investment treaties ('MITs'; 'MIT' in the singular) signed since the end of the Second World War.[4]

The delocalization of investment disputes by means of neutral arbitration under the ICSID Convention process has meant that investors have not had to resort to domestic law or domestic courts to settle their disputes against states. If awards are not met, article 54 of the ICSID Convention requires state parties to recognize and enforce ICSID arbitral awards as though they were decisions of the domestic court.

The system works well so long as awards are honoured, but if domestic law processes become involved state immunity can stand in the way of execution and enforcement against respondent states. Recent developments in English case law relating to immunity have highlighted that all is not straightforward in IIA.

This article focuses on the recent English Court of Appeal decision in the conjoined appeals of *Border Timbers Ltd, Hangani Development Co. (Private) Limited v Republic of Zimbabwe* (on appeal from [2024] EWHC 58 (Comm) ('*Border Timbers*')) and *Infrastructure Services Luxembourg S.À.R.L. (formerly Antin Infrastructure Services Luxembourg S.À.R.L.), Energia Termosolar B.V. (formerly Antin Energia Termosolar B.V.) v Kingdom of Spain* (on appeal from [2023] EWHC 1226 (Comm) ('*ISL*')) [2024] EWCA Civ 1257 ('*ISL / Border Timbers CA*'). The judges at first instance in these cases took different views on the effect of the ICSID Convention on UK state immunity law. The Court of Appeal recently decided that ICSID member states are not entitled to resist the registration of ICSID awards by invoking principles of state immunity.

That decision will be analysed in the context of the wider relationship between immunity and IIA following an introduction to state immunity rules in England and Wales.

2. INTRODUCTION TO STATE IMMUNITY

a. The move away from the absolute doctrine of immunity

It is difficult, if not impossible, to sue a state in a domestic court with success, and it is even harder to enforce a judgment against a state in such a court. This applies in all jurisdictions

[1] PD Winch, 'Public Actors in International Investment Law' in C Titi (ed.), *European Yearbook of International Economic Law* (Springer 2021) 57–79.

[2] See Tom Mortimer and Chrispas Nyombi, 'The Evolution of International Investment Law Pre-1965' in Tom Mortimer and Chrispas Nyombi (eds), *Rebalancing International Investment Agreements in Favour of Host States* (Wildy, Simmonds & Hill 2018).

[3] ICSID Convention, https://icsid.worldbank.org/resources/rules-and-regulations/convention/overview accessed 16 November 2024.

[4] Over 2000 BITs have entered into force. Examples of MITs include the Energy Charter Treaty and the US–Mexico–Canada agreement of 2020; https://investmentpolicy.unctad.org/international-investment-agreements accessed 16 November 2024.

and is a rule of customary international law. Of the several rationales for the rule, the equality, independence, and sovereignty of states expressed by the Latin maxim *par in parem non habet imperium* is the one most often invoked. Sovereign or state immunity is one of the oldest rules in international law.

Developments in the late 20th and early 21st century saw immunity restricted in scope. First, it became possible to sue states in relation to commercial activities, torts in the jurisdiction and shipping matters as more and more states adopted the 'restrictive doctrine' of state immunity.[5] States do not follow an entirely consistent approach in restricting what had been absolute immunity. Different jurisdictions employ different tests and approaches to the curtailment of immunity. Agreement on a codifying United Nations convention was reached in 2004 but the treaty is not in force and its status as representing customary international law is debatable. Differences focus on the meaning of 'commercial', the test for public purpose and, more recently, submission to jurisdiction and agreement to arbitrate.[6]

While the restrictive doctrine in its various guises is now well embedded in most jurisdictions, a successful private litigant may still find it impossible to recover against state assets as an extra layer of protection surrounds those assets in foreign jurisdictions, and complicated rules about service, process, discovery, and pre-trial procedures can impede recovery.

There are several explanations in international law for the doctrine of state immunity that protects one state from the courts of another. The prevailing view is that immunity, as a limit on a state's right to exercise domestic jurisdiction over the activities of other states, is aimed in part at preserving the sovereignty and equality of states.[7] These building blocks of international law justified an absolute approach to immunity until the latter part of the 20th century. Immunity was a derogation from the court's jurisdiction justified by sovereign equality and the independence of states.

By the end of the century, the restrictive doctrine had taken hold in most jurisdictions replacing absolute immunity. Today, in the courts of most states, a foreign state is no longer immune in respect of its commercial activities (*acte jure gestionis*) but is immune from domestic litigation for almost all else (*acte jure imperii*), which may include war crimes and acts of torture (unless classified as a tort and committed in the forum state). Specific rules relate to arbitration, as explored in this article.

Being able to pursue a legal claim against a state in the English courts is one thing, taking enforcement action against states is another. Enforcement is largely limited to the pursuit of assets in use for commercial purposes. The law differentiates between states as such and separate state entities whose immunity is more restricted. State and diplomatic immunity (the immunity of the individual diplomat or diplomatic premises) must also be distinguished. The immunity of states with respect to criminal proceedings is absolute.[8]

b. The restrictive doctrine today: immunity from suit

The 1972 European Convention on State Immunity adopted the restrictive doctrine as did the United Kingdom State Immunity Act 1978 ('SIA') (in force since 22 November 1978). Most common law jurisdictions have enacted similar legislation: the US Foreign Sovereign Immunities

[5] Katherine Reece-Thomas, *The Commercial Activity Exception to State Immunity, An Introduction* (Edward Elgar, 2024), chapters 1 and 2; https://www.e-elgar.com/shop/gbp/the-commercial-activity-exception-to-state-immunity-9781803923451.html?srsltid=AfmBOoqBvkdfwWm3MRHBOwGyOZHn6qtL1eZUWF25xiiUuFRhRuwIg1e1 accessed 4 November 2024.

[6] United Nations Convention on Jurisdictional Immunities of States and Their Property 2004, https://treatiesectionun.org/Pages/ViewDetailsectionaspx?src=IND&mtdsg_no=III-13&chapter=3&clang=_en accessed 4 November 2024.

[7] Immunity issues that arise in suits brought directly against a sovereign or head of state as defendant may take the form of an action *in rem* (in English law) against property in which the sovereign has an interest and less often immunity may also be pleaded in an *inter partes* action affecting property in which the State has an interest. Charles J Lewis, *State and Diplomatic Immunity* (3rd edn, Lloyd's of London 1990) 1. Reece-Thomas (n 5) chapter 1

[8] See, Reece-Thomas (n 5); and State Immunity Act 1978, sections 1 and 16(4).

Act 1976, the Canadian State Immunity Act 1985 (as amended), and the Australian Foreign States Immunities Act 1985 (as amended) are good examples. In 2004, the UN Convention on the Jurisprudential Immunity of States and their Property ('UNCSI') was signed but is not yet in force. Significantly in 2012, the International Court of Justice ('ICJ') reconfirmed that restrictive immunity applies as a matter of customary international law in *Jurisdictional Immunities of the State (Germany v Italy)*.[9] The UNCSI, the SIA, and other common law statutes mostly approach restrictive immunity by providing that absolute immunity applies subject to enumerated exceptions, essentially but not exclusively centred on the nature of the transaction or activity as opposed to its purpose.[10]

The SIA specifies that a state will be immune from suit and therefore enforcement unless the activity in question falls within one of the exceptions enumerated in the Act (section 1). A state will always be immune in respect of criminal proceedings (section 16, SIA). It will not be immune if (i) it has waived its immunity, distinguishing between waiver from suit and waiver from enforcement (section 2, SIA), (ii) the suit relates to the state's commercial transactions and contracts to be performed in the UK (section 3, SIA), (iii) the litigation relates to a contract of employment (section 4, SIA) (subject to exceptions), (iv) the state is alleged to have committed a tort in the jurisdiction resulting in death or personal injury or loss of tangible property (section 5, SIA), (v) proceedings relate to arbitration to which a state has submitted (section 9, SIA), or (vi) the claim relates to a situation covered by sections 6–11 of the SIA (which includes maritime claims and those relating to tax, intellectual property, and corporate ownership). The sections 2 and 9 exceptions to state immunity are considered in detail below as those provisions were the focal point of the Court of Appeal's judgment in *ISL / Border Timbers CA*.

In litigation involving a foreign state or a foreign state entity in UK courts, the issue of whether immunity applies is dealt with as a preliminary matter. A judge can raise state immunity issues even if they are not pleaded. If the immunity plea fails, then the court can only hear the matter if it has jurisdiction, and the rules establishing its jurisdiction will need to be applied. Considerations of act of state and non-justiciability arise, if at all, at that stage.[11]

The extent of state immunity where arbitration proceedings are involved and the way in which a state can be served, and awards enforced against it in England and Wales, are areas of discussion and development in English law. The *ISL / Border Timbers CA* case is an example of this trend.

3. EXCEPTIONS TO STATE IMMUNITY UNDER ENGLISH LAW

a. Submission to jurisdiction

Under the SIA a state will not be immune 'as respects proceedings in respect of which it has submitted to the jurisdiction' of the English courts (section 2(1)). State immunity is a preliminary procedural plea but by pleading immunity a state is not deemed to have submitted to the jurisdiction (section 2(3), SIA).

In the context of proceedings in the English courts involving arbitration, issues of waiver have arisen. Section 2(2) of the SIA provides that a state may waive its immunity by submitting to the jurisdiction after a dispute has arisen or by prior written agreement. A waiver from suit does

[9] [2012] ICJ Rep 99.

[10] See *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62 (UKSC) [37]–[52] (per Lord Sumption).

[11] Issues of jurisdiction in civil matters depend on the common law, the Civil Jurisdiction and Judgments Act 1982 (as amended) and (since the UK's departure from the European Union in 2020) on the application of the Convention of 30 June 2005 on Choice of Court Agreements. On acts of state, see *Belhaj v Straw (United Nations Special Rapporteur on Torture intervening)* [2017] UKSC 3 (UKSC) [25] (per Lord Mance).

not amount to a waiver from enforcement but the courts do not construe agreements to waive narrowly. A submission to arbitration may have the effect of a waiver.[12]

As soon as immunity is raised, proceedings must be halted for the plea to be considered. If a state takes a step in the proceedings, it will be deemed to have submitted under section 2(3)(b) of the SIA (subject to exceptions in sections 2(4) and (5)).[13]

State parties waive state immunity in respect of recognition and enforcement of ICSID awards.[14] The extent to which this amounts to a waiver of state immunity for section 2 of the SIA was considered by the first instance court in *ISL* where it was decided that, by virtue of article 54 of the ICSID Convention, the state was found to have submitted to the jurisdiction. This decision was not followed in *Border Timbers* where the first instance judge held that the waiver of immunity under article 54 was unrelated to any identifiable proceedings and was therefore not synonymous with a submission to the jurisdiction under section 2(2) of the SIA.

The extent to which an agreement to arbitrate is a submission to jurisdiction and hence a waiver of immunity under section 2 of the SIA will be carefully examined below when we discuss the Court of Appeal's decision in the *ISL* and *Borders* conjoined appeals.

b. Arbitration exception

By section 9 of the SIA, submission to arbitration acts without more as a waiver of immunity in relation to arbitration proceedings in the English courts. Section 9 is drafted in clear language and its scope has been explored in a number of English cases.[15] Where a state has agreed in writing to submit a dispute to arbitration (in advance or after a dispute has arisen) the state will not benefit from immunity before a UK court in respect of proceedings which relate to that arbitration. Section 9 acts as a specific exception to immunity for proceedings to recognize and enforce an arbitral award and for all proceedings relating to an arbitration to which a state is a party. It also establishes English jurisdiction in relation to all such proceedings. The consent given by the state to an arbitration is the source of the exception to immunity.

A distinction, however, has to be made between seeking to have a foreign arbitral award recognized and enforced by the English courts where immunity is precluded by section 9 and seeking to enforce any court order so made by execution against state assets, which is the subject of section 13 of the SIA. Only state assets in use or intended for use for commercial purposes can be executed against. Section 17 of the SIA states that 'commercial purposes' are those referred to in section 3.[16]

Section 9 applies to all types of arbitration including under IIAs and investor–state arbitrations commenced under the ICSID Convention. Registration of awards rendered under the ICSID Convention takes place in the UK in accordance with the Arbitration (International Investment Disputes) Act 1966 (the '1966 Investment Disputes Act').

Section 9 refers to proceedings 'which relate to arbitration' and this has been interpreted to include enforcement proceedings relating to a foreign (as opposed to domestic) award under

[12] Discussed in *ISL / Border Timbers CA* [2024] EWCA Civ 1257 as explained below.

[13] Arbitration can give rise to issues in this respect as well: In *London Steam Ship Owners Mutual Insurance Association Ltd v Spain (The Prestige (No.2))* [2015] EWCA Civ 333, an application for relief under the 1996 Act was a step in the proceedings other than for the sole purpose of claiming immunity and Spain was thus deemed to have submitted to the jurisdiction of the court under s 2(3)(b) of the SIA. Applying *Kuwait Airways Corp v Iraqi Airways Co (No.1)* [1995] 1 WLR 1147. See discussion of s 9 in Section 5.

[14] ICSID Convention, art 54.

[15] See *PAO Tatneft v Ukraine* [2018] EWHC 1797 (Comm); *Gold Reserve Inc v Venezuela* [2016] EWHC 153 (Comm); *Ecuador v Occidental Exploration & Production Co* [2005] EWCA Civ 1116; *London Steam-Ship Owners' Mutual Insurance Association Ltd v The Kingdom of Spain (The Prestige (No.4))* [2020] EWHC 1920 (Comm).

[16] In *General Dynamics UK Ltd v Libya* [2024] EWHC 472 (Comm), a final charging order was granted over a property owned by the state of Libya as the arbitration agreement operated as a waiver of immunity from enforcement. SIA, s 13(3) had to be satisfied as this was an enforcement action against state property, not just a recognition of an award under s 9 of the SIA. This decision is being appealed.

section 101 of the Arbitration Act 1996 (the '1996 Act'). Fraser J interpreted this broadly in *ISL* but the Court of Appeal did not agree in *ISL / Border Timbers CA* as discussed in Section 5(c).

It had been decided that a state would be found to have submitted in writing to arbitration under section 9 of the SIA by entering into a BIT which provides for the settlement of investor–state disputes by arbitration[17], but this is now in doubt in light of ISL / Border Timbers CA. Section 9 of the SIA has also been found to encompass enforcement of the arbitration award and registration of the foreign judgment related to the arbitration.[18]

A failure by a state to raise points as to immunity at the original arbitration stage does not prevent it from asserting immunity in England under section 9 of the SIA in proceedings to enforce the award in England. In *Tatneft v Ukraine*, Butcher J explained that '[T]here is nothing in the SIA which suggests that there can be a foreclosure of the points which the state may raise as to the applicability of the immunity afforded by the SIA by reason of what may have occurred in front of an arbitral tribunal'.[19] Of particular relevance, in that case, was the fact that, under the SIA, a state enjoys immunity unless one of the exceptions applies, and also that state immunity issues must be considered by the court of its own motion even if not raised by the defendant state. The Judge noted, however, that a state party could by its clear conduct in the underlying arbitration waive its immunity 'not just for the purposes of the arbitration but for wider purposes including any subsequent issues as to state immunity before a national court'. On the particular facts, there was no such clear conduct. That being the case, Ukraine's claim to immunity was rejected based on the Court's interpretation of the arbitration provisions of the relevant Ukraine–Russia BIT construed against Ukraine's jurisdictional objections.[20]

Both the *ISL* and *Border Timbers* cases considered not only section 2 of the SIA on submission but also section 9(1) of the SIA and the meaning of the words 'agree[ment] in writing to submit a dispute which has arisen, or may arise, to arbitration'. In *ISL*, the Court (Fraser J) refused Spain's application to set aside a without-notice order by which an ICSID arbitration award obtained by the claimants had been registered under the 1966 Investment Disputes Act. The Court considered itself obliged to give effect to the UK's obligations under the ICSID Convention and to apply the provisions of the 1966 Investment Disputes Act. As a result, Spain was not immune; article 26 of the Energy Charter Treaty, incorporating the provisions of the ICSID Convention, constituted a prior written agreement to arbitrate for the purposes of section 9 of the SIA.[21]

Dias J in *Border Timbers* disagreed. The critical issue was whether, for the purposes of determining the applicability of the exception in section 9 of the SIA, the English court was bound by the ICSID tribunal's (and the ICSID annulment committee's) determination as regards jurisdiction. She found it was not and that, in applying section 9 of the SIA, an English court must be independently satisfied that there was an agreement to submit the particular dispute

[17] In *Gold Reserve Inc v Venezuela* [2016] EWHC 153 (Comm) Teare J., following *Ecuador v Occidental Exploration & Production Co* [2005] EWCA Civ 1116, found that Venezuela had submitted to the court's jurisdiction.

[18] *LR Avionics Technologies Ltd v Nigeria* [2016] EWHC 1761 (Comm) (applying *Svenska Petroleum Exploration AB v Lithuania (No.2)* [2006] EWCA Civ 1529). This was endorsed by Butcher J. in *London Steam-Ship Owners' Mutual Insurance Association Ltd v The Kingdom of Spain (The Prestige (No.4))* [2020] EWHC 1920 (Comm). This finding was appealed but the decision on arbitration was upheld: *London Steam-Ship Owners' Mutual Insurance Association Ltd v Spain London Steam-Ship Owners' Mutual Insurance Association Ltd v The French State M/T 'Prestige' (Nos. 3 and 4)* [2021] EWCA Civ 1589 and leave to appeal to the Supreme Court refused: [2022] 10 WLUK 654. In the earlier, related, case of *London Steam Ship Owners Mutual Insurance Association Ltd v Spain* [2015] EWCA Civ 333 it was held that claiming under an insurance policy as a third party amounted to agreeing to the original arbitration provisions and resulted in a loss of state immunity. In that case, the court also found that the defendants' pursuit of a claim in the Spanish proceedings amounted to an adoption of the arbitration agreement under s 9(1) even though there was no written arbitration agreement.

[19] *PAO Tatneft v Ukraine* [2018] EWHC 1797 (Comm) [35].

[20] ibid [94], [99], [102], and [111].

[21] Applying *Svenska Petroleum Exploration AB v Lithuania (No.2)* [2006] EWCA Civ 1529 [91–103].

to arbitration, and that this is so whether or not any particular points were argued in the arbitration.[22]

The Court of Appeal in *ISL / Border Timbers CA* discussed section 9 of the SIA but its conclusion that the section did not remove immunity in these cases was only obiter as explained in Section 5(c).

4. ICSID AWARDS AND STATE IMMUNITY

Until recently, state immunity issues rarely arose in the context of the enforcement of ICSID awards.[23] Historically, most ICSID awards have been voluntarily complied with.[24] This is due to the commonplace understanding that ICSID is a 'self-contained system [permitting] limited review of an ICSID award', oftentimes producing final and unchallengeable arbitral awards.[25] This commonplace understanding emanates principally from the text of the ICSID Convention itself, which—*inter alia* and most notably—establishes an internal annulment mechanism.[26] ICSID awards were, therefore, considered apart and not boxed together with the other awards when it came to matters of enforcement, with the non-ICSID awards usually being capable of enforcement under the New York Convention.

Whilst the New York Convention triggered domestic review regimes, permitting the award to be re-assessed on jurisdictional and limited substantive bases, this was not possible for ICSID awards.[27] In the words of an eminent commentator, there was until recently 'a settled understanding that ICSID awards are fully shielded from review when they come before a national court for enforcement'.[28] Similarly, van den Berg once remarked the ICSID regime as establishing a 'comprehensive, self-sufficient system of truly international arbitration in the area of investment deputes … [which] exclude[s] the application of any national arbitration law'.[29] That aspect of the ICSID Convention is what made ICSID arbitration most appealing to investors investing in foreign, often risky jurisdictions.[30]

However, that orthodox understanding of the nature and effect of ICSID awards has recently been challenged, in part due to the ever-increasing number of ICSID awards being issued against host states with significant compensation awards.[31] Saunders and Salomon once predicted that '[A]s the number of BIT claims increases there will inevitably be more instances of awards not being paid voluntarily'.[32] This prediction has proved too accurate too soon, with many cases being reported in which states are resisting lawful enforcement of arbitral awards on (arguably) slim grounds.

[22] Applying Butcher J's reasoning in *PAO Tatneft v Ukraine* [2018] EWHC 1797 (Comm).

[23] See *Border Timbers* [18]; see also Edward Baldwin, Mark Kantor and Michael Nolan, 'Limits to Enforcement of ICSID Awards' (2006) 23 J Int'l Arb 1, 1 and 22; Susan Choi, 'Judicial Enforcement of Arbitration Awards under the ICSID and New York Conventions' (1995) 28 NYU J Int'l L & Pol 175.

[24] See Andrea K Bjorklund, Lukas Vanhonnaeker, Jean-Michel Marcoux, 'State Immunity as a Defense to Resist the Enforcement of ICSID Awards' (2020) 35(3) ICSID Review—Foreign Investment Law Journal 506–522, 507; David Gaukrodger and Kathryn Gordon, 'Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community', OECD Working Papers on International Investment 2012/03, 30; and Matthew Saunders and Claudia Salomon, 'Enforcement of Arbitral Awards Against States and State Entities' (2007) 23(3) Arbitration International 467–476, 467.

[25] Baldwin et al. (n 23) 3; Albert Jan van Den Berg, 'Recent Enforcement Problems under the New York and ICSID Conventions' (1989) 5(1) Arbitration International 2–20, 3–4.

[26] See George A Bermann, 'Understanding ICSID Article 54' (2020) 35(1–2) ICSID Review—Foreign Investment Law Journal 311–344.

[27] ibid 326 and 332.

[28] ibid 313.

[29] Van Den Berg (n 25) 3–4.

[30] Bjorklund et al. (n 24) 507.

[31] Baldwin et al. (n 23).

[32] Saunders and Salomon (n 24) 467.

a. The ICSID Convention

The ICSID Convention is one of the greatest assets of the international (investment) arbitration community, instilling confidence and trust in foreign investors and facilitating foreign direct investment in real terms.[33] The General Counsel of the World Bank (Aron Broches), the chief architect of the Convention,[34] explained that the ultimate motivation behind the proposal for establishing ICSID was 'the urgent need of promoting the flow of private investment to areas in need of capital'. He continued:

> That private capital is not now moving to these areas in sufficient volume is not in dispute. Nor is there room for doubt that one of the most important impediments to the flow of private capital is the fear of investors that their investment will be exposed to political risks, such as outright expropriation without adequate compensation, governmental interference short of expropriation which substantially deprives the investor of the control or the benefits of his investment, and non-observance by the host government of contractual undertakings in reliance on which the investment was made.[35]

Many scholars have positively commented on the utility of the ICSID Convention in facilitating and enhancing foreign direct investment, particularly for less developed and developing countries. This includes the framework established by the Convention to assist with the amicable resolution of investment disputes through arbitration, thereby providing a real alternative to the unattractive 'gunboat diplomacy' that reigned in the 19th century and before.[36] However, recent attempts by states to evade their payment obligations under investment awards risk the '"re-politicization" of investment disputes [which would be] an unfortunate reversion to a time when power politics [and in the extreme cases brute force] dictated the outcome of legal disputes'.[37] A re-consideration of the ICSID framework and its interaction with state immunity principles is, therefore, much needed.

The Convention's preamble is instructive in explaining the aims and purposes willingly agreed to by contracting states, and stipulates:

> **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…

[33] Francesco Sorace, 'Enforcing an ICSID Award Issued in an Intra-EU Investment Arbitration: An Italian Law Perspective' (2023) 3 The Italian Review of International and Comparative Law 87–114, 89.

[34] *Border Timbers* [31].

[35] SID/63-2 (18 February 1963), 'Paper prepared by the General Counsel and transmitted to the members of the Committee of the Whole', 3. See also Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Volume 1, Part A; and Choi (n 23) 177.

[36] See Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safe-guarding of Capital* (Cambridge University Press 2013), 19. See also Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2012), 1 *et seq*.; and Jeswald W Salacuse, *The Law of Investment Treaties* (OUP 2015), 87 *et seq*.

[37] See Andrea K Bjorklund, 'Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes' 21 Am Rev Int'l Arb 211, 214, and 239 *et seq*.

The drafters of the Convention were at pains to underscore the point that its principal (dual-)purpose of implementation was to incentivize foreign direct investment and at the same time to protect those investments once made, including through amicable resolution of disputes arising in connection therewith. Notwithstanding these goals, there are jurisdictional prerequisites for the applicability of the ICSID Convention, as elaborated below.

b. ICSID jurisdiction

The ICSID Convention does not itself robe an arbitral tribunal with jurisdiction. It creates the framework for the resolution of investment disputes, but the tribunal's jurisdiction must originate in a separate, self-standing agreement to arbitrate. To put it differently, the parties must have agreed to submit their disputes to ICSID arbitration for an ICSID tribunal to have jurisdiction. This is provided for in article 25(1) of the ICSID Convention, which stipulates as follows:

> The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, **which the parties to the dispute consent in writing to submit to the Centre**. (Emphasis added)

Furthermore, the Preamble to the Convention 'Declar[es] 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'. In fact, it was made clear by Broches in his paper advocating the need for the ICSID Convention that its use would be 'entirely voluntary', and that '[N]o government and no investor would ever be under an obligation to go to conciliation or arbitration without having consented thereto'.[38] Schreuer corroboratively notes that '[C]onsent by both or all parties is an indispensable condition for the jurisdiction of the Centre. The fact that the host State and the investor's State of nationality have ratified the Convention will not suffice'.[39]

Accordingly, for an investor to be able to commence an ICSID arbitration claim against a state, it must first locate and trigger an arbitration agreement with the state providing for ICSID arbitration. The agreement to ICSID arbitration is most commonly found in private contracts with states (or state bodies) and in treaties between states, such as in BITs and MITs. In respect of the latter, such treaties contain unilateral offers to arbitrate, which qualifying investors can invoke provided the requisite conditions are satisfied.[40]

c. The role of the Annulment Committee

As explained above, the ICSID Convention provides for a 'self-contained system' for the review of awards rendered by ICSID tribunals.[41] Under article 52, an ICSID tribunal's determination on matters of jurisdiction or on the merits of a dispute may be challenged by way of a request for annulment.[42] The grounds for annulment are exhaustively listed and related to the (i) proper

[38] SID/63-2 (18 February 1963), 'Paper prepared by the General Counsel and transmitted to the members of the Committee of the Whole', 4, in Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Volume II, Part 1.

[39] SW Schill, C Schreuer, A Sinclair, 'Article 25' in SW Schill, L Malintoppi, A Reinisch, CH Schreuer, A Sinclair (eds), *Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (Cambridge University Press 2022), 80–538, 346–347 [759].

[40] Saunders and Salomon (n 24) 471.

[41] A Reinisch, 'Article 53' in SW Schill, L Malintoppi, A Reinisch, CH Schreuer, A Sinclair (eds), *Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (Cambridge University Press 2022) 1443–1469, 1452.

[42] ICSID Convention, art 52(1).

constitution of the tribunal, (ii) the tribunal manifestly exceeding its powers, (iii) corruption of the tribunal, (iv) serious departure from a fundamental rule of procedure, or (v) failure to state reasons on which the award is based. The procedure ensures the finality of the ICSID arbitral process. The award cannot, for instance, be re-considered by national courts.[43]

An *ad hoc* Committee is formed to hear and determine any annulment request, with the Committee consisting of three persons and excluding the arbitrators who served on the initial tribunal.[44] The *ad hoc* Committee may 'annul the award or any part thereof on any of the grounds [for annulment]'.[45] If the award of the tribunal is annulled, a new tribunal will have to be constituted to re-determine the claims.[46]

Awards are very rarely annulled under the ICSID regime. This reflects the intention of the drafters; annulment was to be permitted within strict time limits and treated as an exceptional remedy, respecting the finality of tribunal awards.[47] As Bermann commented, the 'enforceability, and more broadly the finality, of ICSID awards lies at the heart of the Convention's raison d'etre'.[48] A study undertaken by ICSID itself shows that out of the 885 cases registered as of 31 December 2023, 434 awards were rendered, and only 7 of those awards were annulled in full, with another 16 awards being partially annulled. This equates to a 5.3 per cent success rate on annulment applications.[49] The ICSID annulment procedure has accordingly been described as 'exceptional and narrowly circumscribed',[50] an 'extraordinary remedy for unusual and important cases'.[51] The marginal rate of success of annulment applications has not, however, deterred such applications, with a recent study by the British Institute for International and Comparative Law finding that annulment proceedings have increased dramatically in the past decade or so.[52]

d. ICSID Convention and enforcement of awards thereunder

Enforcement is the ultimate prize for a claimant investor. It is the pot of gold at the end of the rainbow. Without actual enforcement and execution of the award, the endeavour will most likely be considered pointless. The ability of investors to be able to actually realise an award is, therefore, of paramount importance. That is why enforceability of ICSID awards 'lies at the heart of the Convention's raison d'etre'.[53]

The drafters of the ICSID Convention were not oblivious to this fact. Discussion of the issues of enforcement and execution of awards attracted considerable attention at the consultative meetings.[54] The matter was ultimately agreed as recorded in articles 53–55 of the ICSID Convention, located in its Chapter IV, section 6 of the Convention. Those provisions are quoted below in full given their centrality to the analysis that follows.

[43] See *Maritime International Nominees Establishment v Republic of Guinea* (II), ICSID Case No. ARB/84/4, Decision for Partial Annulment of the Arbitral Award, 22 December 1989, para 4.02; and Christoph Schreuer, 'ICSID Annulment Revisited' (2003) 30 Legal Issues of Econ Integration 103.

[44] ICSID Convention, art 52(3).

[45] ibid.

[46] ibid art 52(6).

[47] Mark B Feldman, 'The Annulment Proceedings and the Finality of ICSID Arbitral Awards' (1987) 2(1) ICSID Review—Foreign Investment Law Journal 85, 98.

[48] Bermann (n 26) 313.

[49] ICSID Updated Background Paper on Annulment (March 2024), 100.

[50] ibid 46.

[51] *CDC Group plc v Republic of the Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment (June 29, 2005) [34].

[52] British Institute of International Comparative Law and Baker Botts' *Empirical Study: Annulment in ICSID Arbitration* (London 2021), 6.

[53] Bermann (n 26) 313.

[54] See Aron Broches, 'Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution' (1987) 2(2) ICSID Review—Foreign Investment Law Journal 287–334; and *ISL / Border Timbers CA* [75].

> **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. (2) For the purposes of this Section, 'award' shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52. (Emphasis added)
> **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**. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent 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 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. (Emphasis added)

Article 53(1) seemingly shields an ICSID award from any appeal or other challenge before the domestic courts. Accordingly, the enforcement of ICSID awards should be more straightforward and subject to fewer hurdles when compared with the enforcement of non-ICSID arbitral awards, whether investment or otherwise.[55] This is confirmed by article 54(1) which imposes an obligation on contracting states to recognize awards as binding and enforce pecuniary obligations imposed as if the award were 'a final judgment of a court in that State'. The authors are not aware of a similar privilege and protection offered to non-ICSID awards. The award may, nevertheless, be open to challenge on the (limited) grounds available under domestic laws for challenges against final court judgments.[56]

Under the ICSID Convention, matters of execution of awards are, however, reserved and designated to be governed by municipal laws concerning the execution of judgments (article 54(3)). As Bermann explains, semantics are important when it comes to differentiating between enforcement and execution; whilst enforcement is to be understood as referring to the transformation of the arbitral award into a local court judgment, execution is the means by which that judgment is given effect.[57]

It is noteworthy that article 54, on its face, permits the recognition and enforcement of ICSID awards against both sides to the arbitration. It does not differentiate between recognitions and enforcements against investors and host states. Although the *travaux préparatoires* to the ICSID Convention demonstrate that the intention of the drafters was that the provision would apply only against investors, that was premised on a (now proven to be flawed) assumption that a contracting state would always honour its international law commitments as recorded under

[55] See Bjorklund (n 37) 216; A Reinisch, 'Article 54', in SW Schill, L Malintoppi, A Reinisch, CH Schreuer, A Sinclair (eds), *Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (Cambridge University Press 2022) 1470–1515, 1473.

[56] See Kateryna Bondar, 'Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review' (2015) 32 J Int'l Arb 621, 634 *et seq*.

[57] Bermann (n 26) 317.

the Convention.[58] There is a recent trend of states refusing to honour awards of international investment tribunals, both ICSID and non-ICSID.[59]

Article 55 confirms that article 54 was not intended as a provision derogating from the laws in force in any contracting state relating to immunity issues. Accordingly, matters of execution of an award and immunity from execution, where applicable, are reserved for the purview of the domestic courts where the award is to be executed. The Report of the Executive Directors on the Convention explains this as follows:

> The doctrine of sovereign immunity may prevent the forced execution in a State of judgments obtained against foreign States or against the State in which execution is sought. 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 forced 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.[60] (Emphasis added)

Given the paramount importance of the enforceability of an ICSID award considering its aim and purpose, Schreuer rightly describes the article 55 limitation on enforcement as 'the Achilles heel of the Convention', pointing out that the 'otherwise effective machinery of arbitration has its weak point when it comes to the actual execution against States of pecuniary obligations under awards'.[61] He correctly highlights that in addition to the drawbacks of the investor's inability to enforce an eventual favourable ICSID award, the weakness of the enforcement procedure is likely to make itself felt long before the stage of execution is reached, such as in settlement negotiations.[62]

It is near-universally accepted that the principle of state immunity is a cardinal principle of customary international law,[63] as well as being widely recognized in domestic law.[64] That said, most domestic legal systems now stipulate a doctrine of restrictive immunity, as opposed to an absolute rule on immunity.[65] For instance, and as explained in sections 2 and 3 of the SIA, the UK legislation provides various exceptions to the recognized general immunity from jurisdiction foreign states enjoy on UK soil.[66]

However, of (at least) similar importance is the obligation of states to adhere to their international law obligations voluntarily assumed, such as through an international treaty. van den Berg concurs, arguing that the principle of *pacta sunt servanda* dictates that states, when they agree to arbitration, 'must be deemed to have accepted all its consequences, including compliance with

[58] SID/63-16 (20 September 1963) '*Memorandum on the discussion by the Executive Directors, September 10, 1963, not an approved record. Discussion of the First Preliminary Draft Convention*', [12], in Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Volume II, Part 1. See also Bjorklund et al. (n 24) 508.

[59] Bermann (n 26) 326 *et seq*. See also Baldwin et al. (n 23).

[60] See Report of the Executive Directors on the Convention, [43]. See also Broches (n 54) 307 and 330 *et seq*.

[61] A Reinisch, 'Article 55' in SW Schill, L Malintoppi, A Reinisch, CH Schreuer, A Sinclair (eds), *Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (Cambridge University Press 2022) 1516–1553, 1519 [9].

[62] ibid 1529 [9].

[63] Robert Jennings and Arthur Watts, *Oppenheim's International Law*, Volume 1 (9th edn, Longman 2008), 343. See also Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd edn, OUP 2015), 20 and Reece Thomas (n 5) Chapter 1.

[64] Bermann (n 26) 326–327.

[65] See Bjorklund et al. (n 24) 509, wherein the authors define the term 'restrictive immunity' as '*the principle that when States act in a commercial capacity they do not enjoy immunity*'. See also Mees Brenninkmeijer and Fabien Gélinas, 'The Problem of Execution Immunities and the ICSID Convention' (2021) 22 Journal of World Investment and Trade 429–458, 440.

[66] See SIA, ss 2–11.

an unfavourable award',[67] so much so that he advocates the abolition of the differential treatment between state immunity from jurisdiction and state immunity from execution, contending that states should be equally deemed to have waived their execution immunity when they agree to arbitration.

With the above in mind, we now move to consider the English Court of Appeal's recent judgment in the conjoined appeals from *ISL* and *Border Timbers*, analysing the Court's approach to the enforcement and execution of ICSID awards in the UK.

5. ANALYSIS OF *BORDER TIMBERS* AND *ISL* JUDGMENTS

a. Border Timbers

i. Factual matrix

Border Timbers concerned a claim brought against the Republic of Zimbabwe for various BIT violations. The principal violations alleged engaged the usual strands of protection customarily offered in BITs: unlawful expropriation, failure to accord fair and equitable treatment, subjecting the investment to unreasonable, arbitrary, and discriminatory measures, and failing to accord full protection and security to the investor and its investment.

The facts of the underlying dispute were as follows. In 1992, the Zimbabwean government developed a land acquisition programme, which aimed to compulsorily acquire rural land necessary for agricultural settlement purposes and to settle indigenous Zimbabweans on those lands.[68] The law required the payment of fair compensation to the owners of the land. Most landowners challenged the compulsory purchases of their property and refused to sell on the basis that the price offered was not reflective of the real value of the property. The push-back from the landowners de-accelerated the pace of the land reforms.

In 2000, and in part due to the slow pace of the land reform programme, the Zimbabwean government sought to amend the Constitution to permit the acquisitions of land without payment of any compensation. The proposal was (unsurprisingly) rejected at a referendum. Following the referendum defeat, things spiralled out of control and the frustrated local (black) population began forcibly invading land belonging to 'white settlers'.[69] The investors claimed that the Zimbabwean government, operating through its security forces, encouraged and supported such illegal takeovers of property and/or failed to provide adequate security for their investments. There was cogent evidence that court orders declaring the invasions unlawful and requiring the police to put an end to the situation were wilfully ignored by, *inter alia*, the police. These failures resulted in ICSID[70] (and other) investment claims being commenced against Zimbabwe.

In 2010, Border Timbers, and (separately) its foreign national shareholders, initiated ICSID arbitrations against Zimbabwe, seeking restitution of expropriated land and damages as compensation for the losses sustained by virtue of the illegal invasions. The ICSID tribunal (consisting of L. Yves Fortier (President), David A. R. Williams, and Michael Hwang) rendered its final award on 28 July 2015 (the 'Border Award'),[71] holding that Zimbabwe had violated its BIT obligations, and ordering it to provide for restitution together with compensation for losses

[67] Albert Jan Van Den Berg, 'Recent Enforcement Problems under the New York and ICSID Conventions' (1989) 5(1) Arbitration International 2–20, 13.

[68] See *Bernhard von Pezold and Others v Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, para [97] *et seq*.

[69] See Dogan Gültutan, *Moral Damages under International Investment Law: The Path Towards Convergence* (Kluwer Law International 2021), 126.

[70] *Bernardus Henricus Funnekotter and others v Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009.

[71] *Border Timbers Limited and Others v Republic of Zimbabwe*, ICSID Case No. ARB/10/16, Award, 28 July 2015.

sustained because of the illegal invasions, and, failing restitution, to pay compensation at an increased sum to reflect the value of the investment lost (circa US$ 125 million).[72]

After nearly a decade, the Border Award remains unsatisfied. Border Timbers seeks to enforce it against Zimbabwe both in the UK and elsewhere.[73] What follows is a deep dive into the English Court of Appeal's decision on the appeal brought by Zimbabwe, against the first instance judgment of Dias J in the Commercial Court.[74] By appealing Zimbabwe sought to continue to resist enforcement of the Border Award in the UK. The judgment is of critical importance for it raises novel issues concerning whether and to what extent the enforcement of ICSID awards may be successfully resisted on the basis of the doctrine of state immunity.

ii. Parties' contentions on state immunity issues

On 15 September 2021, Border Timbers filed a without-notice application with the English Commercial Court to register the Border Award, pursuant to section 2 of the 1966 Investment Disputes Act. The 1966 Investment Disputes Act implemented the ICSID Convention into English law.

It is important to bear in mind that the Convention itself is not part of English law, it has merely been included as a schedule to the 1966 Investment Disputes Act. This means that whilst the legislation is to be interpreted in the context of the ICSID Convention and that the presumed intention of the UK Parliament was to comply with the UK's treaty obligations thereunder, the Convention itself does not represent the applicable English law. One must have regard to the words of the 1966 Investment Disputes Act insofar as invoking the provisions and protections contained in the Convention in the domestic arena.[75]

Border Timbers' application to register the Border Award was granted by Cockerill J on 8 October 2021, who ordered that it 'be recognised and entered as a judgment in the same manner and with the same force and effect as if it were a final judgment of th[e] court'.[76] The court's order was served in Zimbabwe on 27 May 2022. On 25 July 2022, Zimbabwe sought to set aside the order on the grounds that it was immune from the UK courts' jurisdiction by virtue of section 1(1) of the SIA.

As explained above, section 1(1) of the SIA provides general immunity from the jurisdiction of the UK courts, 'except as provided in the following provisions of this Part of this Act'. Border Timbers argued that Zimbabwe was not immune from the English courts' jurisdiction on the basis that its claim fell within one or both of the exceptions to state immunity, contained in sections 2 (submission to jurisdiction) and 9 (arbitration exception) of the SIA.[77]

The following issues were, therefore, carved out for determination as preliminary issues[78]: (1) whether Zimbabwe was entitled to state immunity in respect of the claim raised; and (2) (if (1) is answered in the affirmative) (a) whether Zimbabwe had waived that immunity by operation of section 2 of the SIA (submission to jurisdiction) through operation of the ICSID Convention; and/or (b) whether Zimbabwe had waived that immunity by operation of section 9 of the SIA (arbitration exception) by agreeing to submit, in writing, the relevant dispute to arbitration.

In respect of the section 9 exception, the critical point for determination was whether, for the purposes of determining the applicability of the exception, the English court was bound by the

[72] ibid.
[73] *Border Timbers* [6].
[74] ibid.
[75] ibid [15].
[76] ibid [2].
[77] See Section 3.
[78] *Border Timbers* [4].

ICSID tribunal's (and the ICSID annulment committee's) determination as regards the ICSID tribunal's jurisdiction.

Border Timbers' submission was two-pronged. First, it argued that insofar as section 2 (submission to jurisdiction) was concerned, Zimbabwe had waived its immunity by acceding to the ICSID Convention, the provisions of which (notably article 54) 'amount to a prior written agreement submitting to the jurisdiction of the English courts for the purposes of enforcement of any award'.[79] This argument found its force from the first instance judgment of Fraser J (as he then was) in *ISL* (see below) where the Judge had held that article 54 of the ICSID Convention was to be construed as a prior written agreement for the purposes of the SIA, meaning that the Convention parties were to be understood as having submitted to the jurisdiction of the English court by reason of their accession to the Convention.[80]

In the alternative, Border Timbers contended that Zimbabwe had agreed to submit the dispute to arbitration, thereby triggering the section 9 (arbitration) exception. Relevant to this second argument, Border Timbers argued that the English court must treat the ICSID tribunal's (and the ICSID annulment committee's) determination on the ICSID tribunal's jurisdiction as final and binding and must not conduct a *de novo* or other enquiry into whether a valid arbitration existed to begin with.[81] It was therefore immaterial, according to Border Timbers, that Zimbabwe had (unsuccessfully) challenged the ICSID tribunal's jurisdiction.

Zimbabwe challenged both strands of Border Timbers' resistance to state immunity. On the section 2 point, Zimbabwe argued that it had never, within the meaning of the provision, submitted to the UK courts' jurisdiction, whether generally or specifically in respect of the present matter. As for the section 9 exception, Zimbabwe forcefully argued that the ICSID tribunal lacked jurisdiction for a variety of reasons, most notably that article 10 of the (applicable) Swiss–Zimbabwean BIT[82] did not properly cover the underlying dispute.[83] Zimbabwe contended that it was entitled to raise its jurisdictional objections anew before the local (English) court when resisting registration, and that it was wholly immaterial that all of its jurisdictional arguments had been rejected twice before (first by the ICSID tribunal and thereafter by the ICSID annulment committee).[84]

iii. The first instance decision

As alluded to above, Dias J ultimately rendered her judgment in favour of the claimant investors, refusing to set aside the order for registration.[85] However, somewhat bizarrely, she decided against the claimants on both sections 2 and 9 of the SIA, instead basing her decision on a novel point of procedure not argued before her during the hearing. Her reasons pertaining to the interaction between the SIA and the ICSID Convention may briefly be summarized as follows.

Dias J opined that, on a correct interpretation[86] of articles 53–55 of the ICSID Convention, the SIA section 2 route, premised on a submission to the UK courts' jurisdiction, had not been engaged. In other words, Zimbabwe had not submitted to the UK courts' jurisdiction. Although Dias J found that article 54(1) of the Convention was intended as 'a waiver of state immunity in respect of recognition and enforcement but not in relation to processes of execution against

[79] ibid [17].
[80] ibid [65].
[81] ibid [17].
[82] Bilateral Investment Treaty between Switzerland and Zimbabwe of 15 August 1996.
[83] *Border Timbers* [81].
[84] ibid.
[85] ibid [110] and [120].
[86] Applying art 31(1) of the Vienna Convention on the Law of Treaties 1969 ('VCLT'), which imposes the general rule 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*'.

assets',[87] she—it is submitted erroneously—drew a distinction between a general waiver of immunity and submission to jurisdiction, with the latter requiring a 'sufficiently clear and unequivocal submission to the jurisdiction of the English courts for the purposes of recogni[tion] and enforce[ement]'.[88] According to the Judge, section 2 of the SIA was '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'.[89] The Judge held that there was no such requisite submission to the UK courts' jurisdiction in the present matter.[90] The language of article 54(1) of the ICSID Convention was not, in her opinion, of the requisite specificity to amount to a submission to jurisdiction. The submission, in the Judge's opinion, must relate to an 'identifiable proceeding' to be capable of triggering the section 2 route to lift the blanket immunity from jurisdiction a state enjoys under section 1 of the SIA.[91] Dias J considered the article 54(1) waiver to be 'entirely general and unrelated to any specific or identifiable proceedings' and, consequently, insufficient.[92]

In holding that the section 9 (arbitration) exception was equally unavailable to Border Timbers, Dias J was unpersuaded by the argument that the ICSID tribunal's (and the ICSID annulment committee's) determination on the jurisdiction of the ICSID tribunal should stand come what may. The Judge, it is submitted rightly, ruled that a valid arbitration agreement must exist to bring a dispute within the four corners of the ICSID Convention and thereby confer jurisdiction on the tribunal. She concluded that, having regard to the plain and ordinary meaning of the statutory provision, the court must satisfy itself that 'the person accepting the offer of arbitration was entitled to do so and that the dispute in question fell within the scope of the arbitration agreement' before section 9 could be engaged.[93]

In doing so, Dias J concurred with the 'compelling' reasoning of Butcher J,[94] who had concluded (albeit in a non-ICSID context) that when considering the remit of section 9 of the SIA, an English court must be independently satisfied that there was an agreement to submit the particular dispute and that this is so whether or not any particular points were argued in the arbitration.[95] Dias J did consider whether ICSID awards warrant preferential treatment when undertaking a section 9 analysis but concluded that they did not, primarily on the basis that section 9 was a provision 'of general application and must apply equally to ICSID and non-ICSID awards'.[96] She dogmatically asserted that the 'sealed' nature of the ICSID procedure was neither here nor there and that the enquiry must always be addressed as to whether a valid arbitration agreement exists.[97]

Having dismissed Border Timbers' arguments on both sections 2 and 9, the only routes open to it to remove the blanket of immunity, one would naturally have expected Dias J to grant the application and set aside the without-notice order for registration. However, that she did not do. Dias J held that Zimbabwe's immunity from the UK courts' jurisdiction is not engaged in an application to register the Border Award; she reasoned that such an application does not engage the court's adjudicative jurisdiction, and that only an action to execute the Border Award would.[98] She explained that a 'foreign state is not impleaded unless and until the order granting

[87] *Border Timbers* [62].
[88] ibid [72].
[89] ibid [68].
[90] ibid [73].
[91] ibid [66] and [68].
[92] ibid [71].
[93] ibid [84].
[94] *PAO Tatneft v Ukraine* [2018] EWHC 1797 (Comm).
[95] *Border Timbers* [87].
[96] ibid [88].
[97] ibid.
[98] ibid [109]–[110].

registration is served on it, and that the doctrine of state immunity has no application at the anterior stage of registration'.[99]

Under the relevant procedural rules, unlike the regime applicable to non-ICSID awards, when an application is made to enforce an ICSID award, there is no obligation to file a claim form or to serve the claim out of the jurisdiction 'notwithstanding that such awards will inevitably involve a foreign state on one side or the other'.[100] The absence of the obligation to notify the defendant state of the application for enforcement resulted in Dias J reasoning that such a process could not be understood to invoke the courts' adjudicative jurisdiction. Consequently, she concluded that state immunity issues could not arise.

As alluded to above, it is noteworthy that this precise point was never argued before her during the 2-day hearing. It was a 'novel' point which had occurred to her after the hearing. However, she had had the benefit of written submissions from counsel, principally on the issue of whether the 'doctrine of sovereign immunity is engaged [] in relation to [] an application [to register ICSID awards]'.[101] Of further note is the fact that Border Timbers did not, on its (cross) appeal, invite the appellate court to uphold her judgment on the 'novel' procedural issue, instead focusing its efforts on the sections 2 and 9 arguments.[102]

b. ISL

i. Factual matrix

ISL concerned a claim brought against the Kingdom of Spain for various violations of the Energy Charter Treaty of 1994 (the 'ECT'). The claimants were a Luxembourg company and its Dutch subsidiary which had made major investments in solar power plants in Spain. They alleged that Spain had breached its obligations under the ECT of fair and equal treatment by removing tariff advantages to their detriment. The claim was referred to arbitration on 22 November 2013. The President of the arbitral tribunal was Dr Eduardo Zuleta; the claimants' appointee was Professor Francisco Orrego Vicuña; and Spain's appointee was Mr J. Christopher Thomas QC ('the Tribunal'). The arbitration was conducted under the auspices of ICSID and a hearing took place in Paris in October 2016.

Spain's challenge to the jurisdiction of the tribunal was unanimously rejected. The tribunal found for the claimants, again unanimously, by an award dated 15 June 2018 in the sum of approximately EUR 120 million.

That award was reduced after rectification based on errors in the calculation of compensation and it was the rectified award that the claimants sought to register in the UK under article 49(2) of the ICSID Convention (the 'ISL Award'). The award covered damages, costs, and interest.

Spain then challenged the ISL Award using the annulment process contained in the ICSID Convention claiming that under EU law the tribunal had exceeded its powers relating to jurisdiction. A stay ordered pending the annulment hearing was lifted in October 2019 and the ICSID Committee issued its final decision in July 2021. The application for annulment failed. The ISL Award remains unpaid and ISL sought to have it recognized and enforced in several jurisdictions, notably in Australia, in New York, and in London.

At first instance, Fraser J found for ISL in the English Commercial Court. In its appeal to the Court of Appeal, Spain sought to continue to resist enforcement of the ISL Award in the UK. The Court of Appeal heard the *Border Timbers* and *ISL* appeals together, and the resulting

[99] ibid [106].
[100] ibid [96].
[101] ibid [101].
[102] *ISL / Border Timbers CA* [36].

decision raises novel issues concerning enforcement of ICSID awards and state immunity as discussed in the deep dive into the Court of Appeal's decision set out below.

First, a look at the arguments and the decision at first instance is needed.

ii. Parties' contentions on state immunity issues

ISL filed a without-notice application with the Commercial Court to register the ISL Award under section 2 of the 1966 Investment Disputes Act.[103] Cockerill J granted the *ex parte* order (without notice to Spain) on 29 June 2021 with leave to have it set aside as she had done in the *Border Timbers* case described above.[104] The order was served on Spain which sought to have it set aside on grounds of state immunity and non-disclosure.[105]

The issues before Fraser J for determination as preliminary issues were therefore whether Spain was entitled to state immunity and whether there had been non-disclosure by the claimants in their application for registration before the Commercial Court.

The immunity point was that both the tribunal and the court lacked jurisdiction based on points relating to decisions of the Court of Justice of the European Union and under international law. The case, therefore, raised important issues about the relationship between international law, the 1966 Investment Disputes Act, and sections 2 and 9 of the SIA.[106]

iii. The first instance decision

As explained above, Fraser J held that, as far as the argument under section 2 of the SIA (submission by prior written agreement) was concerned, article 54 of the ICSID Convention was to be construed as a prior written agreement for those purposes of the SIA, meaning that the Convention parties were to be understood as having submitted to the jurisdiction of the English court by reason of their accession to the Convention. He also found that section 9 of the SIA applied as discussed below.

Spain had argued that article 54 of the ICSID Convention was neither a specific waiver of immunity nor a submission to jurisdiction and thus failed to satisfy section 2(2) of the SIA. Fraser J did not take long to conclude that Spain's arguments could not stand with the ICSID Convention, the terms of the 1966 Investment Disputes Act and also the ratio of *Micula v Romania*.[107]

Fraser J started by a lengthy but (in the light of the wealth of authority before him both domestic and international) quite pithy exposé of the relevant provisions of the ICSID Convention and its domestic implementation under the 1996 Investment Disputes Act. He stated that:

> In simple and summary terms, by becoming a party to the ICSID Convention, the United Kingdom acquired treaty obligations as set out in the Convention itself, … These obligations expressly included bringing into domestic law a procedure for awards under the ICSID Convention to be recognised in law as binding, and enforceable, as though such awards were judgments of a competent court within the Contracting State. That obligation upon the United Kingdom to align the domestic law with the state's international obligations under the Convention was complied with by Parliament enacting the legislation in the 1966 Act.[108]

[103] Which implements the ICSID Convention in English law—see part 4 above and discussion of UK treaty obligations.

[104] *Infrastructure Services Luxembourg S.A.R.L. (formerly Antin Infrastructure Services Luxembourg S.A.R.L) and Energia Termosolar B.V. (formerly Antin Energia Termosolar B.V.) v The Kingdom of Spain* [2023] EWHC 234 (Comm).

[105] An earlier attempt to have it set aside based on defective service was abandoned on the basis of a consent order which gave Spain extra time to plead on other grounds. *ISL* [3].

[106] ibid [5].

[107] ibid [94].

[108] ibid [18].

He went on to consider the relationship between the ECT and the ICSID Convention which it expressly incorporated. He cited article 26 of the ECT at length, which deals with the settlement of disputes. He underlined key sections relating to arbitration in particular article 26(3)(a) under which each Contracting Party 'gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.'[109]

The Judge examined the EU law dimension and concluded that, despite the Court of Justice of the European Union (the 'CJEU') having decided that the article, and the mechanism for referring a dispute between an investor and a Member State to arbitration, could not apply within the EU on the basis that such an arbitration provision was incompatible with the supremacy of the CJEU under the EU Treaties, the position in English law was different.[110]

Fraser J found that EU law could not affect the UK's international obligations under the ICSID Convention or domestic rights set out in the 1966 Investment Disputes Act. The judge was clear that he was bound by the UK Supreme Court decision in *Micula v Romania*[111] which clarified that the UK's pre-existing obligations under the ICSID Convention were not affected by the EU Treaties.[112] On that basis the English court was limited to determining an ICSID arbitration award's authenticity but could not re-examine the ICSID tribunal's jurisdiction, or the merits of the award. It could not refuse recognition on grounds covered by the challenge provisions in the Convention itself or on public policy grounds. His conclusion was thus that, for as long as Spain was a party to it, the ICSID Convention would govern the way in which valid ICSID awards against Spain were dealt with in other national courts.[113] He thus concluded that Spain was not immune (1) since article 26 of the ECT constituted a prior written agreement to arbitrate for the purposes of section 2(2) of the SIA and (2) because section 9 of the SIA removed state immunity where a state had agreed in writing to submit a dispute which might arise to arbitration. He found that:

> …the provision within section 9 can either be seen as a specific sub-set of the more general submission to the jurisdiction by way of a written agreement, or as a free-standing exception relating to arbitration. It does not much matter which analysis is adopted, because under section 9 (and to use its exact wording) no state is immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration.[114]

Fraser J firmly rejected the argument that section 9 did not apply because it was limited to arbitrations involving commercial transactions referring to Spain's (withdrawn) argument to that effect as 'flawed' as the reference to 'arbitration' in section 9 of the SIA was unqualified.[115]

On the issue of the validity of the ISL Award, the Judge was quite clear (despite some Spanish arguments based on EU law) that Spain had no immunity under the 1966 Investment Disputes Act because it had already submitted to the jurisdiction of the court by reason of its accession to the ICSID Convention. The Convention was a written agreement to arbitrate, thus triggering the exceptions to immunity in the SIA. As the ICSID Convention granted the tribunal and the annulment committee exclusive jurisdiction, Spain's challenge against the decision of the

[109] ibid [23].
[110] ibid [86]–[89].
[111] ibid [87] and [2020] UKSC 5 (UKSC).
[112] By virtue of the Treaty on the Functioning of the European Union, art 351.
[113] *ISL* [81]–[89]. Because the ICSID Convention had parties to it which were not EU Member States, the VCLT art 30 applied and the ICSID Convention governed.
[114] ibid [91]–[103], applying *Svenska Petroleum Exploration AB v Lithuania (No.2)* [2006] EWCA Civ 1529, [2007] Q.B. 886.
[115] ibid [95].

tribunal was unsuccessful. The Court also did not agree that there was any basis for setting aside the registration order under the 1966 Investment Disputes Act.[116]

Finally, by reference to *Gold Reserve Inc v Venezuela*[117] and *Union Fenosa Gas SA v Egypt*,[118] the Judge found the court had been entitled to make the registration order without notice under CPR r.62.21 and thus it had not been necessary to convene a hearing of Spain's jurisdictional challenges or claim for sovereign immunity. There had not been any material non-disclosure on the without-notice application.[119]

In conclusion, Fraser J expressed the hope that future cases on these points would be dealt with easily and swiftly. In his view, '[U]nless a case is truly exceptional, it is difficult to foresee how a hearing of the length required in this case, and a judgment of this length, would occur again. To do so would be contrary to the ICSID Convention and the 1966 Act and is exactly what international arbitration is designed to avoid.'[120]

c. The appellate judgment

The judgment in the conjoined appeals in *Border Timbers* and *ISL* was delivered on 22 October 2024, by a court consisting of The Chancellor of the High Court (Sir Julian Flaux), Phillips and Newey LJJ, with the Court ruling that ICSID member states cannot invoke state immunity principles to prevent the registration of an ICSID award.

The appellate court's judgment was delivered by Phillips LJ, with whom the other two members agreed. The Court had to grapple with three central issues, which were:

(1) Whether section 1(1) of the SIA applies, as a matter of principle, to the registration of ICSID arbitration awards against a foreign state under the 1966 Investment Disputes Act, which Dias J had found in the *Border Timbers* case not to be the case (the '**First Issue**');
(2) If the answer to (1) above is in the affirmative, whether the exception to state immunity under section 2 of the SIA is engaged such that, by signing the ICSID Convention, the member states have agreed in writing to submit to the UK courts' jurisdiction in relation to the enforcement of ICSID arbitration awards (the '**Second Issue**');
(3) Further or alternatively, if the answer to (1) above is in the affirmative, and if it is deemed that member states did not submit to the UK courts' jurisdiction by virtue of membership to the ICSID Convention, whether foreign states are estopped or otherwise prevented from asserting the invalidity of the underlying (ICSID) award, such that the exception in section 9 (ie the arbitration exception) of the SIA is engaged (the '**Third Issue**').

On the First Issue, finding Dias J's novel approach to be misconceived, Phillips LJ rejected the notion that the registration of an ICSID award as a judgment of the court is merely a ministerial or administrative act.[121] His Lordship explained that the act of registration requires a judge to satisfy themselves of the requisite standard as to the proof of authenticity and the other evidential requirements, as stipulated in the 1966 Investment Disputes Act. The fact that such a task might be a straightforward one where the evidence is in order does not, according to the learned judge, undermine the adjudicative nature of the judicial task of assessing that evidence.[122]

[116] ibid [124]–[125]. This was a point on which the Court of Appeal disagreed—see below.
[117] *Gold Reserve Inc v Venezuela* [2016] EWHC 153 (Comm).
[118] *Union Fenosa Gas SA v Egypt* [2020] EWHC 1723 (Comm).
[119] *ISL* [143]–[159].
[120] ibid [162].
[121] *ISL / Border Timbers* [36]–[37].
[122] ibid [37].

The appellate court also disagreed with Fraser J's view that section 1 of the SIA simply does not apply in circumstances where what is being sought is the registration, not execution, of an ICSID award. The Court emphasized the nature of the SIA as a 'complete code' insofar as pertaining to matters of state immunity and that, accordingly, states enjoy immunity from court proceedings in the UK, unless and until one of the exception gateways is engaged.[123]

Having answered the First Issue in the affirmative, the Court proceeded to consider whether the jurisdiction exception to immunity under section 2 of the SIA was engaged (ie the Second Issue). The Court found that the exception was engaged, and that Zimbabwe and Spain were precluded from relying on state immunity principles to oppose registration of the ICSID awards rendered against them.[124] The Court adopted the view that in becoming parties to the ICSID Convention, member states submitted to the jurisdiction of the UK courts by virtue of operation of article 54 of the ICSID Convention. Phillips LJ's judgment provides the following rationale for that finding.

Article 54(1), which obliges member states to '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', is to be construed as an agreement by each member state that each will enforce ICSID awards, and that such, on its face, is to be understood as 'an agreement by each [member state] that the United Kingdom has jurisdiction to enforce ICSID awards against [the] state[]'.[125] It was important, and of considerable persuasive force, that such a construction accorded with the stance taken by the courts of Australia, New Zealand, the USA, France, and Malaysia on similar matters. Phillips LJ noted the importance of international treaties being interpreted harmoniously and in uniformity, to the extent possible.[126] Having extensively considered the High Court of Australia's ('HCA') judgment relating to a dispute between ISL and Spain concerning the very same factual setting, in which the HCA dismissed Spain's attempt to resist registration, Phillips LJ remarked:

> It is [] 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 … [127]

His Lordship noted that the suggested interpretation also conformed with the clear object and purpose of the ICSID Convention, in particular its preamble, which emphasizes the need to encourage private international investment, a concern to mitigate sovereign risk and a mutuality as to the binding effect of an award.[128] It would have been contrary to the ICSID Convention's spirit and purpose if, having agreed to the wording in article 54, respondent states found to have violated their investment obligations could prevent the enforcement of supposedly final arbitral awards by invoking state immunity principles. To permit such conduct would have risked creating a hollow, toothless investment arbitration regime, potentially resulting in the politicization of investment law disputes.

Having found that the jurisdictional gateway under section 2 of the SIA was satisfied, Phillips LJ rightly remarked that it was unnecessary for him to decide whether the section 9 (arbitration) gateway was engaged. Nonetheless, his Lordship opined that it is an English court's duty,

[123] ibid [43]–[58].
[124] ibid [103].
[125] ibid [59].
[126] ibid [60].
[127] ibid [79].
[128] ibid [80].

pursuant to section 9 of the SIA, to 'satisfy itself that the state in question has in fact agreed in writing to submit the dispute in question to arbitration'.[129] The Court thereby seemingly disagreed with the investors' contention that ICSID is a closed system and that domestic courts cannot, failing which should not, re-open jurisdictional matters once heard and determined by ICSID tribunals (and also by ICSID annulment committees). The Court reasoned:

> 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.[130]

Accordingly, the Court would likely have decided otherwise and allowed the appeals had it not found there to be a valid submission to jurisdiction under section 2. That being said, the Court acknowledged that its views were only *obiter* and could not therefore bind future courts.[131] It is interesting to see that the appellate court did not adopt a similar analysis in respect of section 2 of the SIA, that is to consider whether absent a valid arbitration agreement it could truly be said that there was submission to jurisdiction via the ICSID Convention in respect of an ICSID award. All that said, whether ICSID arbitration can rightly be described as a closed system, barring domestic courts from verifying the tribunal's jurisdiction, is yet to be decided and remains open for debate.

6. ANALYSIS OF *ISL / BORDER TIMBERS CA* JUDGMENT

The appellate court's judgment is to be applauded for averting the risk of re-politicization of investment disputes, through the adoption of a teleological approach to interpretation, one which accords with the spirit and purpose of the ICSID Convention. Furthermore, the judgment is legally defensible as it adheres to the UK's international law (treaty) obligations voluntarily assumed under the ICSID Convention.

State immunity should not be permitted to trump international law obligations freely assumed by states so as to operate as an easy escape route, enabling states to evade their international law obligations without cause. Its confines should be narrowed. Domestic laws regulating issues of state immunity should therefore be interpreted in a 'pro-enforcement' manner insofar as possible. This may, in the appropriate cases, require a teleological approach to the statutory construction of established case law, depending on the exact terminology prevalent in the relevant legal system. As far as English law is concerned, the courts would be considered as having the ability to interpret the provisions of the SIA 'purposively'.

By way of background, the English law rules concerning the interpretation of statutes do allow legislative provisions to be interpreted in a manner consistently and in harmony with the desired purpose of the enactment. Lord Burrows, speaking extra-judicially, explained that recent UK Supreme Court (and earlier House of Lords) decisions clearly demonstrate that the modern approach to statutory interpretation is contextual and purposive, and requires one to 'arrive at the best interpretation of the words in the light of their context and the purpose of the statutory provision'.[132] His Lordship referred to the speech of Lord Bingham in *R (Quintavalle) v Secretary of State for Health*, where Lord Bingham had remarked as follows:

[129] ibid [105].
[130] ibid.
[131] ibid [106].
[132] Lord Burrows, 'Sir Christopher Staughton Memorial Lecture 2022; Statutory Interpretation in the Courts Today' (24 March 2022), https://supremecourt.uk/uploads/sir_christopher_staughton_memorial_lecture_2022_3428298067.pdf accessed 13 August 2024.

> The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute… **The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.**[133] (Emphasis added)

Concurringly, Lord Steyn declared in the same case that the 'pendulum has swung towards purposive methods of construction.'[134]

The teleological interpretation advocated is desirable and warranted for three principal reasons. First and foremost, such purposive construction is necessitated by the wording and purpose of the ICSID Convention. The ICSID Convention was deemed necessary and introduced primarily to de-politicize investment disputes and permit their enforcement through legal mechanisms.[135] Accordingly, it must be accepted that by entering into the ICSID Convention the contracting states waived their right to invoke their immunity in defence of enforcement of ICSID awards. This aligns with the intentions of the draftsmen of the ICSID Convention.[136] The prospect of a host state refusing to honour an ICSID award was (perhaps naively) never contemplated.[137] One commentator has accordingly remarked that 'the assumption… that "no resistance" is possible to the enforcement of an ICSID award should not be surprising', with the commentator noting that such 'strong view is reinforced by the drafting history of the Convention'.[138] The adoption of a teleological interpretation in the construction of domestic state immunity provisions, thereby maximizing the chances of successful enforcement of ICSID awards, is consequently necessary. At least in the UK, that is what the terms and spirit of the 1966 and 1978 Acts dictate.

Secondly, the SIA was introduced to liberalize the state immunity regime that previously existed, which dictated absolute immunity.[139] The desire of the draftsmen behind the SIA was to therefore facilitate and ensure that states could only plead and shield themselves with state immunity only when absolutely essential to the protection of their sovereignty. This is particularly observable through the wording in the 1966 Act, which provides that the Act is to be 'construed in a way which is consonant with the Convention and, so far as possible, with the UK's other international obligations'.[140]

Last, but not least, the teleological interpretation to domestic state immunity rules is required to ensure that ICSID serve its primary function of facilitating foreign investment and resolving

[133] [2003] UKHL 13, [2003] 2 AC 687, [8].
[134] ibid [21].
[135] See Ibrahim Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA', Washington, D.C. World Bank Group (34898), accessed via https://documents1.worldbank.org/curated/en/335931468315286974/pdf/Towards-a-greater-depoliticization-of-investment-disputes-the-roles-of-ICSID-and-MIGA.pdf.
[136] Baldwin et al. (n 23) 3. See also Bermann (n 26) 314.
[137] See Bermann (n 26) 312.
[138] Baldwin et al. (n 23) 4.
[139] See *ISL / Border Timbers CA*, [29] *et seq*.
[140] *Border Timbers* [15].

any disputes relating to such investments through amicable dispute resolution mechanisms, such as arbitration. Refusing to accord the provisions of the SIA Act a broad construction would jeopardize the ICSID regime and arguably enable rogue states to evade their international law obligations freely assumed. This would have the very serious adverse consequence of re-politicizing international law disputes and potentially endangering world peace and global security. Courts must therefore strive to interpret domestic legislation purposively to disengage state immunity from execution where possible, thereby eradicating the 'greatest restriction'[141] on obtaining satisfaction of an ICSID award. Otherwise, the process will result in an unsatisfactory pyrrhic victory for the investor and hollow out the ICSID regime.

It must be remarked that the suggested approach of preferring a teleological (purposive) interpretation to statutory interpretation is not a novel idea. There are several illustrations of the courts of reputable, arbitration-friendly jurisdictions loosening the boundaries of state immunity to enable the enforcement of ICSID awards.[142] For instance, in an enforcement action brought by the von Pezolds against Zimbabwe on facts identical to the *Border Timbers* case, the Malaysian High Court rejected Zimbabwe's defences to recognition and enforcement on state immunity grounds, holding that Zimbabwe had both (i) submitted, through its conduct, to the 'jurisdiction of the courts of every contracting state to the ICSID Convention where the Award and Decision on Annulment are being recognised' and, in any event (ii) it was to be considered to have waived its immunity before such courts.[143] The Court seemingly took an expansive, purposive approach to the construction of the ICSID Convention, which convention was appended to the applicable legislation as a schedule,[144] stipulating for the enforcement of ICSID awards. The Malaysian Court remarked:

> [A]s long as the requirement of Article 54(2) of the ICSID Convention is satisfied, which the Plaintiffs have done by exhibiting a copy of the Award and the Decision on Annulment certified by the Secretary-General of the ICSID Centre, the Court is mandated to recognise the Award and Decision on Annulment pursuant to the provisions of the ICSID Act.[145]

Unfortunately, the Court did not elaborate on the reasons it considered Zimbabwe to have submitted to jurisdiction or waived its immunity from suit, but the reasoning suggests that the Court deemed being a signatory to the ICSID Convention as sufficient. The Court did, however, distinguish between immunity from jurisdiction (suit) and immunity from execution, noting that whilst the 'Court must recognise the award as if it were a judgment, [] the state can still claim immunity from execution processes'.[146]

A similar expansive, teleological construction of domestic legislative provisions to facilitate the enforcement of ICSID awards can be observed in the judgment of the High Court of Australia in *ISL v Spain*.[147] In that case, the Court held that the effect of Spain's agreement to articles 53–55 of the ICSID Convention amounted to 'a waiver of foreign State immunity from the jurisdiction of the courts of Australia to recognise and enforce, but not to execute, the award'.[148] The Court's reasoning clearly evidences a purposive construction of the (Australian) Foreign States Immunities Act 1985, construed in light of the terms of the ICSID Convention.

[141] Saunders and Salomon (n 24) 476.
[142] For a detailed analysis, see Bjorklund et al. (n 24) 516.
[143] *Elisabeth Regina Maria Gabriele von Pezold and others v Republic of Zimbabwe*, High Court of Malaya, Kuala Lumpur High Court (Commercial Division) (17 February 2023) ('Von Pezold Malaya Judgment'), [24].
[144] Convention on the Settlement of Investment Disputes Act 1966 (Revised 1989).
[145] Von Pezold Malaya Judgment [7].
[146] ibid [18].
[147] *Kingdom of Spain v Infrastructure Services Luxembourg S.A.R.L. & Anor* [2023] 275 CLR 292; [2023] HCA 11.
[148] ibid [8].

This is most visible in the Court's analysis of Spain's submission that article 54(1) of the ICSID Convention requires an 'express' waiver of immunity from jurisdiction by a foreign State, which the Court rejected, on the basis that it would be incompatible with 'the ordinary meaning of Art 54(1) [interpreted in accordance with] the Vienna Convention on the Law of Treaties requires, in light of its object and purpose, which includes mitigating sovereign risk'.[149] The Court was clearly at pains to ensure that the purpose and object of the ICSID Convention would be adhered to in domestic enforcement proceedings and conducted the exercise of statutory interpretation with that in mind.

The traces of a teleological interpretation can also be found in the High Court of New Zealand's decision in *Sodexo v Hungary*.[150] That was a case concerning Sodexo's application for recognition of an ICSID award, which ordered Hungary to pay Sodexo circa EUR 73 million for unlawful expropriation of investment due to changes in tax legislation.[151] Dismissing Hungary's objections to recognition on the grounds of state immunity, the Court concluded that, construing the terms of the ICSID Convention, 'states in the position of Hungary have agreed that an ICSID arbitral award will be recognised as enforceable before domestic courts subject to their ability to claim state immunity in relation to subsequent execution steps'.[152] Throughout its judgment, the Court underscores the importance of having regard to the object and purpose of the Convention in the interpretation of the applicable domestic legislation and, relatedly, the state's entitlement to invoke state immunity protection.[153]

A purposive construction of the terms of sections 2 and 9 of the SIA would not therefore put the UK at odds with other established centres of arbitration; quite the opposite. It would ensure that the UK retains its 'top-spot' position as a centre of arbitration, facilitating the enforcement (and where permissible, execution) of ICSID awards to the maximum extent possible. Furthermore, as Bjorklund put it, the pro-ICSID construction of the SIA is essential if the ICSID Convention's enforcement regime is to be preserved.[154]

There is an important caveat to the proposed purposive interpretation of statutory provisions concerning state immunity. States' immunity from execution against state assets, to the extent protected from execution under domestic laws, must be respected. The ICSID Convention (article 55) and the Report of the Executive Directors on the Convention unambiguously mark this limitation on ICSID awards and their use.[155] Consequently, the suggested teleological approach to the SIA would not be permitted to prevent a State from invoking state immunity to hinder execution, however desirable that may be given the importance of execution for the full satisfaction of the award.[156] For states to lose their immunity from execution in the ICSID context, the ICSID Convention (article 55) itself would need to be amended to allow the enforcers entry into the protected realm of state assets except, for instance, assets that are regarded as commercial assets. Alternatively, a well-drafted contractual term in the arbitration agreement or in another agreement encompassing the agreement to arbitrate may suffice to waive the state's immunity from execution in certain jurisdictions.[157] Without a carefully drafted waiver from

[149] ibid [71].
[150] *Sodexo Pass International SAS v Hungary* [2021] NZHC 371.
[151] ibid [2]–[5].
[152] ibid [23].
[153] ibid [21]–[32].
[154] Bjorklund et al. (n 24) 518.
[155] See Brenninkmeijer and Gélinas (n 65) 438.
[156] See Brenninkmeijer and Gélinas (n 65), wherein the authors express the view that '*…when immunity from execution allows States to escape their consensually assumed obligations, and when it allows for the fruits of a favourable award to be withheld from claimants, the promise of arbitration becomes, quite simply, a false promise*' (432).
[157] See Choi (n 23) 214; and Albert Jan Van Den Berg, 'Recent Enforcement Problems under the New York and ICSID Conventions' (1989) 5(1) Arbitration International 2–20, 14.

execution and enforcement against assets, a disregard of a state's immunity from execution would risk falling foul of the Vienna Convention on the Law of Treaties, which requires that treaties 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'.[158] It would be incompatible with good faith to accord a provision an interpretation which not only stands at odds with the express words used but which also was clearly an outcome its drafters refused to accept and would have disagreed at its inclusion.[159]

In any event, it is worth noting that the ICSID Convention is not rendered 'toothless' by virtue of the operation of article 55 and the immunity of states from execution. As already alluded to above, most developed legal systems have abandoned the principle of absolute immunity from execution and permit execution against states' commercial assets. For instance, the SIA provides a 'commercial purposes'[160] exception to execution against state assets in certain settings. Hence, there is no need to be unduly negative as to the utility of the ICSID regime in amicably resolving investment disputes without resorting to solutions that simply do not work, textually or otherwise. Nevertheless, this does render ICSID arbitration somewhat hollow as investors are in practice unlikely to locate substantial assets in foreign jurisdictions that are not protected against execution. As Saunders and Salomon rightly remarked, 'the practical reality is that there are very few state assets which will not fall under the protective cloak of [execution] immunity'.[161]

The Court of Appeal was correct in its analysis and conclusion and is to be commended for securing the legitimacy and effectiveness of ICSID arbitration in holding states to their promises. Had the Court permitted Zimbabwe and Spain to evade their treaty obligations and resist the registration or enforcement of seemingly valid awards on state immunity principles, it would have seriously damaged the investment arbitration regime. The regime would have been rendered largely redundant, lacking teeth. Furthermore, and as importantly, such a finding would have been contrary to the wording of articles 54 and 55 of the ICSID Convention. It is clear from the ICSID Convention that only state immunity from execution against state assets is to survive where the Convention applies. Such is the near-unanimous interpretation adopted by foreign courts, and it is naturally important that international treaties be harmoniously interpreted. It would have been very unfortunate for the UK to have been the outlier and would have made it harder for it to retain its reputation as an arbitration-friendly jurisdiction, adopting pragmatic solutions to legal issues insofar as possible. The adoption of a teleological interpretation by the English Court of Appeal is therefore truly praiseworthy. It is hoped that the UK Supreme Court, on a likely appeal, will hold tight and give the Court of Appeal's judgment its stamp of approval.

FUNDING

The authors can confirm that they have received no funding in connection with this publication.

[158] VCLT, art 31.1.

[159] See Choi (n 23) 180–181. See also, *contra*, Brenninkmeijer and Gélinas(n 65) 446–448, who argue that '*[I]nterpreting consent to arbitration as an implied waiver of immunity from execution should be seen as the reasonable consequence of legal obligations which the State voluntarily undertakes*' (457).

[160] SIA, s 13(4). See Reece-Thomas (n 5), Chapter 5.

[161] Saunders (n 24) 469.