Hilary Term
[2026] UKSC 9
On appeal from: [2024] EWCA Civ 1257

JUDGMENT

The Kingdom of Spain (Appellant) *v* Infrastructure Services Luxembourg S.À.R.L. and another (Respondents); Republic of Zimbabwe (Appellant) *v* Border Timbers Ltd and another (Respondents)

before

Lord Lloyd-Jones
Lord Briggs
Lord Sales
Lord Leggatt
Lady Simler

JUDGMENT GIVEN ON
4 March 2026

Heard on 1, 2 and 3 December 2025

First Appellant
Lucas Bastin KC
Cameron Miles
Freddie Popplewell
(Instructed by Curtis, Mallet-Prevost, Colt & Mosle LLP)

Second Appellant
Salim Moollan KC
Benedict Tompkins
Tom Foxton
(Instructed by Gresham Legal)

First Respondent
Patrick Green KC
Andrew Stafford KC
Philippa Webb
Richard Clarke
(Instructed by Kobre & Kim (UK) LLP (London))

Second Respondent
Christopher Harris KC
Dominic Kennelly
Catherine Drummond
(Instructed by Baker & McKenzie LLP (London))

Intervener – The European Commission
Josephine Norris
(Assisted by Knights Professional Services Limited (York))

LORD LLOYD-JONES AND LADY SIMLER (with whom Lord Briggs, Lord Sales and Lord Leggatt agree):

I Introduction

1. The question on these two appeals is whether two foreign sovereign states, the Kingdom of Spain and the Republic of Zimbabwe, each the subject of adverse arbitration awards rendered pursuant to the provisions of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States 575 UNTS 159 ("the ICSID Convention"), can rely on their sovereign immunity to set aside the registration of those awards in the High Court under the Arbitration (International Investment Disputes) Act 1966 ("the 1966 Act"). The 1966 Act is the legislation by which the United Kingdom has given effect to its obligation to make the provisions of the ICSID Convention effective in its territories.

II The facts and background to each appeal

2. The United Kingdom signed the ICSID Convention on 26 May 1965, and it entered into force for the United Kingdom on 18 January 1967. It entered into force for Spain on 17 September 1994 and for Zimbabwe on 19 June 1994.

(i) The Kingdom of Spain's appeal

3. Spain ratified the multilateral Energy Charter Treaty 1994 ("the ECT") in 1997. (Spain has since withdrawn from the ECT with effect from 17 April 2025 but that has no impact on this appeal.) In May 2007, Spain introduced Royal Decree 661/2007 which built on an earlier measure providing that the owners of renewable energy facilities located in Spain would receive a reasonable return on their investments in Spain.

4. The respondents, Infrastructure Services Luxembourg S.À.R.L. and Energia Termosolar BV (together referred to for convenience as "Infrastructure") are companies domiciled in Luxembourg and the Netherlands, respectively. Both Luxembourg and the Netherlands were at the relevant times parties to the ICSID Convention and the ECT, and were EU Member States.

5. Infrastructure claimed to have invested €139.5 million in renewable energy facilities in Spain, by acquiring a 45% shareholding in the Andasol solar power station in Granada with effect from 31 August 2011, on the strength of Royal Decree 661/2007. Infrastructure claimed that subsequent changes to the regulatory regime governing the Spanish energy market damaged their investments in Spain in breach of the ECT. They

made a request for arbitration against Spain under article 26 of the ECT and the ICSID Convention, leading to the constitution of an arbitral tribunal and the commencement of arbitration proceedings on 22 November 2013. Spain challenged the jurisdiction of the arbitral panel, including on the basis that a claim under the ECT between an EU Member State and the national of another EU Member State infringed article 344 of the 2007 Treaty on the Functioning of the European Union ("the TFEU"), and that the ECT had in any event to be interpreted as excluding such "intra-EU" claims.

6. By an award dated 15 June 2018, those objections were rejected by the arbitral tribunal, and Infrastructure succeeded in their substantive claim, with the panel finding that, by amending its regulatory regime, Spain had breached the "fair and equitable treatment" standard in article 10(1) of the ECT. Spain was ordered to pay €112 million in compensation, plus interest and costs. On 29 January 2019, following an application for rectification by Spain pursuant to article 49(2) of the ICSID Convention, the award was reduced by €11 million. Spain then applied to challenge the award under the annulment procedure in the ICSID Convention, alleging (among other things) that the arbitral tribunal had exceeded its powers by exercising jurisdiction over the arbitration on the basis that any intra-EU arbitration under the ECT is precluded by EU law. The ICSID *Ad Hoc* Committee conducted a hearing and heard arguments on all matters raised by Spain. Spain's application for annulment was rejected by a decision of the ICSID *Ad Hoc* Committee dated 30 July 2021. Spain also sought a stay of enforcement which was initially granted but then lifted.

7. On 4 June 2021, Infrastructure applied without notice to the High Court of England and Wales to register the rectified award as a judgment in the sum of €120,083,287.88 under section 1 of the 1966 Act. On 29 June 2021, Cockerill J registered the award as if it were a final judgment of the High Court. (Infrastructure had also applied to the Federal Court in Australia for recognition of the award as well as to the US District Court for the District of Columbia in Washington DC. Recognition in those jurisdictions was challenged by Spain on broadly the same grounds as advanced in this jurisdiction.) On 28 April 2022, Spain applied to set aside the registration order on the basis that it was immune from the adjudicative jurisdiction of the English courts under section 1(1) of the State Immunity Act 1978 ("the SIA 1978").

8. The application was heard by Fraser J and dismissed by a judgment dated 24 May 2023, reported at [2023] EWHC 1226 (Comm), [2024] 1 All ER 404, [2023] 2 Lloyd's Rep 299. Fraser J dealt with several issues that are no longer relevant on these appeals. So far as relevant, he held, in summary, that by becoming a party to the ICSID Convention (article 54(1) in particular) and the ECT (article 26), Spain had submitted to the jurisdiction of the English courts by prior written agreement under section 2(2) of the SIA 1978. In the alternative, the Supreme Court's reasoning in *Micula v Romania* [2020] UKSC 5, [2020] 1 WLR 1033 also precluded Spain from contesting the existence of an arbitration agreement between itself and Infrastructure, such that section 9(1) of the SIA 1978 (which excepts a state from immunity as respects proceedings which relate to an

arbitration) was automatically satisfied. In the alternative, pursuant to article 26 of the ECT and the ICSID Convention, there was a valid arbitration agreement between Infrastructure and Spain for the purposes of section 9(1) of the SIA 1978.

9. Spain was granted permission to appeal Fraser J's order to the Court of Appeal.

(ii) The Republic of Zimbabwe's appeal

10. Zimbabwe is party to a bilateral investment treaty with Switzerland (signed on 15 August 1996 and in force from 9 February 2001) which provides for disputes with respect to investments between a contracting party and an investor of the other contracting party to be "submitted to the arbitration of the International Centre for Settlement of Investment Disputes, instituted by the [ICSID] Convention", if an investment dispute cannot be resolved by agreement between the parties (article 10(2) of the bilateral investment treaty). The respondents to this appeal, Border Timbers Ltd and Hangani Development Co. (Private) Ltd (together referred to for convenience as "Border Timbers"), claim to have invested in land in Zimbabwe which was later expropriated without compensation. The resulting dispute was not resolved by agreement, and Border Timbers initiated arbitral proceedings against Zimbabwe pursuant to article 10 of the bilateral investment treaty.

11. Zimbabwe disputed the tribunal's jurisdiction. It was and remains Zimbabwe's position that article 10 does not apply to the "investments" (a term defined in the treaty) purportedly made by Border Timbers as a purported "investor" (also a term defined in the treaty) in Zimbabwe, that it accordingly never agreed to arbitrate disputes with Border Timbers under the bilateral investment treaty, and that there is thus no question of the application of the ICSID Convention (which can only come into play to provide the applicable framework for an arbitration if there is in fact a valid agreement to arbitrate).

12. By an award in favour of Border Timbers dated 28 July 2015, the arbitral tribunal dismissed Zimbabwe's objections to jurisdiction and ordered Zimbabwe to pay US$124,041,223 together with interest, a further US$1m in moral damages and costs. Zimbabwe applied to have the award annulled by means of a process provided for in article 52 of the ICSID Convention. That application was dismissed by the ICSID annulment committee on 21 November 2018, with further costs ordered to be paid by Zimbabwe. Zimbabwe also sought a stay of enforcement, which was refused by that committee. The award was not satisfied, and, on 15 September 2021, Border Timbers applied without notice to the High Court of England and Wales to register the award as a judgment of the domestic courts under section 1 of the 1966 Act. On 8 October 2021, Cockerill J registered the award as if it were a final judgment of the High Court. The order was served on Zimbabwe on 27 May 2022.

13. On 25 July 2022, Zimbabwe applied to set it aside on the basis that it was immune from the adjudicative jurisdiction of the English courts under section 1(1) of the SIA 1978. Border Timbers resisted the application, contending that Zimbabwe fell within one or both exceptions to immunity set out in sections 2 and 9 of the SIA 1978 on the basis that Zimbabwe had submitted to the jurisdiction by virtue of its agreement to the ICSID Convention and/or had agreed to submit the underlying dispute to ICSID arbitration and so was not immune in respect of proceedings in the United Kingdom relating to that arbitration.

14. The set-aside application was heard and dismissed by Dias J. In a judgment reported at [2024] EWHC 58 (Comm), [2024] 1 WLR 3417, she held that, as a matter of public international law, article 54(1) constituted a general waiver of immunity, but such a general waiver did not meet the elevated threshold she applied to qualify as a submission to the jurisdiction for the purposes of section 2 of the SIA 1978. Section 9 of the SIA 1978 required the English court to make its own determination of whether Zimbabwe had agreed to arbitration, and an arbitral tribunal's own finding that it had jurisdiction could not preclude the English court from doing so. In any event, she held that registration of an ICSID award is a purely administrative act and therefore not an exercise of adjudicative jurisdiction, such that the SIA 1978 did not apply at all to registration proceedings under the 1966 Act.

15. Zimbabwe appealed to the Court of Appeal with the permission of Dias J.

16. The appeals of Spain and Zimbabwe (together "the appellant states") were heard together by the Court of Appeal (Flaux C and Newey and Phillips LJJ) in June 2024. By a judgment dated 22 October 2024, reported at [2024] EWCA Civ 1257, [2025] 2 WLR 621, the appeals were dismissed. In summary and so far as relevant, the Court of Appeal held that registration of an ICSID award under section 1 of the 1966 Act engages the adjudicative jurisdiction of the English courts (paras 35 – 39). This conclusion is not challenged by any of the parties. In relation to section 2(2) of the SIA 1978, the Court of Appeal held that article 54(1) of the ICSID Convention constitutes a prior written agreement by which the contracting states to the ICSID Convention submitted to the jurisdiction of the courts of other contracting states including the United Kingdom, such that the section 2(2) exception is necessarily established in relation to proceedings to register ICSID awards here (para 59). Further, while section 2(2) of the SIA 1978 requires any submission to the jurisdiction to be express and not implied, properly interpreted, agreement to article 54(1) of the ICSID Convention was a sufficiently express and clear submission to displace the immunity otherwise afforded by section 1(1) of the SIA 1978 in respect of each appellant state (para 96). Finally, in Zimbabwe's case only, because Zimbabwe had reserved its right to advance non-immunity defences to enforcement of the award, if necessary, following determination of its claim to immunity, and these had therefore not been adjudicated upon, the Court of Appeal remitted Zimbabwe's set-aside application to the Commercial Court for directions as to the determination of Zimbabwe's reserved non-immunity defences.

17. In light of those conclusions, the Court of Appeal considered it unnecessary to decide whether section 9(1) applied, though it indicated that, had the issue fallen to be decided, it was difficult to interpret section 9(1) of the SIA 1978 other than as imposing a duty on the English court to satisfy itself that the state in question has in fact agreed in writing to submit the dispute in question to arbitration. There was no legal basis, whether by way of issue estoppel or statutory interpretation, which would justify the court in abrogating that duty and considering itself bound by the determination of an arbitral tribunal as to its own jurisdiction under the ICSID Convention (para 105).

18. So far as concerned the difficult intra-EU issues raised by Spain's appeal, the Court of Appeal declined to address these given its conclusion that there was an agreement to submit to the jurisdiction under article 54(1) of the ICSID Convention.

19. The appellant states now appeal to the Supreme Court. Two main issues are raised by their appeals:

> **Issue 1**: By agreeing to be bound by article 54(1) of the ICSID Convention, did the appellant states submit to the jurisdiction of the English courts by agreement within the meaning of section 2(2) of the SIA 1978 such that they do not enjoy immunity from adjudicative jurisdiction with respect to these proceedings under section 1(1) of the SIA?
>
> **Issue 2**: Did the appellant states agree to arbitrate with the respondent investors within the meaning of section 9(1) of the SIA 1978 such that they do not enjoy immunity from adjudicative jurisdiction with respect to these proceedings under section 1(1) of the SIA 1978?

The Infrastructure respondents also advance additional reasons for upholding the judgment of the Court of Appeal. For reasons that will become apparent, it is not necessary to set these out and the court heard no argument on them.

20. The court heard argument over two days on issue 1 and concluded that it was unnecessary to hear argument on issue 2 or any other issues. Accordingly, this judgment addresses issue 1 only and, in particular, whether by agreeing to the obligations in article 54(1) of the ICSID Convention as properly construed, Zimbabwe and Spain agreed that all other contracting states (including the United Kingdom) would exercise adjudicative jurisdiction to recognise and enforce the ICSID awards obtained by the respondent investors, and thereby waived their immunity and submitted to the jurisdiction of UK courts for the purpose of section 2(2) of the SIA 1978.

21. We are concerned on these appeals with immunity from adjudicative jurisdiction only. We are not concerned with immunity from execution.

22. The rules of state immunity in international law which limit a domestic court's jurisdiction over a foreign state are a reflection of the principle of the sovereign equality of states. In the *Jurisdictional Immunities of the State (Germany v Italy)* (2012) ICJ Rep 99 the International Court of Justice observed (at para 57):

> "The Court considers that the rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order. This principle has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it."

The immunity of states in international law is not absolute but is subject to a number of exceptions. In addition, a state may waive its immunity. An agreement between states by treaty obliging those states to exercise jurisdiction on a mutual, reciprocal basis over each other would be capable of constituting a waiver of immunity.

III The legislative framework

The 1966 Act

23. As already stated, the ICSID Convention is given effect in the United Kingdom by the 1966 Act. Section 1 applies to awards rendered pursuant to the ICSID Convention. Section 1(2) provides that a person seeking recognition or enforcement of such an award "shall be entitled to have the award registered in the High Court subject to proof of the prescribed matters and to the other provisions of this Act". Rules of court prescribe the matters to be proved on the application and the manner of proof and require the applicant to furnish a copy of the award certified pursuant to the ICSID Convention.

24. Section 2 of the 1966 Act deals with the effect of registration and provides:

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

The State Immunity Act 1978

25. In the United Kingdom the rules relating to state immunity, previously governed by the common law, have been codified in the SIA 1978.

26. Section 1 of the SIA 1978 accords to foreign states immunity from the jurisdiction of courts of the United Kingdom, except as provided for in sections 2 to 11 of the SIA 1978. The application of the presumptive immunity in section 1 means that if a case does not fall within one of these exceptions, the foreign state is immune. The burden is on the applicant to prove the application of an exception. Sovereign state immunity is a procedural bar to proceedings where it applies, and the court is bound to give effect to it of its own motion.

27. The exception relevant in these appeals is section 2. So far as material, it provides as follows:

> "**Submission to jurisdiction.**
>
> (1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom.
>
> (2) A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement; but a provision in any agreement that it is to be governed by the law of the United Kingdom is not to be regarded as a submission.
>
> (3) A State is deemed to have submitted—

(a) if it has instituted the proceedings; or

(b) subject to subsections (4) and (5) below, if it has intervened or taken any step in the proceedings.

…"

28. Section 17 is an interpretation provision. Section 17(2) provides:

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

It follows that a state is not immune in relation to proceedings in the United Kingdom where it has submitted to the jurisdiction by a prior written treaty or convention.

The ICSID Convention

29. The ICSID Convention (which had three original language texts: English, French and Spanish) was opened for signature on 18 March 1965. It was registered by the International Bank for Reconstruction and Development ("the IBRD") on 17 October 1966. It is currently in force in 158 contracting states (including, as we have indicated above, the United Kingdom, Spain and Zimbabwe). This Convention imposes certain treaty obligations upon all those contracting states.

30. The Preamble provides as follows:

"Preamble

The Contracting States

Considering the need for international cooperation for economic development, and the role of private international investment therein;

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

31. In short, the ICSID Convention established an agreement between its contracting states which took account of the need for international cooperation for economic development, and the role of private investment in that regard. Recognising that disputes would potentially arise between private investors and host states, and although those disputes would sometimes be subject to national processes, an international settlement of disputes between such parties would sometimes be appropriate. Therefore, facilities for this were established under the auspices of the IBRD, an international institution that is part of the World Bank. Both it and ICSID are headquartered in Washington DC. IBRD is the seat of the International Centre for the Settlement of Investment Disputes (“ICSID”) (which is called “the Centre” in the ICSID Convention).

32. Chapter I of the ICSID Convention establishes the structures and organs of ICSID, while Chapter II defines its jurisdiction. It is clear from these provisions that the ICSID Convention does not itself constitute an agreement to arbitrate between foreign investors and Contracting States. Foreign investors are private persons. They are not and cannot be parties to the ICSID Convention. The ICSID Convention provides a framework for the resolution of such disputes as the parties may agree in writing to submit to ICSID. A separate agreement to arbitrate is therefore required and is commonly formed by the acceptance by an investor of a standing offer to arbitrate in a bilateral investment treaty or other treaty between two or more states. Absent such an agreement, a foreign state, which is a sovereign actor in public international law, cannot be brought into any sort of compulsory international adjudicatory process by a private person.

33. So far as material, article 25(1) of the ICSID Convention states:

> "(1) 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. When the parties have given their consent, no party may withdraw its consent unilaterally."

34. Article 27(1) provides that no contracting state shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another contracting state shall have consented to submit or shall have submitted to arbitration under the ICSID Convention, unless that other contracting state has failed to abide by and comply with the award rendered in that dispute.

35. Chapter III deals with conciliation while Chapter IV covers the processes and procedures for arbitration.

36. By article 41(1), the arbitral tribunal shall be the judge of its own competence. Article 41(2) provides:

> "Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute."

37. Article 42(1) provides:

> "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."

38. So far as the arbitral award is concerned, interpretation, revision and annulment are dealt with by articles 50 to 52. Disputes about interpretation or requests for revision are dealt with by the arbitral tribunal or a new tribunal constituted in accordance with the ICSID Convention, and where there is a request for annulment, by an ad hoc committee.

39. "Recognition and Enforcement of the Award" are provided for in section 6 of Chapter IV, and the following provisions constitute the scheme which is at the heart of these appeals:

> "*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.
>
> *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."

40. Provision is made for disputes between contracting states in article 64 which provides:

> "Any dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party to such dispute, unless the States concerned agree to another method of settlement."

41. Finally, article 69 provides: "Each Contracting State shall take such legislative or other measures as may be necessary for making the provisions of this Convention effective in its territories."

IV The central questions on this appeal

42. Against this background, two principal questions arise. First, what is the test for deciding whether there has been an agreement to submit to the jurisdiction under section

2(2) of the SIA 1978? This is a matter of domestic law. Secondly, what is the correct interpretation of articles 53 to 55 of the ICSID Convention as a matter of customary international law, and does article 54(1) satisfy the section 2 test? We start with the test under section 2 of the SIA 1978.

V The test under section 2 of the SIA 1978 for waiver of immunity

43. A considerable amount of time was devoted at the hearing to the question whether any waiver of immunity by treaty must be express or whether it may be implied. We were told initially that it was common ground between the parties that any waiver of immunity by treaty must be express. However, when counsel were pressed as to the precise meaning and effect of this statement differences emerged. Counsel for the appellant states submitted that state immunity is a matter of such fundamental importance that an agreement to waive it must be express. Ordinarily this would require that words such as "waiver" or "submission" should appear. Where such words are absent, Mr Moollan KC for Zimbabwe accepted that it may be possible to infer a waiver of immunity from the words used, but only if not inferring waiver would otherwise render the clause unworkable, meaningless or lead to absurdity or complete incompatibility. Mr Bastin KC for Spain submitted that a necessary implication from express terms would be an implied term and not a valid waiver. By contrast, Mr Green KC and Mr Harris KC for the respondent investors explained their position that an express waiver does not require the explicit use of words such as "waiver", "submission" or "immunity" but would include a necessary implication from the express words used. In their submission, "express" means clear when the interpretative process required by articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969 ("the Vienna Convention on the Law of Treaties") is applied to the words used. It appears therefore that there are in fact important differences between the positions of the parties.

44. The issue before the court is made the more difficult by an inconsistent use of the terminology of express and implied terms and disagreement as to the boundary between the two.

45. The starting point must be section 2 of the SIA 1978, which establishes an exception to immunity in the case of submission to the jurisdiction. We note that it does not employ the terminology of express or implied submission or waiver. Section 2(2) simply states that a state may submit after a dispute giving rise to the proceedings has arisen or by prior written agreement.

46. By contrast, the European Convention on State Immunity, Basle, 16 May 1972 (Misc 31 (1972); Cmnd 5081) distinguishes in this regard between submission by international agreement and other forms of waiver.

"Article 2

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if it has undertaken to submit to the jurisdiction of that court either:

(a) by international agreement;

(b) by an express term contained in a contract in writing; or

(c) by an express consent given after a dispute between the parties has arisen."

47. The UN Convention on Jurisdictional Immunities of States and their Property (2004), 44 ILM 801 ("UNCSI") requires express consent to the exercise of jurisdiction:

"*Article 7*

Express consent to exercise of jurisdiction

1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case:

(a) by international agreement;

(b) in a written contract; or

(c) by a declaration before the court or by a written communication in a specific proceeding."

48. The US Foreign Sovereign Immunities Act 28 USC paragraph 1605 provides that immunity may be waived "either explicitly or by implication".

> "(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –
>
> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver; …"

49. The principal authority on which the appellant states rely in this regard is the dissenting judgment of Lord Goff in *R v Bow Street Magistrate, Ex parte Pinochet (No 3)* [2000] 1 AC 147 ("*Pinochet (No 3)*"). The central issue in that case was whether the state parties to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 ("Convention against Torture") had agreed to exclude reliance on state immunity ratione materiae in relation to proceedings brought against their public officials, or other persons acting in an official capacity, in respect of torture contrary to the Convention. More particularly the question was whether General Pinochet, a former head of state of Chile, enjoyed immunity ratione materiae in respect of an application for his extradition to Spain to face charges of official torture contrary to the Convention against Torture or whether any such immunity had been removed by the provisions of the Convention against Torture to which Chile, Spain and the United Kingdom were parties. (Immunity ratione materiae is an immunity in international law which arises by reason of the subject matter of the proceedings and is to be distinguished from immunity ratione personae which arises by reason of the status of the defendant. Immunity ratione personae did not apply in that case because General Pinochet was no longer head of state of Chile.)

50. Accepting a submission on behalf of Chile that a state's waiver of its immunity by treaty must always be express, Lord Goff stated in relation to the Convention against Torture (at 213C-D):

> "It is to be observed that no mention is made of state immunity in the Convention. Had it been intended to exclude state immunity, it is reasonable to assume that this would have been the subject either of a separate article, or of a separate paragraph in article 7, introduced to provide for that particular matter."

He stated (at 213H–214B) that, since exclusion of immunity was said to result from the Convention against Torture and there was no express term of the Convention to this effect, the argument had to be formulated as dependent upon an implied term in the Convention. He commented that the proposed implied term had not been precisely formulated.

51. Citing *Oppenheim's International Law*, vol. I, 9th ed. (1992) (ed. Sir Robert Jennings QC and Sir Arthur Watts QC), pp 351–355, the International Law Commission commentary on the Draft Articles which were eventually adopted as UNCSI and the decision of the US Supreme Court in *Argentine Republic v Amerada Hess Shipping Corporation* (1989) 109 S Ct 683, Lord Goff considered (at 215A-216G) that in international law waiver of immunity by treaty must always be express. Turning to the provisions of the SIA 1978, he observed (at 216H – 217B):

> "Section 2(2) recognises that a state may submit to the jurisdiction by a prior written agreement, which I read as referring to an express agreement to submit. There is no suggestion in the Act that an implied agreement to submit would be sufficient, except in so far as an actual submission to the jurisdiction of a court of this country, may be regarded as an implied waiver of immunity; but my reading of the Act leads me to understand that such a submission to the jurisdiction is here regarded as an express rather than an implied waiver of immunity or agreement to submit to the jurisdiction."

Lord Goff went on to state that this was consistent with Part III of the SIA 1978 which by section 20 applied to a head of state the provisions of the Diplomatic Privileges Act 1964 ("DPA"), subject to any necessary modifications. Section 2 of the DPA in turn rendered applicable certain articles of the Vienna Convention on Diplomatic Relations 1961, 500 UNTS 95, article 32(2) of which:

> "provides that such waiver must always be express, which I read as including an actual submission to the jurisdiction, as well as an express agreement in advance to submit. Once again, there is no provision for an implied agreement." (at 217C)

52. Lord Goff came to the following conclusion (at 217D):

> "In the light of the foregoing it appears to me to be clear that, in accordance both with international law, and with the law of this country, which on this point reflects international law, a state's waiver of its immunity by treaty must … always be express. Indeed, if this was not so, there could well be international chaos as the courts of different state parties to a treaty reach different conclusions on the question whether a waiver of immunity was to be implied."

53. While a waiver of immunity must always be clear and unequivocal, we consider that Lord Goff took an unnecessarily narrow view of what may constitute an express waiver of immunity.

54. First, it should be noted that Lord Goff's is a dissenting judgment. The other six members of the Appellate Committee held that General Pinochet was not entitled to immunity. The only support to be found in other judgments for Lord Goff's views on waiver of immunity is the brief observation of Lord Millett (at 268B-C):

> "State immunity is not a personal right. It is an attribute of the sovereignty of the state. … It may be asserted or waived by the state, but where it is waived by treaty or convention the waiver must be express. So much is not in dispute."

However, Lord Millett was one of four members of the court who considered that the existence of immunity was inconsistent with the provisions of the Convention against Torture. He considered that customary international law had changed before the entry into force of the Convention against Torture in 1987 with the result that immunity ratione materiae was no longer available in cases of official torture. Nevertheless, Lord Millett considered that Chile, as a party to the Convention against Torture, must be taken to have assented to the imposition of an obligation on foreign national courts to take and exercise criminal jurisdiction in respect of the official use of torture. He explained that he did not regard Chile as having thereby waived its immunity. Rather he considered that there was no immunity to waive. However, he went on to state:

> "International law cannot be supposed to have established a crime having the character of a jus cogens and at the same time to have provided an immunity which is coextensive with the obligation it seeks to impose." (at 278A-B)

55. In contrast to Lord Goff's view as to what might constitute express waiver, Lord Saville, a member of the majority, characterised Chile's consent to the Convention against Torture as an express waiver of immunity:

> "Since 8 December 1988 Chile, Spain and this country have all been parties to the Torture Convention. So far as these countries at least are concerned it seems to me that from that date these state parties are in agreement with each other that the immunity ratione materiae of their former heads of state cannot be claimed in cases of alleged official torture. In other words, so far as the allegations of official torture against Senator Pinochet

> are concerned, there is now by this agreement an exception or qualification to the general rule of immunity ratione materiae.
>
> I do not reach this conclusion by implying terms into the Torture Convention, but simply by applying its express terms. …" (at 267B-C)
>
> "It is also said that any waiver by states of immunities must be express, or at least unequivocal. I would not dissent from this as a general proposition, but it seems to me that the express and unequivocal terms of the Torture Convention fulfil any such requirement. To my mind these terms demonstrate that the states who have become parties have clearly and unambiguously agreed that official torture should now be dealt with in a way which would otherwise amount to an interference in their sovereignty." (at 267F-G)

56. Secondly, Lord Goff's conclusion that there was no express waiver in *Pinochet (No 3)* seems to have been based on the absence of an explicit provision in the Convention against Torture referring to a waiver of immunity. As we have seen, he noted that there was no reference to state immunity in the Convention and that there was "no express term" relating to waiver. As a result, he considered that the argument had to be formulated as dependent upon an implied term in the Convention (213C-D, 213H-214B). The notion that some express reference to consent is needed is, however, difficult to reconcile with the undoubted fact that immunity may be waived by, for example, taking a step in the proceedings. Immunity can be waived by simply doing something inconsistent with an intention to preserve immunity. If, as we consider, such conduct involving submission before the court is properly characterised as a waiver of immunity, it is difficult to see why words may not amount to such a waiver, provided they are sufficiently clear and unequivocal.

57. This approach also fails to take any account of the possibility that waiver could be achieved by an express term which did not explicitly refer to waiver, or as a necessary consequence of such an express term, without requiring the implication of a term. As a result, Lord Goff did not analyse the relevant articles of the Convention against Torture to ascertain the explicit and inherent meaning of the words used. Instead, he proceeded on the basis that something had to be read in.

58. The approach of Lord Goff in this regard is inconsistent with the decision of the Supreme Court in *NML Capital Ltd v Republic of Argentina* [2011] 2 AC 495 ("*NML*"). In that case Argentina had issued a series of bonds which included the following clause (referred to below as the "first clause") (at para 57):

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

Following Argentina's default under the bonds, NML obtained a "related judgment" against Argentina in the United States District Court for the Southern District of New York. Despite the narrow approach to construction required by the law of New York, the governing law of the bonds, Blair J (at first instance [2009] EWHC 110 (Comm), [2009] QB 579) considered that the first clause constituted a submission to the jurisdiction of the English court insofar as "Argentina unambiguously agreed that a final judgment on the bonds in New York should be enforceable against Argentina in other courts in which it might be amenable to a suit on the judgment" (para 38). In the Court of Appeal, Aikens LJ disagreed ([2010] EWCA Civ 41, [2011] QB 8). He held that the agreement that the New York judgment could be enforced in any courts to the jurisdiction "of which Argentina is or may be subject by a suit upon such judgment" was neither a waiver of immunity nor a submission to the jurisdiction of the English court.

59. The Supreme Court held unanimously that the first clause was both an agreement to waive immunity and an express agreement that the New York judgment could be sued on in any country that, state immunity apart, would have jurisdiction. Because England was such a country the clause constituted a submission to the jurisdiction of the English courts (per Lord Phillips, para 59). Lord Collins considered (at para 128) that the first clause "was the clearest possible waiver of immunity". Lord Mance agreed (see para 83, dealing with what is described as the third issue), as did Lord Clarke (para 138). The members of the Supreme Court reached these conclusions notwithstanding the absence of any explicit language in the clause referring to submission or waiver.

60. On behalf of Spain, Mr Bastin sought to distinguish *NML*. He relied on the fact that there were two potentially relevant clauses in the bonds in that case, and one of these dealt explicitly with waiver and submission. He argued that this affected the approach to construction of the first clause. The argument is incorrect. Lord Phillips construed the two clauses separately and held that the second clause (dealing explicitly with waiver) was an independent submission to the jurisdiction (para 61), while Lord Collins held that the waiver in the first clause was confirmed by the waiver in the second clause (para 129).

61. On behalf of Zimbabwe, Mr Moollan relied on Lord Phillips' statement (at para 59) that to hold otherwise would be "to rob the provision of all effect" to argue that *NML* is authority for the proposition that it is necessary, in order to make a finding of waiver, to find that the clause in question would otherwise have no operative effect. In our judgment this is a misreading of what Lord Phillips was saying in *NML*. Lord Phillips said (para 59):

> "If a state waives immunity it does no more than place itself on the same footing as any other person. A waiver of immunity does not confer jurisdiction where, in the case of another defendant, it would not exist. If, however, state immunity is the only bar to jurisdiction, an agreement to waive immunity is tantamount to a submission to the jurisdiction. In this case Argentina agreed that the New York judgment could be enforced by a suit upon the judgment in any court to the jurisdiction of which, absent immunity, Argentina would be subject. It was both an agreement to waive immunity and an express agreement that the New York judgment could be sued on in any country that, state immunity apart, would have jurisdiction."

When expressing the view that the provision would be robbed of all effect, Lord Phillips was simply responding to and rejecting the alternative view (expressed by Aikens LJ) that it was neither a waiver nor an agreement that the judgment could be sued on in specific courts. If the clause was not a waiver of immunity but an agreement that the judgment could be sued on (subject to immunity) in courts, it would not have been robbed of all effect. The decisive finding on waiver was not dependent on a need to ensure the provision had effect, as Mr Moollan contended. It was held to be a waiver because this was the clear meaning of the express words used.

62. Thirdly, the materials relied on by Lord Goff do not support his uncompromising approach.

63. Sir Robert Jennings QC and Sir Arthur Watts QC writing in *Oppenheim's International Law* state (at pp 351–353):

> "A state, although in principle entitled to immunity, may waive its immunity. It may do so by expressly submitting to the jurisdiction of the court before which it is sued, either by express consent given in the context of a particular dispute which has already arisen, or by consent given in advance in a contract or international agreement. … A state may also be considered to have waived its immunity by implication, as by instituting or intervening in proceedings, or taking any steps in the proceedings relating to the merits of the case."

This passage does not support Lord Goff's narrow approach to express consent. It also accepts that waiver may be by implication. Furthermore, contrary to Lord Goff's expressed view (at 215C-D), the fact that the only example given in this passage of waiver

of immunity by implication is to actual submission by a state in instituting or intervening in proceedings, or taking any steps in the proceedings relating to the merits of the case, is not in our view of any particular significance. It simply provides an example of waiver by implication.

64. The ILC commentary on which Lord Goff also relies (*Report of the International Law Commission on the Jurisdictional Immunities of States and their Property*, 1991 YBILC, vol II, Part 2, para (8)) is a commentary on draft article 7(1), which was limited to express consent. That draft article was adopted in identical terms as article 7(1) UNCSI which is set out at para 47 above. The commentary stated:

> "In the circumstances under consideration, that is, in the context of the state against which legal proceedings have been brought, there appear to be several recognisable methods of expressing or signifying consent. In this particular connection, the consent should not be taken for granted, nor readily implied. Any theory of "implied consent" as a possible exception to the general principles of state immunities outlined in this part should be viewed not as an exception in itself but rather as an added explanation or justification for an otherwise valid and generally recognised exception. There is therefore no room for implying the consent of an unwilling state which has not expressed its consent in a clear and recognisable manner, including by the means provided in article 8 [concerning the effect of participation in a proceeding before a court]. It remains to be seen how consent would be given or expressed so as to remove the obligation of the court of another state to refrain from the exercise of its jurisdiction against an equally sovereign state." (Emphasis added)

65. We need not be detained here by the reference to generally recognised exceptions to immunity being presented as cases of implied consent as this has no bearing on the present case. The important point is that the commentary does not support Lord Goff's narrow view of express consent. On the contrary, it strongly suggests that what matters is that consent should be expressed in a clear and recognisable manner.

66. Similarly, *Argentine Republic v Amerada Hess Shipping Corporation* (1989) 488 US 428 does not support Lord Goff's approach. Paragraph 1605(a)(1) of the US Foreign Sovereign Immunities Act 1976 provides for an exception to immunity where a foreign state has waived its immunity either explicitly or by implication. The plaintiffs in that case submitted that there was an implicit waiver of immunity in two international agreements to which Argentina was a party, the Geneva Convention on the High Seas 1958, 450 UNTS 82 and the Pan American Maritime Neutrality Convention (1928) 22

AJIL Supp 151. The submission was rejected by Rehnquist CJ delivering the judgment of the US Supreme Court. However, those treaties had broad objectives and were concerned with defining maritime zones and state activity in those zones. Having explained, in the context of paragraph 1604, that the conventions did "not create private rights of action for foreign corporations to recover compensation from foreign states in United States courts" (at p 442), Rehnquist CJ continued (at pp 442–443):

> "Nor do we see how a foreign state can waive its immunity under para 1605(a)(1) by signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States."

There was nothing in either convention capable of giving rise to the implication for which the plaintiffs contended.

67. An issue closely analogous to the present arose for consideration by the Court of Appeal in *General Dynamics United Kingdom Ltd v State of Libya* [2025] EWCA Civ 134, [2025] 4 WLR 34. That case arose from an application to set aside an interim charging order and was principally concerned with whether there was immunity from enforcement jurisdiction under the SIA 1978. Section 13(2)(b) of the SIA 1978 provides that the property of a state shall not be subject to any process for the enforcement of a judgment or arbitration award. This, however, is subject to section 13(3) which provides:

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

Libya's first ground of appeal to the Court of Appeal was that the judge erred in holding that "clear words" were not required for a state to consent to execution against its property within the meaning of section 13(3) of the SIA 1978. Libya contended that section 13(3) should be interpreted as requiring heightened express consent because of the sensitivity of enforcement against a state and because clear express words must be used in order to rebut the presumption that neither party to a contract intended to give up valuable rights or remedies. On the latter point Libya relied on *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd* [1974] AC 689 per Lord Diplock at 717H and *Triple Point Technology Inc v PTT Public Co Ltd* [2021] UKSC 29; [2021] AC 1148 per Lord Leggatt at paras 106–110. Although the agreement was governed by Swiss law, it was submitted

that the presumption pre-dated the SIA 1978 and must be assumed to have been intended by Parliament to apply.

68. Phillips LJ, with whom Lewison and Zacaroli LJJ agreed, rejected the submission (at para 32):

> "In my judgment, however, there is no justification for putting any gloss on the words of section 13(3). The subsection requires the written consent of the state concerned, such consent being 'expressed so as to apply to a limited extent or generally' by the words used. The task of the court is therefore to determine whether and to what extent the state gave (that is, expressed) its consent by construing the words used according to the law applicable to that exercise, in the present case, Swiss law. Once the court has determined that the state's consent for the giving of the relief in question was expressed by the written words, section 13(3) is satisfied. As it is common ground that there is no need to use the word 'consent' or any other specific wording, it is unclear what would be required, beyond that the words used express consent, for that consent to be regarded as 'express'. Further, given that words will not be construed as giving consent if they express an intention which is unclear or equivocal, there appears to be no scope for an additional requirement for 'clear words'."

Phillips LJ went on to state (at paras 34–35) that the same analysis applies to section 2(2) of the SIA 1978 and to cite his conclusion in the Court of Appeal in the present proceedings (at para 92):

> "If the express words used amount, on their proper construction, to an unequivocal agreement by the state to submit to the jurisdiction, that is sufficient to satisfy section 2(2) of the SIA, even if the words 'submit' and 'waiver' are not used."

We agree with the reasoning and conclusion of Phillips LJ.

69. We consider that a waiver of immunity by treaty requires a clear and unequivocal expression of the state's consent to the exercise of jurisdiction. Whether this exists depends upon an exercise of treaty interpretation in accordance with the treaty's governing law, public international law. For this purpose, the relevant rules of interpretation are to be found in articles 31 and 32 of the Vienna Convention on the Law

of Treaties. Such an expression of consent does not require explicit words such as waiver or submission. Meaning is conveyed not only by the express words used but also by what is necessarily inherent in those words, and by what necessarily follows as a consequence of the use of those words. Accordingly, when considering the waiver of state immunity by treaty, the test is whether the words used necessarily lead to the conclusion that the state has submitted to the jurisdiction.

70. *Pinochet (No 3)* provides a striking example of the application of such an approach. We consider that the ratio of *Pinochet (No 3)* is that, as between states party to the Convention against Torture, that Convention excludes the operation of immunity ratione materiae. Four of the Law Lords (Lord Browne-Wilkinson at 205C-F; Lord Saville of Newdigate at 266D, 266H-277B, 267F-G; Lord Millett at 277D-E, 277H-278B; Lord Phillips of Worth Matravers at 290E-G) considered that, since the offence of torture established by the Convention is limited to offences of torture committed in an official capacity, every case would otherwise be met by a plea of immunity. The immunity would be exactly coextensive with the offence. In these circumstances the parties to the Convention against Torture must be taken to have decided that immunity ratione materiae should not be available. (In this regard we agree with the judgment of the Criminal Division of the Court of Appeal in *R v Lama* [2014] EWCA Crim 1729, [2017] QB 1171 at paras 30–35.) The fact that the four Law Lords reached this conclusion by different routes—Lord Saville was the only one to hold that this was an express waiver—is immaterial. What matters for present purposes is that a majority concluded that the express terms of the Convention against Torture could convey an unequivocal agreement that immunity ratione materiae should not apply to acts of official torture. They considered that it was a necessary consequence of the express provisions of the Convention against Torture requiring contracting states to criminalise and establish jurisdiction over acts of official torture that those states accepted that there was no immunity ratione materiae in respect of such conduct.

71. A further example of such reasoning, but in a different context, is provided by the judgment of the ICJ in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) Judgment [2007] ICJ Rep 43. The terms of the Convention on the Prevention and Punishment of the Crime of Genocide ("the Genocide Convention") do not in so many words impose an obligation on contracting parties not to commit genocide. Article I on its face requires contracting parties only to prevent and punish the crime of genocide. The ICJ nevertheless derived from the express obligations a duty not to commit genocide.

> "Under Article I the States parties are bound to prevent such an act, which it describes as 'a crime under international law', being committed. The Article does not *expressis verbis* require States to refrain from themselves committing genocide. However, in the view of the Court, taking into account the established purpose of the Convention, the effect of Article I is

> to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that the Article categorizes genocide as 'a crime under international law': by agreeing to such a categorization, the States parties must logically be undertaking not to commit the act so described. Secondly, it follows from the expressly stated obligation to prevent the commission of acts of genocide. That obligation requires the States parties, *inter alia*, to employ the means at their disposal, in circumstances to be described more specifically later in this Judgment, to prevent persons or groups not directly under their authority from committing an act of genocide or any of the other acts mentioned in Article III. It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law. In short, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide." (at para 166)

72. As a result, it is not necessary to consider in this judgment the circumstances in which terms may be implied more widely into treaties.

VI The interpretation of the ICSID Convention

73. Having addressed the test to be applied in domestic law pursuant to section 2(2) of the SIA 1978, the next question is whether and, if so, to what extent the appellant states are to be treated as having waived state immunity and submitted to the adjudicative jurisdiction of the courts of other contracting states (including the UK) in proceedings to recognise and enforce ICSID awards, by becoming signatories to the ICSID Convention (and in particular article 54). The answer to that question depends on the proper interpretation of articles 53 to 55 of the ICSID Convention, interpreted in accordance with customary international law principles on treaty interpretation as codified in the Vienna Convention on the Law of Treaties.

74. As already stated, the relevant principles of interpretation are those set out in articles 31 and 32 of the Vienna Convention on the Law of Treaties which provide materially as follows:

> "*Article 31*

General rule of interpretation

1. 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 . . .

3. There shall be taken into account, together with the context: (a) . . . (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties . . .

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; (b) leads to a result which is manifestly absurd or unreasonable."

75. Article 31 thus requires the terms of a treaty to be interpreted in good faith in accordance with their ordinary meaning, in their context, and in the light of the treaty's object and purpose. A holistic approach is required. Context and object and purpose may be found in the treaty's text, in other words its surrounding provisions, and in the treaty as a whole, including its preamble. The clear focus of article 31 is, accordingly, on seeking to ascertain the ordinary meaning of the relevant terms of the treaty having regard to context, object and purpose of the treaty as a "single combined operation": see *JTI Polska sp. z o.o. v Jakubowski* [2024] AC 621 (para 26, per Lord Hamblen); and *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* [2017] ICJ Rep 3, para 64.

76. Article 32 allows for recourse to supplementary material for limited purposes only, emphasising that the court's task is to interpret the treaty rather than the supplementary material. Where the ordinary meaning of treaty terms can be ascertained by applying the primary rule in article 31 of the Vienna Convention on the Law of Treaties, recourse to supplementary means of interpretation under article 32 is permitted only "in order to confirm" that ordinary meaning. Such confirmation can be drawn from the travaux

préparatoires. However, the supplementary means of interpretation in article 32 cannot be used to change or contradict the meaning resulting from the application of article 31.

77. Where, however, the application of the rule in article 31 produces a meaning that is ambiguous or obscure or leads to a manifestly absurd or unreasonable result, the rule in article 32 permits supplementary means to be used to determine the meaning of treaty terms. But such cases "should be rare, and only where two conditions are fulfilled, first, that the material involved is public and accessible, and secondly, that the travaux préparatoires clearly and indisputably point to a definite legislative intention" (*Fothergill v Monarch Airlines* [1981] AC 251, 278B-C per Lord Wilberforce; and also *Effort Shipping Co Ltd v Linden Management S.A. and others* [1998] AC 605, 623E per Lord Steyn).

78. Article 17(1) of the Vienna Convention on the Law of Treaties provides that: "Without prejudice to articles 19 to 23 [the provisions on reservations], the consent of a State to be bound by part of a treaty is effective only if the treaty so permits or the other contracting States so agree". In the absence of a provision specifically authorising states to consent to a part or parts only of a treaty or to exclude certain parts, the established rule is that the consent must relate to the treaty as a whole, and a purported partial consent is regarded as no consent at all: see *Oppenheim's International Law*, pp 1232–1233; Corten and Klein (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2011), p 364. It also follows that, in general, a state's consent to be bound by a treaty reflects its acceptance of the other parties to that treaty being bound by the obligations contained therein in relation to the first state.

79. Finally, it is well-established that the text of an international treaty or convention is intended to be given the same uniform meaning by all the states which become parties to it. This means that so far as possible the text should be interpreted in a uniform manner and that regard should be had to how it has been interpreted by the courts of different countries, particularly where there is consensus among national courts in relation to the question of interpretation: see, for example, *Islam v Secretary of State for the Home Department* [1999] 2 AC 629, 657A–B, per Lord Hope of Craighead.

Ordinary meaning of articles 53 to 55 of the ICSID Convention

80. Applying the approach set out in article 31, the starting point is the words of articles 53 to 55 of the ICSID Convention (these articles are set out above at para 39).

81. Article 53(1) contains an agreement (in writing) by each contracting party that awards rendered under the ICSID Convention shall be final and binding. Each party agrees to abide by and comply with the terms of such an award except to the extent that enforcement is stayed. Subject to that (and there is no extant stay of enforcement in either

of these appeals) article 53 is directed at achieving finality and an enforcing court cannot re-examine the award on its merits or refuse enforcement (in the sense used in the ICSID Convention) on grounds of public policy.

82. Under article 54(1) each contracting state is obliged to recognise as binding and enforce the pecuniary obligations of an award rendered pursuant to the ICSID Convention as if it were a final judgment of its own courts. It follows that, upon becoming party to the ICSID Convention, a contracting state not only assumes that obligation to recognise and enforce ICSID awards but also consents to the fact that all other contracting states are undertaking the same obligation. As a matter of ordinary language, each contracting state therefore agrees by article 54(1) not only that it will recognise and enforce awards, but also that awards to which it is a party will be recognised and enforced in other contracting states which have undertaken the same obligation. Thus, the United Kingdom has agreed with the other contracting states that it will recognise any ICSID award as if it were a final judgment of its own domestic courts, and the appellant states have agreed to the United Kingdom doing so, and agreed with all contracting states, including the United Kingdom, that this is the United Kingdom's obligation. On the face of it, this is inconsistent with the preservation of adjudicative immunity.

83. The contracting state's obligation to recognise and enforce in article 54(1) may require the taking of certain formal steps but the ICSID Convention does not prescribe the machinery to achieve this, leaving it to the contracting states to determine, save only that article 54(2) sets out a formal procedural requirement on the party seeking recognition and enforcement to provide a copy of the award certified as authentic by the Secretary-General to the designated domestic court. The High Court is designated for this purpose by the 1966 Act, and it is contemplated that it will honour the United Kingdom's international obligations in this respect.

84. These articles draw no distinction between states parties and investor parties and plainly apply to both. On the face of it, the appellant states have agreed that the respondent investors are entitled to have their ICSID awards recognised in the United Kingdom and enforced under domestic law against them as if each were a judgment of the High Court. The High Court is obliged to recognise these awards and enforce them as if they were judgments. This does not affect the position as regards immunity from execution as discussed below.

85. Execution is dealt with in article 54(3) which provides that the available processes of execution will be those in the law of the state where enforcement is sought. This provision does not limit the obligation on contracting states to enforce awards which is to be governed by the domestic laws in force concerning execution of judgments in the forum state in which execution is sought (here, England).

86. Article 55 contains a clarificatory saving for immunity, providing that nothing in article 54 derogates from state immunity from execution.

87. While the line between enforcement and execution may not be clear and neither term is defined (a perhaps unsurprising feature of the scheme given that the work on drafting these articles was carried out "under great time pressure and is described by Broches [the General Counsel of the World Bank and chairman of the negotiations] as being characterized by great fluidity, sometimes bordering on confusion"—see Stephan W. Schill and others, *Schreuer's Commentary on the ICSID Convention*, 3rd ed (2022), p 1493, para 80), the scheme of these articles draws a sharp distinction between recognition and enforcement on the one hand (article 54(1) and (2)) and execution on the other (articles 54(3) and 55). It follows that the award must first be recognised and only after that stage has been completed can any execution steps be taken. The immunity from execution is not an immunity from the prior step involved in having the award recognised in domestic law and domestic laws on immunity from execution can only be applied if the domestic courts first have jurisdiction. The preservation of state immunity in article 55 extends only to execution and does not concern the earlier steps including recognition. Accordingly, the obligation to recognise and enforce an arbitral award is limited to steps up to but not including the obligation to ensure execution if that is barred by a claim to state immunity.

88. It is significant that only immunity from execution is expressly preserved in this scheme. The absence of any preservation of adjudicative immunity in articles 53–55 accords entirely with the obligations in article 54(1) being fundamentally inconsistent with the maintenance of such immunity from adjudicative jurisdiction because the obligation to recognise and enforce an arbitral award as binding necessarily involves an exercise of adjudicative jurisdiction that must have overcome any jurisdictional bar to the exercise of that jurisdiction. Put another way, once there is a binding award, recognised and to be enforced like a final judgment, adjudication has already taken place and the scope for reliance on immunity from adjudicative jurisdiction has passed. It follows that the reciprocal obligations on each contracting state in article 54(1) are inconsistent with the maintenance by contracting states of any such immunity from adjudicative jurisdiction. On the face of it, the terms of article 54(1) mean that there is a waiver of reliance on state immunity.

89. The waiver follows from the fact that each contracting state has agreed that all other contracting states are obliged to ("Each Contracting State shall") recognise and enforce ICSID awards, including as against them in the territories of those other contracting states. These are obligations undertaken on a mutual and reciprocal basis. That necessarily involves an express acceptance by each contracting state that if an ICSID award is rendered against it, then every other contracting state must exercise jurisdiction, if requested, to recognise and enforce that award.

90. Mr Bastin sought to avoid this result by suggesting that it is unnecessary for one state to consent to another acquiring obligations under a treaty. In his submission contracting states (eg the United Kingdom) can and did acquire obligations under the ICSID Convention without the consent of other contracting states (eg Spain). Spain may have recognised this but did not agree to it. But this submission ignores the fact that consent to a treaty by a contracting state is consent to the application of all provisions of the treaty as between itself and other contracting states, subject only to any permissible reservations that the treaty allows (see article 17(1) of the Vienna Convention on the Law of Treaties).

91. Nor is there any sustainable basis for limiting the application of article 54(1) to the recognition and enforcement of awards against private investors by the courts of the contracting state itself, as the appellant states sought to argue. Article 53 makes clear that each party, which includes each contracting state, "shall abide by and comply with the terms of the award", except to the extent to which the terms are stayed. Article 54 then imposes the obligation to recognise and enforce arbitral awards as final and binding without any distinction being drawn between awards against private investors and against host contracting states.

92. Furthermore, recognition and enforcement proceedings will in all, or almost all, cases involve the courts of one contracting state exercising adjudicative jurisdiction over another contracting state. The appellant states agree that the obligations of other contracting states that are being consented to are obligations to bring about a required result: their courts must recognise and enforce the pecuniary obligations of ICSID awards as if they are final judgments. They are wrong therefore to assert that article 54(1) is limited to imposing an obligation to create a domestic mechanism for recognition and enforcement. Contracting states must use existing or newly established mechanisms to achieve the required result, namely, to recognise and enforce awards as if they are final judgments. They must achieve that result in all cases, not just in some cases. To do that there must be an exercise of adjudicative jurisdiction by the forum state. Put another way, a contracting state (such as Spain or Zimbabwe) cannot simultaneously agree that the United Kingdom "shall" recognise and enforce an ICSID award rendered against them, whilst also claiming immunity from recognition and enforcement that would prevent the United Kingdom from complying with its own ICSID obligations. The obligations to recognise and enforce consented to by the contracting states are therefore inconsistent with the maintenance of immunity.

93. This conclusion does not involve reading in words or implying terms into article 54(1) of the ICSID Convention. The submission to jurisdiction on a reciprocal basis is deduced from the ordinary meaning of the express and unequivocal terms of article 54(1). On the face of the express words of article 54(1), consent to this provision could not be a clearer submission to the jurisdiction. Just as the Supreme Court held in *NML* (at para 128) that Argentina's agreement that a judgment against it "may be enforced … in any … courts to the jurisdiction of which the republic is or may be subject" was the "clearest

possible waiver of immunity because Argentina was or might be subject to the jurisdiction of the English court" the same approach adopted here leads to the same conclusion.

94. This was also the approach described by Lord Saville in *Pinochet (No 3)* at 267F-G, where he explained that the express terms of the Convention against Torture demonstrated that the states who had become parties had clearly and unambiguously agreed that official torture should now be dealt with in a way which would otherwise amount to an interference in their sovereignty (see para 55 above). It is also consistent with the process of deduction described in *Bosnia v Serbia* discussed at para 71 above.

95. In the present case the reciprocal operation of article 54(1) is readily apparent from the meaning of the express words and it is not necessary to resort to implication of terms.

96. The appellant states submit that even if they had consented to other contracting states undertaking an obligation to recognise and enforce ICSID awards, that does not mean that they submitted to the jurisdiction of the courts of other contracting states. In this regard they rely on the decision of the ICJ in the *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (2002) ICJ Rep 1. The ICJ stated (at para 59):

> "It should further be noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction."

The ICJ was here making the important point that jurisdiction and immunity are two distinct concepts. It went on to explain that although various international conventions for the prevention and punishment of certain serious crimes impose on states obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. Clearly, an acceptance of jurisdiction does not necessarily in every case carry with it a waiver of immunity. However, this does not assist the appellant states in the present case. This is not a case where a state agrees that another state shall have jurisdiction but reserves its immunity. On the contrary, there is an agreement that every other contracting state will enforce the pecuniary obligations imposed by an award within its territories as if it were a final judgment of a court in that state. That refers to the end result of the adjudicative process. In order to reach that point immunity must necessarily have been overcome.

Context

97. The treaty context reinforces our conclusions about the ordinary meaning of article 54(1) as a clear and unequivocal waiver of adjudicative immunity by state parties.

98. Article 54 is part of a self-contained or closed scheme for producing binding awards. A notable feature of the scheme (as the Supreme Court described it in *Micula*) is that "once the authenticity of an award is established, a domestic court before which recognition is sought may not re-examine the award on its merits. Similarly, a domestic court may not refuse to enforce an authenticated ICSID award on grounds of national or international public policy. In this respect, the ICSID Convention differs significantly from the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958" (para 68).

99. Contracting states may not refuse recognition or enforcement of an award on grounds covered by the challenge provisions in the ICSID Convention itself (articles 50-52) or on the basis of jurisdiction or competence (article 41(2)).

100. In *Micula* the Supreme Court explained that article 54(3) (concerned with execution of awards) does not limit the obligation of contracting states to enforce awards (para 76). It recognised that there may be scope for some additional defences against enforcement in exceptional or extraordinary circumstances, if national law recognises them in respect of final judgments of national courts and if they do not directly overlap with the grounds of challenge specifically reserved to ICSID tribunals under articles 50 to 52 of the ICSID Convention (para 78).

101. The Supreme Court in *Micula* also emphasised the fact that the obligations (in articles 53, 54 and 69) are expressed in unqualified terms without distinguishing between the persons (private investors or states) to whom they are owed; and (at para 104) that obligations to comply with the ICSID Convention scheme are owed by all contracting states to the community of contracting states:

> "104. It is clear that the specific duties in articles 54 and 69 of the ICSID Convention are owed to all other contracting states. The Convention scheme is one of mutual trust and confidence which depends on the participation and compliance of every contracting state. The importance within this scheme of the effective recognition and enforcement of awards is apparent from the Preamble which emphasises the requirement that any arbitral award be complied with".

102. Moreover, as the Supreme Court explained at para 106, "failure of any contracting state to enforce an award in accordance with article 54 would undermine the Convention scheme on which investors and contracting states all rely. This points to a network of mutual enforcement obligations."

103. Article 27 supports this. It confirms that the obligation on a contracting state against whom an arbitration award is made to comply with the award is not just owed to the other parties to the dispute, since it recognises that any contracting state whose national is involved in the dispute may bring an international claim against the other contracting state if it fails to comply with the award rendered. Recognition and enforcement are no guarantee of payment given that domestic laws on immunity from execution continue to apply and may prevent an investor from obtaining satisfaction.

104. The requirement on each contracting state in article 69 to take "such legislative or other measures as may be necessary for making the provisions of this Convention effective in its territories" shows that the scheme is concerned with achieving the intended result, namely an arbitral award recognised and treated as a final judgment, and not simply with an obligation to set up the mechanism to do so.

105. The appellant states' contention that the ICSID Convention operates perfectly well without any waiver of adjudicative immunity because the primary remedy against non-complying states is at the public international law level is misplaced. That a separate route for resolution of disputes between contracting states is provided by article 64 of the ICSID Convention (which permits an aggrieved state to refer the dispute to the ICJ) simply underlines the fact that there cannot have been any absolute assumption that states would comply with their Convention obligations thereby avoiding any need for parity of obligations as between investors and host states. In any event, article 64 is necessary in order to provide a remedy where there is an infringement of the obligations owed by contracting states party to all other contracting states.

Object and purpose

106. A primary purpose of the ICSID Convention was to encourage the flow of private investment in sovereign states by offering assurances against sovereign risk in the host state absent satisfactory dispute settlement mechanisms. This is reflected in the first to third paragraphs of the ICSID Convention's preamble (see para 30 above). It is also clear from the summary record of proceedings of the first consultative meeting at Addis Ababa where the Chairman, Mr Broches, is recorded repeating the concern of developing countries that one of the most serious impediments to the flow of private capital was "the fear of investors that their investment would be exposed to political risks such as outright expropriation, government interference and non-observance by the host government of contractual undertakings on the basis of which the investment had been made" (see

History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1968), vol II-1 at p 240).

107. The object was therefore to create a system for the international arbitration of investment disputes between states and foreign investors, that would produce binding awards supported by a fully reciprocal regime to ensure compliance and increase mutual trust and confidence: see the fourth to sixth paragraphs of the preamble (above at para 30) and *Micula* paras 104 and 106. The sixth paragraph of the preamble is a particularly strong indicator of this purpose, recognising "that mutual consent by the parties to submit such disputes to … arbitration … constitutes a binding agreement which requires … any arbitral award be complied with." In this statement "parties" means the parties to the arbitration agreement, not state parties, which are referred to as Contracting States. Again, this strongly indicates the purpose is to achieve a result.

108. The importance of the need for reciprocity and mutual enforcement obligations is plain. Contracting states signed up to the ICSID Convention in good faith, agreeing to such binding obligations. Moreover, as already explained, a significant feature of the scheme is that once the authenticity of an award is established, a domestic court before which recognition is sought may not re-examine the award on its merits, or the fairness and propriety of the proceedings and may not refuse to enforce.

109. *Pinochet (No 3)* provides a closely analogous example of the object and purpose of a treaty influencing its interpretation. Four members of the Appellate Committee considered that immunity ratione materiae would be incompatible with the object and purpose of the Convention against Torture.

110. Lord Browne-Wilkinson stated (at 205E-F)

> "Under the Convention the international crime of torture can only be committed by an official or someone in an official capacity. They would all be entitled to immunity. It would follow that there can be no case outside Chile in which a successful prosecution for torture can be brought unless the State of Chile is prepared to waive its right to its official's immunity. Therefore, the whole elaborate structure of universal jurisdiction over torture committed by officials is rendered abortive and one of the main objectives of the Torture Convention — to provide a system under which there is no safe haven for torturers — will have been frustrated. In my judgment all these factors together demonstrate that the notion

of continued immunity for ex-heads of state is inconsistent with the provisions of the Torture Convention."

111. Lord Saville stated (at 266H-267B):

"So far as the states that are parties to the Convention are concerned, I cannot see how, so far as torture is concerned, this immunity can exist consistently with the terms of that Convention. Each state party has agreed that the other state parties can exercise jurisdiction over alleged official torturers found within their territories, by extraditing them or referring them to their own appropriate authorities for prosecution; and thus to my mind can hardly simultaneously claim an immunity from extradition or prosecution that is necessarily based on the official nature of the alleged torture."

112. Lord Millett stated (at 277D-E and 277H-278B):

"The definition of torture, both in the Convention and section 134, is in my opinion entirely inconsistent with the existence of a plea of immunity ratione materiae. The offence can be committed *only* by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. The official or governmental nature of the act, which forms the basis of the immunity, is an essential ingredient of the offence. No rational system of criminal justice can allow an immunity which is coextensive with the offence."

"My Lords, the Republic of Chile was a party to the Torture Convention, and must be taken to have assented to the imposition of an obligation on foreign national courts to take and exercise criminal jurisdiction in respect of the official use of torture. I do not regard it as having thereby waived its immunity. In my opinion there was no immunity to be waived. The offence is one which could only be committed in circumstances which would normally give rise to the immunity. The international community had created an offence for which immunity ratione materiae could not possibly be available. International law cannot be supposed to have established a crime having the character of a jus cogens and at the same time to have provided an immunity which is coextensive with the obligation it seeks to impose."

113. Lord Phillips stated (at 290E-G):

> "Each state party is required to make such conduct [official torture under article 1 of the Convention against Torture] criminal under its law, wherever committed. More pertinently, each state party is required to prosecute any person found within its jurisdiction who has committed such an offence, unless it extradites that person for trial for the offence in another state. The only conduct covered by this Convention is conduct which would be subject to immunity ratione materiae, if such immunity were applicable. The Convention is thus incompatible with the applicability of immunity ratione materiae. There are only two possibilities. One is that the states parties to the Convention proceeded on the premise that no immunity could exist ratione materiae in respect of torture, a crime contrary to international law. The other is that the states parties to the Convention expressly agreed that immunity ratione materiae should not apply in the case of torture. I believe that the first of these alternatives is the correct one, but either must be fatal to the assertion by Chile and Senator Pinochet of immunity in respect of extradition proceedings based on torture."

114. In each case the conclusion was reached by deduction from the express provisions of the Convention against Torture having regard to their object and purpose. The same process operates in the present case.

115. The response of the appellant states is that *Pinochet (No 3)* is an extreme case in that to uphold immunity ratione materiae in cases of official torture under the Convention against Torture would have defeated the entire purpose of the Convention. They point to the observations in *Pinochet (No 3)* that to uphold immunity ratione materiae in those circumstances would reduce the law to incoherence. They submit that an agreement to exercise jurisdiction can only be a waiver of immunity if otherwise the treaty would be deprived of all effect. By contrast, they submit, upholding the immunity of the appellant states in the present case would not deny all *effet utile* to the provisions of ICSID. In particular, Mr Moollan on behalf of Zimbabwe submitted that ICSID could operate effectively and would have purpose and effect even if contracting states were not taken to have waived their immunity. Here, he relied on a number of matters. First, it would achieve what he maintained was the primary purpose of ICSID by providing a remedy for states against investors in the domestic courts of the state where the investors operate. Secondly, it would operate against a respondent state in its own jurisdiction. Thirdly, it may operate in third states depending on the domestic rules of state immunity applying there. Fourthly, article 64 of ICSID provides an alternative remedy against states.

116. It is correct that *Pinochet (No 3)* was an extreme case in that the immunity contended for would have been coextensive with the offence of official torture. To uphold immunity ratione materiae for official torture would have prevented prosecutions for official torture save in the unlikely event that the state in question waived the immunity. However, it does not follow that an agreement to exercise jurisdiction can only be a waiver of immunity if otherwise the treaty would entirely defeat the object and purpose of the treaty and deprive it of all effect. As we have demonstrated, the existence of immunity in the circumstances of the present case would be incompatible with a major object of the ICSID Convention, namely, to encourage investment by providing protection against sovereign risk. The immunity contended for would render valueless the protection which article 54(1) is intended to provide by making enforceable the pecuniary obligations imposed by an award as if it were a final judgment of a court in a contracting state. In this respect, the present case may not be as strong as *Pinochet (No 3)* but it is still compelling.

117. In another respect, however, the present case is stronger than *Pinochet (No 3)*, as was pointed out by Philippa Webb in her oral submissions on behalf of Infrastructure. In *Pinochet (No 3)* the Convention against Torture obliged each contracting state to make official torture an offence under its criminal law (article 4), to establish jurisdiction over such offences in specified circumstances including when the alleged offender is present in its territory (article 5) and, where an alleged offender is found in its territory, to extradite him or to submit the case to its competent authorities for the purpose of prosecution (article 7). Article 7 leaves a discretion to the authorities of each contracting state to decide whether or not to exercise the jurisdiction. By contrast the obligation on contracting states under article 54(1) of ICSID is one of result: to recognise an award as binding and to "enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State". Furthermore, that obligation to treat an award as a judgment, the final product of the judicial process, is entirely incompatible with immunity from that judicial process.

118. In the result, we are satisfied that the meaning of article 54(1) is clear when interpreted in accordance with article 31 of the Vienna Convention on the Law of Treaties. Article 54(1) is a clear and unequivocal submission to the adjudicative jurisdiction of the English courts for the purposes of recognising and enforcing the arbitral awards against Spain and Zimbabwe in these proceedings. This conclusion is entirely consistent with the object and purpose of the ICSID Convention which was to preserve state immunity only in respect of execution while providing for mandatory recognition and enforcement in respect of all parties, investors and states alike.

Supplementary means of interpretation

i. Travaux préparatoires

119. The meaning derived from the article 31 exercise is clear. It follows that to have recourse to supplementary means of interpretation, including the travaux préparatoires, is not necessary. Were we to do so in these circumstances, it could only be to confirm the meaning arrived at from the article 31 exercise.

120. In fact, having considered the travaux préparatoires with care, we are satisfied that they do confirm that consent to article 54(1) constitutes a waiver of immunity from the adjudicative jurisdiction of other contracting states. Throughout the preparatory stages the overarching intention was that awards (including awards against states) would be treated in each contracting state as final judgments and enforced as such. There was a concern that this process should not be interpreted as removing state immunity against execution if such immunity was otherwise conferred on the foreign state by the law of the forum state. But this was addressed by the introduction of article 55 by way of clarification and the avoidance of doubt.

121. In this regard we draw attention to three matters in particular.

122. First, Mr Moollan for Zimbabwe relied on what he claimed was a consensus among the delegates at the consultative meetings that the law of state immunity would be unaffected by article 54. However, when the relevant travaux préparatoires are read in context it becomes clear that they are concerned with immunity from execution and not immunity from adjudicative jurisdiction, the subject matter of the present appeal.

123. The original draft section which became article 54 did not expressly preserve immunity from execution (ICSID, *History of the ICSID Convention* (1968), vol-II-1, Doc 21 (9 August 1963) "Annotated First Preliminary Draft Convention", p 161, section 15). A series of consultative meetings was held in Addis Ababa (December 1963), Santiago de Chile (February 1964), Geneva (February 1964) and Bangkok (April to May 1964) to consider the Preliminary Draft Convention. The issue of state immunity from execution was discussed in those meetings and resulted in the addition of what became article 55. The first draft of that article referred to immunity from execution only and the language remained unchanged (*History*, vol-II-1, Doc 43 (11 September 1964) "Draft Convention: Working Paper for the Legal Committee", pp 636–637). Mr Aron Broches explained at the Addis Ababa meeting that:

> "…where, as in most countries, the law of State Immunity from execution would prevent enforcement against a State as

> opposed to execution against a private party, the Convention would leave the law unaffected. All the Convention would do would be to place an arbitral award rendered pursuant to it on the same footing as a final judgment of the national Courts. If such judgment could be enforced under the domestic law in question, so could the award; if that judgment could not be so enforced, neither could the award." (*History*, vol-II-1, Doc 25 (30 April 1964) "Summary Record of Proceedings, Addis Ababa Consultative Meetings of Legal Experts, December 16-20, 1963" p 242)

124. At the Santiago meeting, the representatives from Jamaica and the United States expressed concern that the doctrine of state immunity be maintained (*History*, vol-II-1, Doc 27 (12 June 1964) "Summary Record of Proceedings, Santiago Consultative Meetings of Legal Experts, February 3-7, 1964", p 343). Mr Broches at the Geneva meeting recalled this exchange and made the following observation:

> "…the intention was not to modify the existing law on State immunity. The view had been expressed at the Santiago meeting that Section 15 [which became Article 54] as now drafted would force a modification in State practice and law on the question of a State's immunity from execution. He thought this view unfounded, but an express proviso removing any doubt as to the intent of the section might be inserted… The lack of uniformity in State practice, concerning the immunity of other States from execution had convinced him that it would be preferable to refrain from attempting to legislate either positively or negatively in Sections 14 and 15." (*History*, vol-II-1, Doc 29 (1 June 1964) "Summary Record of Proceedings, Geneva Consultative Meetings of Legal Experts, February 17-22, 1963", pp 428–429)

125. The position is summed up by the Report of the Executive Directors on the ICSID Convention which states in respect of Article 54 and 55:

> "43. 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 forcible execution of awards rendered pursuant to the Convention in cases in which final judgments could not be

> executed. In order to leave no doubt on this point Article 55 provides that nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution." (*History,* vol-II-2, Doc 145, "Convention on the Settlement of Investment Disputes between States and Nationals of Other States and Accompanying Report of the Executive Directors", p 1083).

126. Secondly, nothing in the travaux préparatoires directly addresses the waiver of adjudicative immunity. The picture which emerges from the travaux préparatoires is that awards would be enforceable subject only to immunity from execution. See, for instance, the comment of the Italian representative:

> "that Section 15 was essential and formed a logical link in the system, since it enabled a successful party to seek execution of the award in any Contracting State wherever property of the losing party could be found, subject only to the local laws and procedures on execution of judgments including any law on the immunity of the property of a foreign State from execution…" (*History*, vol-II-1, Doc 29 (1 June 1964) "Summary Record of Proceedings, Geneva Consultative Meetings of Legal Experts, February 17-22, 1964", p 430).

127. There is nothing in the references made by counsel to the travaux préparatoires that shows it was contemplated that state immunity would present a barrier to the registration of an award before domestic courts. Rather, Article 54(1) provided a legal basis for execution by treating the award as a final judgment of the national court. It is only when measures are taken to execute the award that immunity arises. At the outset of the negotiations, Mr Broches observed that the draft text:

> "…was quite a step forward in the recognition of international arbitral awards when compared with the general law in most countries. As to whether forced execution following upon an award could be obtained against a government, that would depend upon the force of a final judgment in the country in which enforcement was sought. In general it would not be possible to enforce a judgment against the State in the sense of seizing its property and selling it in forced execution. But this did not seem to present a major problem. The problem had been that there was doubt as to whether States would accept an award as valid and binding. There were hardly any cases in which there had been difficulty in obtaining compliance with an award

> once its binding character was clearly established." (*History*, vol-II-1, Doc 22 (20 September 1963) "Memorandum of the discussion by the Executive Directors, September 10, 1963, Discussion of the First Preliminary Draft Convention", pp 177.)

128. The picture is complicated by the conflation of the terms 'enforcement' and 'execution' by the drafters of the ICSID Convention. However, a reading of the exchanges in the travaux préparatoires concerning state immunity shows that the term 'enforcement' is there used to refer to the execution of the award against state assets. Mr Broches also suggested that the intent of the provision might be better expressed if the words "recognize … and enforce it" were substituted by "recognize as enforceable" in what became Article 54(1) (*History*, vol-II-1, Doc 27 (12 June 1964) "Summary Record of Proceedings, Santiago Consultative Meetings of Legal Experts, February 3-7, 1964", p 344; *History*, vol-II-1, Doc 31 (20 July 1964) "Summary Record of Proceedings, Bangkok Consultative Meetings of Legal Experts, April 27-May 1, 1964", p 519).

129. It is notable that at the time the Convention was drafted there were few exceptions to immunity from execution (see *Schreuer's Commentary*, p 1522, para 18). The travaux préparatoires accordingly reflect the view that execution of the award would not be possible. (See, for example, the observations of Mr Broches (*History*, vol-II-1, Doc 31, p 522)). The Austrian representative highlighted that in Austria the immunity is relative as opposed to absolute so that an award could be executed under certain circumstances (*History*, vol-II-2, Doc 46 (24 November 1964) "Austrian Comment on the Draft Convention", p 671). This statement presupposes that there is no adjudicative immunity precluding the registration of the award, thereby enabling a party to seek execution of the award, subject to the local law on immunity from execution.

130. Thirdly, counsel for the appellant states relied heavily on passages in the travaux préparatoires identifying the principal purpose of article 54 as providing states with recourse to enforce awards against investors (*History*, vol-II, pp 304, 344, 433, 520, 522). While it is true that one of the main purposes of article 54(1) at the time it was drafted was to enable states to enforce against investors on the footing that states parties would comply with awards in any event—an assumption that has not always been borne out as these proceedings show—the travaux préparatoires show that it was always intended that article 54 would not operate solely in one direction, and that investors would have parity of treatment and the same rights as states under article 54 as regards the entitlement to recognition and enforcement of awards where states lost an arbitration. It was contemplated throughout the negotiations that article 54 would apply to enforcement against states by investors, notwithstanding the expectation that such cases would be uncommon, since states were generally assumed to comply with awards (*History*, vol-II, pp 10–11, 176–177, 344, 574–575).

131. Two examples make good this point. First, at the discussion of the First Preliminary Draft of the Convention in September 1963, Mr Oellerer requested various clarifications, including asking, as to enforcement of awards, whether it was certain that all awards under the Convention would be enforceable in all contracting states, particularly awards made against a government. As we have seen, Mr Broches responded emphasising that section 15 required each state to recognise an award as binding and enforce it within its territory as if the award were a final judgment of the courts of that state; and stating that this was "quite a step forward in the recognition of international arbitral awards when compared with the general law in most countries". (*History*, vol-II-1, Doc 22 (20 September 1963) "Memorandum of the discussion by the Executive Directors, September 10, 1963, Discussion of the First Preliminary Draft Convention", pp 176–177, cited at para 127 above.) The second passage is from the Santiago meetings in February 1964, where Mr Broches said:

> "…the principal purpose of Section 15 (although this was not its only effect) was to give States which had been successful plaintiffs a means to enforce awards against investors who did not have assets within the host State's territories. States would be directly bound by the Convention to comply with awards rendered against them, which could not be void of investors. In the unlikely event that a losing State failed to comply with an award it would be in clear violation of the Convention itself, and the State whose national had failed to obtain satisfaction, could take up his case". (*History*, vol-II-1, 344)

132. These passages show that it was contemplated from the outset that what became article 54 might be used against states, even if that was not expected to be very common, because it was assumed that states would comply with their treaty obligations. Article 64 of the ICSID Convention underlines the fact that there cannot have been any absolute assumption that states would comply. The passages do not support the position of the appellant states that there cannot have been any agreement to waiver.

133. Our reading of the travaux préparatoires also finds support in *Schreuer's Commentary* (at p 1474, para 7) which explains:

> "all the drafts leading to the Convention refer to recognition and enforcement against the parties in equal terms, without distinguishing between investors and host States, and it is clear that this was also the intention of the drafters…"

Indeed, the language of Article 54 applies equally to the recognition and enforcement of awards, whether against investors or states. Furthermore, Article 54 must have been

intended to apply to enforcement against states, otherwise there would have been no need to preserve immunity from execution under Article 55. The reciprocal nature of the obligations is reinforced by the sixth paragraph of the preamble as discussed above.

ii. Judgments in other jurisdictions

134. We have referred above to the principle of consistent interpretation of international instruments and the intention that the text of international treaties should be interpreted by the courts of all the states parties as having the same meaning. As Lord Hope said in this context in *Islam v Secretary of State for the Home Department,* "if it could be said that a uniform interpretation was to be found in the authorities, I would regard it as appropriate that we should follow it" (657B). (See also *Basfar v Wong* [2022] UKSC 20, [2023] AC 33, para 16 per Lords Briggs and Leggatt. Consistency as to how the courts of different states party to a treaty interpret that treaty also motivated Lord Goff's position in *Pinochet (No 3)* at 217D, when he referred to the international chaos that would ensue if the courts of different state parties to a treaty reach different conclusions about its meaning.)

135. In fact, as the Court of Appeal observed at para 62, there is broad international consensus as to the meaning and effect of article 54(1) of the ICSID Convention. The courts of Australia, New Zealand, Malaysia, and the United States have all interpreted article 54(1) as a waiver of adjudicative immunity by each contracting state and, where domestically relevant, a submission to jurisdiction. There is one outlier but as we explain below, little weight can properly be attached to that decision.

136. In the decision of the High Court of Australia ("HCA") in *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* [2023] HCA 11, which concerned proceedings by Infrastructure to enforce the same ICSID award against Spain as is in issue here, the High Court of Australia considered whether article 54(1) of the ICSID Convention reflects a waiver of jurisdictional immunity. Spain had argued that article 54(1) only contemplated recognition and enforcement of an arbitral award in three circumstances: against an investor in an Australian court; against the state of Australia in an Australian court; and against a foreign state in an Australian court only if the foreign state chose to waive immunity over the proceeding. Spain argued that the express words of article 54(1) are not sufficiently clear to amount to a waiver of immunity from court processes concerning recognition or enforcement.

137. This submission was rejected as requiring a contorted reading of articles 53 to 55 (para 69). The HCA regarded the textual difficulties with Spain's primary submission as being compounded when the ordinary meaning of article 54(1) is understood in light of its object and purpose, which includes mitigating sovereign risk (para 71). The HCA

concluded that the express terms of article 54(1) involve a waiver of immunity from jurisdiction in relation to recognition and enforcement (para 75).

138. In *Sodexo Pass International SAS v Hungary* [2021] NZHC 371, Sodexo had investments in Hungary which were adversely affected by tax changes introduced in Hungary in 2010. Sodexo alleged that the changes resulted in an unlawful expropriation of its investments. It obtained an ICSID tribunal award in 2019. Hungary resisted recognition and enforcement of the arbitral award in New Zealand claiming state immunity. Cooke J dismissed Hungary's claim. He expressed general agreement with the courts of Australia, the USA, and France that "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" (para 23). Cooke J explained that his conclusion was based on the terms of the ICSID Convention, noting that "the proper meaning of articles 53-55 should be considered together as they are interrelated provisions that involve an overall scheme relating to the enforcement of ICSID arbitral awards" (para 24). In his view, an important feature of the scheme was that each contracting state is obliged to recognise an award as binding and agree to enforce it as if it were a final judgment of its own courts. It followed that Hungary had agreed with contracting states, including New Zealand, that this was New Zealand's obligation. Hungary was able to claim state immunity under New Zealand law in relation to any execution processes, but that immunity did not prevent the award from first being recognised. Hungary had agreed that the award may be so recognised and had thereby waived any adjudicative immunity it had in relation to recognition (para 25).

139. In *Von Pezold v Zimbabwe* WA-24NCC-322-07/2021 (27 November 2023), which involved the same expropriated properties in Zimbabwe as the case with which we are concerned, the investors in Border Timbers, the Von Pezold family, sought recognition of the ICSID awards obtained against Zimbabwe in Malaysia. Judge Ahmad in the Kuala Lumpur High Court held that Zimbabwe could not invoke state immunity to avoid recognition and enforcement of the awards as a final judgment under article 54(1), adopting the conclusion of Cooke J in *Sodexo Pass* on this point (para 37) and further stating that articles 54 and 55 are clear and that by ratifying the ICSID Convention Zimbabwe had acquiesced to contracting states (including Malaysia) recognising the award as a binding domestic court judgment pursuant to article 54 without any right to immunity (paras 40–48).

140. In *Blue Ridge Investments LLC v Republic of Argentina* (2012) 735 F.3d 72, the United States Court of Appeals, Second Circuit, reached the same conclusion in response to Argentina's application to dismiss a petition to confirm an arbitral award under the ICSID Convention. The court held (just as it had in an earlier case—*Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co, Kommanditgesellschaft v Navimpex Centrala Navala* (1993) 989 F. 2d 572—where it held that by becoming a contracting state to the Convention on the Recognition and Enforcement of Arbitral Awards ("CFREAA"), the contracting state must have contemplated by the very provisions of the CFREAA

enforcement actions in other contracting states) that the same was true of article 54 of the ICSID Convention and Argentina must have contemplated enforcement actions in other contracting states including the United States under the ICSID Convention (p 84).

141. The appellant states rely on *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan* BVIHC (Com) 2020/0196, 25 May 2021, a decision of the High Court of the British Virgin Islands, where a claim to state immunity from jurisdiction under article 54(1) was raised for the first time during the hearing and upheld. Wallbank J dealt with the point very briefly. He dismissed the contention that there was a submission to the jurisdiction by agreement in the ICSID Convention itself, holding at para 51:

> "Moreover, Article 54(1) of the Convention imposes on Pakistan, as a contracting state, an obligation to allow recognition and enforcement of the award before its own courts. Article 54(1) places no obligation on Pakistan, at all, before the BVI courts and so it cannot constitute a waiver by Pakistan of its immunity or anything else."

142. With respect, this conclusion takes no account of the fact that Pakistan had both agreed to abide by and comply with the terms of an arbitral award under the ICSID Convention (article 53) and consented, by becoming party to the ICSID Convention, to each other contracting state also being under an obligation to recognise an ICSID award as binding and to enforce the pecuniary obligations imposed by it within its territories as if it were a final judgment of a court in that state (article 54(1)). This agreement is clear from these articles as we have already explained and places clear obligations on Pakistan before the courts of other contracting states parties.

Other points

143. The appellant states sought faintly to rely on Hansard to discern the purpose of the disputed provision in section 2 of the SIA 1978 or to clarify ambiguities. We can see no proper basis for doing so. The well-established rule in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 makes it clear that reference to Parliamentary material as an aid to statutory construction is permitted only where (a) the legislation in question is ambiguous, obscure or leads to absurdity, (b) the material relied on comprises statements by the Minister or other promoter of the bill and (c) the statements relied on are clear and directed at the point in issue. The meaning of the statutory provision is clear and gives rise to no ambiguity, obscurity or absurdity. It is unnecessary to consider (b) and (c) in the circumstances.

VII Conclusion

144. It follows that the appeals are dismissed on the first ground. The appellant states have submitted to the jurisdiction by virtue of article 54 of the Convention and consequently, they may not oppose the registration of ICSID awards against them on the grounds of state immunity.

145. This conclusion makes it unnecessary to determine the remaining ground in either appeal and, as we have explained, we were not in the event addressed upon these arguments. Our decision should not be treated as expressing any view either way as to the correctness of the Court of Appeal's conclusions on issue 2.

146. Finally, the Court of Appeal's order remitting Zimbabwe's application to set aside to the Commercial Court for directions as to determination of its non-immunity defences stands. As we have explained, Zimbabwe maintains that these defences would come within the class of exceptional matters recognised in *Micula* as remaining open by reason of the award being treated like any other final judgment. The defences have not yet been adjudicated upon, and we express no view on their merits.