FEDERAL COURT OF AUSTRALIA

CCDM Holdings, LLC v Republic of India (No 3) [2023] FCA 1266

File number(s):	NSD 347 of 2021
Judgment of:	**JACKMAN J**
Date of judgment:	24 October 2023
Catchwords:	**ARBITRATION** – international arbitration – originating application seeking recognition and enforcement of foreign arbitral award of the Permanent Court of Arbitration – interlocutory application to set aside originating application on the basis of foreign State immunity **PRIVATE INTERNATIONAL LAW** – where foreign State respondent asserts sovereign immunity under s 9 of the *Foreign States Immunities Act 1985* (Cth) (**FSI Act**) – whether there has been a submission to the jurisdiction of the Court within the meaning of s 10(2) of the FSI Act – where the foreign State has signed the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (**New York Convention**) – where the applicants tender a copy of the arbitral award and a copy of what appears on its face to be an arbitral agreement – where the respondent contends that the arbitral agreement is tainted by fraud – consideration of the impact of findings of fact and law in winding up proceedings in India – whether the New York Convention can apply to the conduct of a State acting in its governmental capacity – whether any waiver from the signing of the New York Convention is limited to arbitrations by consent – clear and unmistakable submission by agreement by the respondent **PRIVATE INTERNATIONAL LAW** – whether the commercial transactions exception to foreign State immunity in s 11 of the FSI Act is made out – where the respondent annulled an agreement for the lease of space segment capacity in the S-band on the respondent's satellites – whether s 11 of the FSI Act provides a freestanding exception to foreign State immunity – whether the present proceeding "concerns" the annulment – whether the annulment is a "commercial transaction" or "like activity" – where the annulment was a decision made by the highest executive organ of a foreign State for reasons of public policy – exception to foreign State immunity not made out

Legislation:	*Evidence Act 1995* (Cth) s 136 *Foreign States Immunities Act 1985* (Cth) ss 3, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24 *International Arbitration Act 1974* (Cth) ss 2D, 3, 8, 9, 10, Sch 1, Sch 2 (UNCITRAL Model Law on International Commercial Arbitration), Arts 35, 36 *Trade Practices Act 1974* (Cth) Pt IV *Federal Court Rules 2011* (Cth) rr 9.09, 9.11, 13.01, 35.13 *Agreement between the Government of the Republic of India and the Government of the Republic of Mauritius for the Promotion and Protection of Investments*, signed 4 September 1998 (entered into force 20 June 2000) Arts 1, 2, 3, 4, 6, 8, 11 *Convention on the Execution of Foreign Arbitral Awards*, opened for signature 26 September 1927, 92 UNTS 301 (entered into force 25 July 1929) *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) Arts I, II, III, IV, V, VI *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) Arts 53, 54, 55 *Energy Charter Treaty*, opened for signature 17 December 1994, 2080 UNTS 95 (entered into force 16 April 1998) *United Nations Commission on International Trade Law Arbitration Rules 1976* Arts 8, 16, 21 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) Arts 31, 32 Companies Act 2013 (India) s 271 Foreign Sovereign Immunities Act of 1976 28 USC §1603, 1604, 1605
Cases cited:	*Argentine Republic v Amerada Hess Shipping Corporation* 488 US 428 (1989) *Blasket Renewable Investments, LLC v Kingdom of Spain*, No. 21-3249, 2023 US Dist LEXIS 54502 *CC/Devas (Mauritius) Ltd. v Republic of India (No 2)* [2023] FCA 527 *Creighton Limited v Government of Qatar* 181 F3d 118 (DC Cir 1999) *Eiser Infrastructure Ltd v Kingdom of Spain* [2020] FCA 157; (2020) 142 ACSR 616 *Firebird Global Master Fund II Ltd v Republic of Nauru*

[2015] HCA 43; (2015) 258 CLR 31

Garsec Pty Ltd v His Majesty the Sultan of Brunei [2008] NSWCA 211; (2008) 250 ALR 682

Gold Reserve Inc v Bolivarian Republic of Venezuela [2016] EWHC 153 (Comm); [2016] 1 WLR 2829

IMC Aviation Solutions Pty Ltd v Altain Khuder LLC [2011] VSCA 248; (2011) 38 VR 303

Jurisdictional Immunities of the State (*Germany v Italy: Greece Intervening*) [2012] ICJ Reports 99

Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l [2023] HCA 11; (2023) 97 ALJR 276

Li v Zhou [2014] NSWCA 176; (2014) 87 NSWLR 20

Lighthouse Corporation Ltd v Republica Democratica de Timor Leste [2019] VSC 278; (2019) 59 VR 492

Morrison v Peacock [2002] HCA 44; (2002) 210 CLR 274

PAO Tatneft v Ukraine [2018] EWHC 1797 (Comm); [2018] 1 WLR 5947

Povey v Qantas Airways Ltd [2005] HCA 33; (2005) 223 CLR 189

PT Garuda Indonesia Limited v Australian Competition and Consumer Commission [2011] FCAFC 52; (2011) 192 FCR 393

PT Garuda Indonesia Limited v Australian Competition and Consumer Commission [2012] HCA 33; (2012) 247 CLR 240

R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet (No 3) [2000] 1 AC 147

Republic of Ecuador v Occidental Exploration and Production Co [2006] QB 432; [2005] EWCA Civ 1116

Republica Democratica de Timor Leste v Lighthouse Corporation Ltd [2019] VSCA 290

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Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	International Commercial Arbitration
Number of paragraphs:	122
Date of hearing:	25 – 28 September 2023
Counsel for the Applicants:	Mr B Walker SC and Ms A Garsia
Solicitor for the Applicants:	Norton Rose Fulbright Australia
Counsel for the Respondent:	Mr J Gleeson SC and Dr F Roughley
Solicitor for the Respondent:	White & Case

Table of Corrections

24 October 2023	At [67], "1995 Report" deleted and "1955 Report" inserted

ORDERS

NSD 347 of 2021

BETWEEN:	**CCDM HOLDINGS, LLC** First Applicant
	DEVAS EMPLOYEES FUND US, LLC Second Applicant
	TELCOM DEVAS, LLC Third Applicant
AND:	**THE REPUBLIC OF INDIA** Respondent

ORDER MADE BY:	**JACKMAN J**
DATE OF ORDER:	**24 OCTOBER 2023**

THE COURT ORDERS THAT:

1. The respondent's interlocutory application dated 12 April 2022 be dismissed.
2. The respondent pay the applicants' costs of that interlocutory application.
3. The matter be listed for a case management hearing on 10 November 2023 at 9.15 am.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

JACKMAN J

1 This is an interlocutory application by the Republic of India (**India**) to set aside the originating application to recognise and enforce a foreign award under the *International Arbitration Act 1974* (Cth) (the **Arbitration Act**) pursuant to r 13.01(1)(a) of the *Federal Court Rules 2011* (Cth) (the **Rules**), or alternatively to set aside the service of the originating application pursuant to r 13.01(1)(b) of the Rules. The relevant originating application is now the Amended Originating Application, which seeks an order pursuant to s 8(3) of the Arbitration Act that the award of the Permanent Court of Arbitration in Case No. 2013-09 dated 13 October 2020 against India (the **Quantum Award**) may be enforced as if it were a judgment of the Court, together with orders that judgment be entered in amounts based on the Quantum Award.

2 On 16 May 2023, I made orders pursuant to rr 9.09(2) and 9.11 of the Rules that, without prejudice to any claim to immunity or objection to jurisdiction by India and without affecting the right of India to apply to set aside those orders after the determination of India's claim to immunity:

(a) CCDM Holdings, LLC be joined as applicant in these proceedings and substituted for CC/Devas (Mauritius) Limited;

(b) Devas Employees Fund US, LLC be joined as applicant in these proceedings and substituted for Devas Employees Mauritius Private Limited; and

(c) Telcom Devas, LLC be joined as applicant in these proceedings and substituted for Telecom Devas Mauritius Limited.

I ordered further that pursuant to r 9.09(2) of the Rules, the original applicants each be removed as an applicant in these proceedings: *CC/Devas (Mauritius) Ltd. v Republic of India (No 2)* [2023] FCA 527. I will refer to the parties joined as applicants on 16 May 2023 as the **Applicants**, and the parties which were removed as applicants on that day as the **Original Applicants**. The Applicants are assignees respectively of the Original Applicants in relation to the Quantum Award.

Factual and Procedural Background

3 The Original Applicants were incorporated in Mauritius. On 4 September 1998, India and Mauritius each signed a bilateral investment treaty known as the *Agreement between the*

Government of the Republic of India and the Government of the Republic of Mauritius for the Promotion and Protection of Investments, signed 4 September 1998 (entered into force 20 June 2000) (the **BIT**). The BIT was terminated on 22 March 2017.

4 The BIT defines "investment" in Art 1(1)(a) relevantly as meaning "every kind of asset established or acquired under the relevant laws and regulations of the Contracting Party in whose territory the investment is made …". Article 2 provides as follows:

> This Agreement shall apply to all investments made by investors of either Contracting Party in the territory of the other Contracting Party, accepted as such in accordance with its laws and regulations, whether made before or after the coming into force of this Agreement.

Article 3(1) provides as follows:

> Each Contracting Party shall encourage the making of investments in its territory by investors of the other Contracting Party, and admit such investments in accordance with the provision of its laws and its policy in the field of foreign investment.

5 The BIT contained promises between India and Mauritius to each other with respect to the treatment of investments made in the territory of one Contracting Party by investors of the other. Among other things, the BIT provided a legal regime for Mauritian investors to invest in India, requiring the fair and equitable treatment of investments (Art 4(1)), providing for treatment on most favoured nation terms (Art 4(3)), and imposing a broad prohibition on investments being "nationalised, expropriated or subjected to measures having effects equivalent to nationalisation or expropriation except for public purposes, under due process of law, on a non-discriminatory basis and against fair and equitable compensation" (Art 6(1)). Those provisions did not limit the right of either Contracting Party to take action "directed to the protection of its essential security interests, or to the protection of public health or the prevention of diseases in pests and animals or plants" (Art 11(3)).

6 Article 8 of the BIT provided for a regime of international arbitration, including for the resolution of claims made by investors against India for violations of the protections afforded to them under the BIT. The regime included an option for arbitration under the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) (the **ICSID Convention**) (Art 8(2)(b)) if both India and the investor's Contracting Party were parties thereto, or binding *ad hoc* arbitration in accordance with the *United Nations Commission on International Trade Law Arbitration Rules 1976* (**UNCITRAL Rules**) (Art 8(2)(d)), subject to

certain modifications. India was not at the relevant time a Contracting State to the ICSID Convention. Article 8 of the BIT provided relevantly:

> (1) Any dispute between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former under this Agreement shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.
>
> (2) If such dispute cannot be settled according to the provisions of paragraph (1) of this Article within six months from the date of request for settlement, the investor may submit the dispute to:
>
> …
>
> (d) to an ad hoc arbitral tribunal set up in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law, 1976, subject to the following modifications:
>
> (i) The appointing authority under Article 7 of the Arbitration Rules shall be the President, the Vice-President or the next senior Judge of the International Court of Justice, who is not a national of either Contracting Party. The third arbitrator shall not be a national of either Contracting Party.
>
> (ii) The parties shall appoint their respective arbitrators within two months.
>
> (iii) The arbitral award shall be made in accordance with the provisions of this Agreement and shall be binding on the parties to the dispute.
>
> (iv) The arbitral tribunal shall state the basis of its decision and give reasons upon the request of either party.

7 An issue debated on this application was whether Art 8 of the BIT should be characterised either as: (a) a standing offer to the investors of the other Contracting Party, whose investments qualified as investments under the terms of the BIT, to settle disputes in accordance with that provision, including by arbitration (as the Applicants submit); or (b) a set of binding promises between two sovereign States to that effect which operate for the benefit of third party beneficiaries, namely the investors of the other Contracting Party (as India submits). The former view was adopted by the UK Court of Appeal in *Republic of Ecuador v Occidental Exploration and Production Co* [2006] QB 432; [2005] EWCA Civ 1116 at [32] (Lord Phillips MR, Clarke and Mance LJJ), which in turn was cited with approval in *Eiser Infrastructure Ltd v Kingdom of Spain* [2020] FCA 157; (2020) 142 ACSR 616 at [179] (Stewart J); and see to the same effect *Gold Reserve Inc v Bolivarian Republic of Venezuela* [2016] EWHC 153 (Comm); [2016] 1 WLR 2829 at [17] (Teare J); *PAO Tatneft v Ukraine* [2018] EWHC 1797 (Comm); [2018] 1 WLR 5947 at [27] (Butcher J). I agree with that analysis, which in my view corresponds to the language of Art 8(2) of the BIT and the practical and realistic expectations

of the parties to it. The latter view was advanced by Professor Alan Scott Rau in "*BG Group* and 'Conditions' to Arbitral Jurisdiction" (2016) 43 *Pepperdine Law Review* 577 at 586-587, but the theory does not appear to be supported by any Anglo-Australian judicial reasoning and it is difficult to conceptualise for those imbued with the Anglo-Australian concept of privity of contract.

8 Article 21(1) of the UNCITRAL Rules confers on the arbitral tribunal the power to rule on objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement. Article 21(3) provides relevantly that a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence.

9 In the arbitral proceedings between the Original Applicants (as Claimants) and India (as Respondent) administered by the Permanent Court of Arbitration, the Original Applicants alleged by Statement of Claim dated 1 July 2013 that they had made qualifying investments in India within the meaning of the BIT, that India had expropriated those investments without compensating the Original Applicants in breach of the BIT, and that India's conduct also constituted a breach of the promises in the BIT to Mauritius of "fair and equitable treatment" (Art 4(1)) and the "most favoured nation" clause (Art 4(2) and 4(3)). The Original Applicants sought an award declaring India liable to make reparation, as well as declarations of breach of the BIT.

10 The "investments" (using the quotation marks to indicate neutrality on my part as to the Claimants' allegations) which the Original Applicants claimed in the arbitral proceedings to be qualifying investments for the purposes of the BIT comprised their respective shareholdings in an Indian company, Devas Multimedia Private Limited (**Devas India**), and through that shareholding, an indirect interest in an agreement made between Devas India and Antrix Corporation Limited (**Antrix**), a corporation wholly owned by India under the administrative control of the Department of Space (the **Devas/Antrix Agreement**). That agreement with Antrix (to which India itself was not a party) was in respect of the lease of space segment capacity in the S-band electromagnetic spectrum on two Indian satellites yet to be built, launched and operated by the Indian Space Research Organisation.

11 The conduct of India impugned by the Original Applicants in the arbitration was alleged to include the conduct of "various emanations of the Indian state". These were alleged to include: the Prime Minister of India and his office; the Union Cabinet (described in the Statement of Claim as "a core decision-making body of the Indian government that is comprised of 35

ministers"); the Indian Cabinet Committee on Security (**CCS**) comprised of the Prime Minister, Minister of Home Affairs, Minister of External Affairs, Minister of Finance and the Minister of Defence; the Indian Space Commission; the Department of Space; the Indian Space Research Organisation; Antrix; and the Additional Solicitor-General, one of the law officers of India. Relevantly for the present application, on 17 February 2011, the CCS decided to annul the Devas/Antrix Agreement, referring to "an increased demand for allocation of spectrum for national needs, including for the needs of defence, para-military forces, railways and other public utility services as well as for societal needs, and having regard to the needs of the country's strategic requirements" and to the Government not being "able to provide orbit slot in S band to Antrix for commercial activities" (the **Annulment**). I return to the Annulment in more detail below.

12 On 3 July 2012, the Original Applicants as Claimants sent a Notice of Arbitration to India (the **Notice of Arbitration**). On 15 May 2013, the parties to the arbitration and the members of the tribunal agreed to and signed the Terms of Appointment in the arbitration (the **Terms of Appointment**). Paragraph 2(a) of the Terms of Appointment stated that the Claimants' Notice of Arbitration was made pursuant to Art 8 of the BIT. Paragraph 10(a) of the Terms of Appointment provided that, for the purposes of Art 16(1) of the UNCITRAL Rules, the place of arbitration would be The Hague, the Netherlands. In the arbitration, India challenged the jurisdiction of the tribunal, including whether the underlying dispute engaged the promises contained in the BIT.

13 On 25 July 2016, the arbitral tribunal (the **Tribunal**) rendered an Award on Jurisdiction and Merits (the **Merits Award**). On 13 October 2020, the tribunal issued the Quantum Award, being the award which is the subject of the Amended Originating Application in this Court.

14 In India, proceedings were commenced against Devas India seeking the winding up of the company pursuant to s 271(c) of the Companies Act 2013 (India) (the **2013 Act**), on the basis of fraud and the unlawful conduct of its affairs. Section 271(c) provides that a company may be wound up by the National Company Law Tribunal (**NCLT**):

> (c) if on an application made by the Registrar or any other person authorised by the Central Government by notification under this Act, the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up….

15 The winding-up proceedings were decided at first instance by the NCLT on 25 May 2021. The NCLT exercises the jurisdiction of the High Court of India in respect of Indian company law matters, including winding up proceedings. The NCLT found, among other things, that Devas India's management engaged in fraudulent activities, Devas India was incorporated by shareholders to enter into the Devas/Antrix Agreement "for unlawful purposes", and the Devas/Antrix Agreement was "void ab initio". Devas India appealed to the National Company Law Appellate Tribunal (**NCLAT**), which upheld the NCLT orders and dismissed the appeal. Devas India and one of the Original Applicants (namely, Devas Employees Mauritius Private Limited) then appealed to the Supreme Court of India, which dismissed the appeals.

16 These proceedings were commenced by Originating Application on 21 April 2021. After India raised a service objection, the Original Applicants sought leave to file an Amended Originating Application and to serve that application on India through the diplomatic channel in accordance with s 24 of the *Foreign States Immunities Act 1985* (Cth) (the **FSI Act**). Orders to that effect were made on 29 July 2021. On 12 April 2022, India filed the present interlocutory application seeking orders that the Originating Application be set aside. On 11 March 2022, the Original Applicants filed an interlocutory application for substitution of parties, which I heard and decided on 16 May 2023.

Salient Legislation and Treaties

17 Dealing first with the FSI Act, Pt II deals with immunity from jurisdiction. Section 9 provides as follows:

> Except as provided by or under this Act, a foreign State is immune from the jurisdiction of the courts of Australia in a proceeding.

18 Section 10 deals with submission to jurisdiction, and provides relevantly as follows:

> (1) A foreign State is not immune in a proceeding in which it has submitted to the jurisdiction in accordance with this section.
>
> (2) A foreign State may submit to the jurisdiction at any time, whether by agreement or otherwise, but a foreign State shall not be taken to have so submitted by reason only that it is a party to an agreement the proper law of which is the law of Australia.
>
> (3) A submission under subsection (2) may be subject to a specified limitation, condition or exclusion (whether in respect of remedies or otherwise).
>
> …
>
> (7) A foreign State shall not be taken to have submitted to the jurisdiction in a proceeding by reason only that:

…

(b) it has intervened, or has taken a step, in the proceeding for the purpose or in the course of asserting immunity.

The term "agreement" is defined in s 3(1) as:

an agreement in writing and includes:

(a) a treaty or other international agreement in writing; and

(b) a contract or other agreement in writing.

19 Section 11 contains the following provision in relation to commercial transactions:

(1) A foreign State is not immune in a proceeding in so far as the proceeding concerns a commercial transaction.

(2) Subsection (1) does not apply:

(a) if all the parties to the proceeding:

(i) are foreign States or are the Commonwealth and one or more foreign States; or

(ii) have otherwise agreed in writing; or

(b) in so far as the proceeding concerns a payment in respect of a grant, a scholarship, a pension or a payment of a like kind.

(3) In this section, ***commercial transaction*** means a commercial, trading, business, professional or industrial or like transaction into which the foreign State has entered or a like activity in which the State has engaged and, without limiting the generality of the foregoing, includes:

(a) a contract for the supply of goods or services;

(b) an agreement for a loan or some other transaction for or in respect of the provision of finance; and

(c) a guarantee or indemnity in respect of a financial obligation; but does not include a contract of employment or a bill of exchange.

20 Other exceptions to the immunity of a foreign State are set out in the sections which follow, relating to contracts of employment (s 12), personal injury and damage to property (s 13), ownership, possession and use of property (s 14), copyright, patents and trademarks (s 15), membership of bodies corporate (s 16), arbitration (s 17), actions *in rem* (s 18), bills of exchange (s 19), taxes (s 20), and related proceedings (s 21). Part II (with certain exceptions) applies in relation to a separate entity of a foreign State as it applies in relation to the foreign State (s 22). I set out in full the provision concerning arbitrations in s 17:

(1) Where a foreign State is a party to an agreement to submit a dispute to arbitration, then, subject to any inconsistent provision in the agreement, the foreign State is not immune in a proceeding for the exercise of the supervisory

jurisdiction of a court in respect of the arbitration, including a proceeding:

(a) by way of a case stated for the opinion of a court;

(b) to determine a question as to the validity or operation of the agreement or as to the arbitration procedure; or

(c) to set aside the award.

(2) Where:

(a) apart from the operation of subparagraph 11(2)(a)(ii), subsection 12(4) or subsection 16(2), a foreign State would not be immune in a proceeding concerning a transaction or event; and

(b) the foreign State is a party to an agreement to submit to arbitration a dispute about the transaction or event;

then, subject to any inconsistent provision in the agreement, the foreign State is not immune in a proceeding concerning the recognition as binding for any purpose, or for the enforcement, of an award made pursuant to the arbitration, wherever the award was made.

(3) Subsection (1) does not apply where the only parties to the agreement are any 2 or more of the following:

(a) a foreign State;

(b) the Commonwealth;

(c) an organisation the members of which are only foreign States or the Commonwealth and one or more foreign States.

21 Turning next to the Arbitration Act, the objects of the Act are set out in s 2D, and include relevantly:

(a) to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes; and

(b) to facilitate the use of arbitration agreements made in relation to international trade and commerce; and

(c) to facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce; and

(d) to give effect to Australia's obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its twenty-fourth meeting….

The Convention referred to in subpara (d) is set out in Sch 1 to the Arbitration Act, and I refer to it below by its usual shorthand of the **New York Convention**, or by the term used in the Arbitration Act, namely "the Convention".

22 Part II of the Arbitration Act deals with the enforcement of foreign arbitration agreements and awards. Section 3(1) defines the terms "agreement in writing" and "arbitral award" as having

the same meaning as in the Convention, and defines "arbitration agreement" as "an agreement in writing of the kind referred to in sub-article 1 of Article II of the Convention". The term "foreign award" is defined as "an arbitral award made, in pursuance of an arbitration agreement, in a country other than Australia, being an arbitral award in relation to which the Convention applies". Section 3(2) provides that, where the context so admits, "enforcement" in relation to a foreign award includes the recognition of the award as binding for any purpose.

23 Section 8 of the Arbitration Act provides as follows in relation to the recognition of foreign awards:

> (1) Subject to this Part, a foreign award is binding by virtue of this Act for all purposes on the parties to the award.
>
> (2) Subject to this Part, a foreign award may be enforced in a court of a State or Territory as if the award were a judgment or order of that court.
>
> (3) Subject to this Part, a foreign award may be enforced in the Federal Court of Australia as if the award were a judgment or order of that court.
>
> (3A) The court may only refuse to enforce the foreign award in the circumstances mentioned in subsections (5) and (7).
>
> (5) Subject to subsection (6), in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may, at the request of the party against whom it is invoked, refuse to enforce the award if that party proves to the satisfaction of the court that:
>
> (a) a party to the arbitration agreement in pursuance of which the award was made was, under the law applicable to him or her, under some incapacity at the time when the agreement was made; or
>
> (b) the arbitration agreement is not valid under the law expressed in the agreement to be applicable to it or, where no law is so expressed to be applicable, under the law of the country where the award was made; or
>
> (c) that party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his or her case in the arbitration proceedings; or
>
> (d) the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration; or
>
> (e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
>
> (f) the award has not yet become binding on the parties to the award or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

….

24 Section 9 provides as follows in relation to the evidence of awards and arbitration agreements:

> (1) In any proceedings in which a person seeks the enforcement of a foreign award by virtue of this Part, he or she shall produce to the court:
>
> (a) the duly authenticated original award or a duly certified copy; and
>
> (b) the original arbitration agreement under which the award purports to have been made or a duly certified copy.
>
> (2) For the purposes of subsection (1), an award shall be deemed to have been duly authenticated, and a copy of an award or agreement shall be deemed to have been duly certified, if:
>
> (a) it purports to have been authenticated or certified, as the case may be, by the arbitrator or, where the arbitrator is a tribunal, by an officer of that tribunal, and it has not been shown to the court that it was not in fact so authenticated or certified; or
>
> (b) it has been otherwise authenticated or certified to the satisfaction of the court.
>
> …
>
> (5) A document produced to a court in accordance with this section is, upon mere production, receivable by the court as prima facie evidence of the matters to which it relates.

25 Section 10 deals with evidence relating to the Convention as follows:

> (1) For the purposes of this Part, a certificate purporting to be signed by the Secretary of the Foreign Affairs Department and stating that a country specified in the certificate is, or was at a time so specified, a Convention country is, upon mere production, receivable in any proceedings as prima facie evidence of that fact.
>
> (2) For the purposes of this Part, a copy of the *Gazette* containing a Proclamation fixing a date under subsection 2(2) is, upon mere production, receivable in any proceedings as prima facie evidence of:
>
> (a) the fact that Australia has acceded to the Convention; and
>
> (b) the fact that the Convention entered into force for Australia on or before the date so fixed.

The term "Convention country" means "a country (other than Australia) that is a Contracting State within the meaning of the Convention" (s 3(1)).

26 As mentioned above, the New York Convention is set out in Sch 1 to the Arbitration Act. Articles I-VI of the New York Convention provide as follows:

> ARTICLE I
>
> 1. This Convention shall apply to the recognition and enforcement of arbitral

awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extensions under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

ARTICLE II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

ARTICLE III

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

ARTICLE IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

   (a) The duly authenticated original award or a duly certified copy thereof;

   (b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the

country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

ARTICLE V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

   (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

   (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

   (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

   (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

   (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

   (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

   (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

ARTICLE VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

27 As to the applicable principles of interpreting an international convention or treaty, the following provisions of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (the **Vienna Convention**) are relevant:

> **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.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (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.
>
> 4. A special meaning shall be given to a term if it is established that parties so intended.
>
> **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; or
>
> (b) leads to a result which is manifestly absurd or unreasonable.

28 The High Court in *Morrison v Peacock* [2002] HCA 44; (2002) 210 CLR 274 at [16] said the following in relation to Art 31 of the Vienna Convention:

> The effect of Art 31 is that, although primacy must be given to the written text of the [Convention], the context, objects and purpose of the treaty must also be considered. The need to give the text primacy in interpretation results from the tendency of multilateral treaties to be the product of compromises by the parties to such treaties. However, treaties should be interpreted in a more liberal manner than that ordinarily adopted by a court construing exclusively domestic legislation.

29 It has also been observed that the principles set out in Art 31 are in mandatory terms, whereas the supplementary means of interpretation identified in Art 32 are phrased in permissive terms; accordingly, the mandatory factors should be considered first, with such further assistance as may be gained from the preparatory work of the treaty and the circumstances of its conclusion being addressed before reaching a final conclusion: *Li v Zhou* [2014] NSWCA 176; (2014) 87 NSWLR 20 at [26] (Basten JA, with whom Bathurst CJ and Beazley P agreed). That case is also authority for the proposition, in relation to reliance on subsequent State practice as a basis for construing a treaty, that the practice must relate to or reveal an understanding as to the interpretation of the treaty and must be "concordant, common and consistent": at [65]. At [71], Basten JA doubted whether judicial decisions were relevant in considering subsequent State practice, but did not need to resolve that question as the subsequent State practice in that case did not approach the standard of concordant, common and consistent practice required to clarify the meaning of the relevant provisions: at [72]. In that case, the question to be determined was whether the People's Republic of China had submitted to the jurisdiction of Australian domestic courts with respect to claims of torture committed by its officials in China, and Basten JA held that unless some conduct of China were to be relied on (and none was), the conduct of other States parties would not appear to be relevant to the question in issue: at [69]. As a separate matter, although the Vienna Convention was made in 1969, and therefore post-dates the New York Convention of 1958, the Vienna Convention is still applicable to the interpretation of the New York Convention, given that relevantly it was declaratory of customary international law: *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l* [2023] HCA 11; (2023) 97 ALJR 276 (***Kingdom of Spain***) at [38].

Outline of the main issues

30 In response to India's reliance on foreign State immunity pursuant to s 9 of the FSI Act, the Applicants rely on the exceptions to immunity provided by ss 10 and 11.

31 In relation to s 10, the Applicants contend that India, having signed the New York Convention, submitted to the jurisdiction of this Court by agreement within the meaning of s 10(2), in relation to proceedings for recognition and enforcement of a foreign arbitral award, in circumstances where the Applicants have tendered a copy of the award to which India was a party together with what appears on its face to be an agreement with India to arbitrate the underlying dispute. The Applicants contend that the agreement to arbitrate the underlying dispute is constituted by Art 8 of the BIT, the Notice of Arbitration and the Terms of

Appointment. The Applicants submit that they do not have to establish at this stage the validity or applicability of the agreement to arbitrate, those being questions which may potentially arise under Art V of the New York Convention or s 8 of the Arbitration Act at a later stage at the request of India, in the event that India is found to have submitted to this Court's jurisdiction. The principal issues which arise in relation to s 10(2) of the FSI Act are thus:

(1) what are the principles which are relevantly applicable to determine whether a submission by agreement has been made for the purposes of s 10(2)? (**Issue 1**)

(2) did India, by signing the New York Convention, submit within the meaning of s 10(1) and (2) to the jurisdiction of this Court in relation to proceedings for recognition and enforcement of a foreign arbitral award in circumstances where the Applicants tender a copy of the award together with what appears on its face to be an agreement to arbitrate the underlying dispute? (**Issue 2**)

32 The second of those questions contains a number of subsidiary issues, which India identifies as follows:

(a) to what extent are the terms of the New York Convention distinguishable from the ICSID Convention?

(b) is any application of the New York Convention to arbitral awards to which a State is a party limited to only such awards involving a commercial or private law dispute (as opposed to disputes concerning the conduct of the State acting in its governmental capacity)?

(c) is any waiver by States pursuant to Art III of the New York Convention subject to local "rules of procedure", including the forum's laws of foreign State immunity?

(d) does the New York Convention, to the extent it supplies conduct which may give rise to a waiver of immunity, limit such waiver to awards arising from arbitral proceedings to which the respondent State voluntarily submitted?

(e) what, if anything, is the content and relevance of State practice to the Applicants' s 10 case?

(f) what is the impact, if any, of findings of fact and law contained in judgments given in winding up proceedings in India, including as to whether the Applicants

are precluded from presenting various documents as documents which appear to be an agreement to arbitrate by reason of the findings made?

33 As to the Applicants' reliance on the commercial transaction exception in s 11 of the FSI Act, the Applicants' argument is based solely on the Annulment as "a like activity in which the State has engaged" within the meaning of s 11(3). The Applicants expressly disavow any contention that the BIT or the Devas/Antrix Agreement falls within the definition of "commercial transaction" in s 11(3), the former not being commercial in nature, and the latter not being a transaction which India itself had entered into. India expresses the issues which arise as follows:

(1) can the commercial transaction exception in s 11 supply a freestanding exception to immunity in relation to proceedings to recognise and enforce a foreign arbitral award?

(2) if so:

(a) what is the construction and application of s 11(1) ("concerns a commercial transaction"), including having regard to the findings of fact and law made in the winding up proceedings?

(b) what is the construction and application of s 11(3) ("commercial transaction") to the impugned conduct of India, being a decision of its highest executive organ, including having regard to the findings of fact and law made in the winding up proceedings?

What are the principles which are relevantly applicable to determine whether a submission by agreement has been made for the purposes of s 10(2) of the FSI Act?

34 The High Court has recently considered this question in relation to arbitral proceedings brought against the Kingdom of Spain pursuant to the ICSID Convention in *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.*

35 In the unanimous judgment of the High Court at [23]-[26], the Court dealt with the meaning of the international law principle that waiver of immunity in a treaty be express. The Court said that the international authorities that insist upon express waiver of immunity should not be understood as denying the ordinary and natural role of implications in elucidating the meaning of the express words of the treaty: [24]. The Court said that the insistence that the waiver be "express" should be understood as requiring only that the expression of waiver be derived from the express words of the international agreement, whether as an express term or as a term

implied for reasons including necessity: [25]. Although that statement used the non-exhaustive language "including necessity", the proposition was then illustrated by the references to necessary implication in the reasons of Lord Goff in *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet (No 3)* [2000] 1 AC 147 at 176, 216 and the reasons of Basten JA (with whom Bathurst CJ and Beazley P agreed) in *Li v Zhou* at [38]. The High Court then stated that the insistence by international authority that a waiver of immunity in an international agreement must be "express" is an insistence that any inference of a waiver of immunity must be drawn with great care when interpreting the express words of that agreement in context: [26]. Accordingly, if an international agreement does not expressly use the word "waiver", the inference that an express term involves a waiver of immunity will only be drawn if the implication is clear from the words used and the context: [26]. The Court cited in that passage with apparent approval the statement by Rehnquist CJ in *Argentine Republic v Amerada Hess Shipping Corporation* 488 US 428 (1989) at 442-443 that a foreign State will not waive its immunity merely "by signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States", however that reference must be read in the context of the High Court's reasoning as a whole to the effect that the express meaning of an international agreement can include implications.

36 The High Court then dealt at [27]-[29] with the proper approach to waiver in s 10(2) of the FSI Act. The Court said that, against the background of international law which it had analysed, there was no basis to interpret s 10(2) in a way which would exclude the possibility of a waiver of immunity being evidenced by implications inferred from the express words of a treaty in their context and in light of their purpose: [27]. The Court said that a high level of "clarity and necessity" are required before inferring that a foreign State has waived its immunity in a treaty because it is so unusual and the consequence is so significant: [28]. That passage appears to restore the criterion of necessity as an essential element in any implication of submission to jurisdiction, despite the use of the non-exhaustive phrase "including necessity" at [25]. The Court then stated that s 10(2) aligns with the approach taken to waiver of immunity in the United States, where the general immunity of a foreign State from jurisdiction does not apply if the foreign State "waived its immunity either explicitly or by implication" (Foreign Sovereign Immunities Act of 1976 (28 USC §1605(a)(1)), and where it has been accepted in various cases that words said to evidence waiver by implication must be construed narrowly, as well as that waiver is rarely accomplished by implication and only arises where the waiver

is unmistakable: [29]. I conclude from that reasoning that the standard of conduct required for submission by agreement pursuant to s 10(2) requires either express words or an implication arising clearly and unmistakably by necessity from the express words used.

37 The High Court then proceeded to apply that principle to the ICSID Convention. It first analysed the background, purpose and operation of the ICSID Convention at [30]-[37]. The High Court referred to the primary purpose of the ICSID Convention being, and remaining to be, to promote the flow of private capital to sovereign nations, especially developing countries, by the mitigation of sovereign risk, and that the ICSID Convention mitigates risk by giving private investors, upon default by a country, an arbitral remedy which is intended to provide certainty: [34]. The Court referred to the preamble to the ICSID Convention referring expressly to the possibility that from time to time disputes may arise in connection with private international investment between Contracting States and nationals of other Contracting States: [35]. The Court referred to the provisions of the ICSID Convention establishing the International Centre for Settlement of Investment Disputes (the **Centre**) and establishing the jurisdiction of that Centre, which broadly extends to any legal dispute arising directly out of an investment between a Contracting State and a national of another Contracting State: [35]. The Court referred to Ch IV of the ICSID Convention being concerned with arbitration, and providing a process by which any Contracting State or any national of a Contracting State may institute arbitration proceedings following a request in writing: [36]. The Court referred to the way in which the Arbitration Act gives effect to the ICSID Convention in Australia: [37].

38 The High Court then dealt in detail with the meaning of recognition, enforcement and execution in Arts 53-55 of the ICSID Convention at [38]-[66]. In that section of the judgment, the Court dealt sequentially with principles of treaty interpretation by reference to the Vienna Convention, the terms of Arts 53-55, the textual meaning of recognition, enforcement and execution, the confirmation of those meanings in the preparatory work, and finally the particular dispute involving the French and Spanish texts of Arts 53-55. The Court then dealt with the waiver of immunity from court processes concerning recognition or enforcement in Art 54 at [67]-[75]. It is worth setting out the terms of Art 54(1), as it bears some resemblance to Art III of the New York Convention:

> 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.

The High Court said that in light of the effect of the provision in Art 53 that awards shall be "binding" on Contracting States, together with the preservation in Art 55 of immunity from execution only (subject to the laws of Contracting States), it would distort the terms of Art 54(1) to require separate conduct that amounted to a waiver of immunity before an award could be recognised and enforced against a foreign State: [69]. The Court said that the textual difficulties with the Kingdom of Spain's primary submission were compounded when the ordinary meaning of Art 54(1) is understood, as the Vienna Convention requires, in light of its object and purpose, which includes mitigating sovereign risk: [71]. The Court said that although the main reason for the inclusion of Art 54 was to ensure that Contracting States were able to obtain effective remedies against private investors, this was to ensure parity with the obligations of the Contracting States because it was otherwise assumed that participating nation states would abide by arbitral outcomes, an assumption which was said to be most explicit in Art 53(1): [71]. The Court also referred to the assumption of parity having been recorded in the preparatory work: [72].

39 The High Court concluded its reasons in relation to waiver of immunity from court processes concerning recognition or enforcement in Art 54 by reference to international authority. Reference was made to United States authorities which concluded that entry into the ICSID Convention involves a waiver of immunity from jurisdiction: [74]. The Court then said that the conclusion that the express terms of Art 54(1) involve a waiver of immunity from jurisdiction in relation to recognition and enforcement is also supported by the United Nations General Assembly, *Report of the International Law Commission on the work of its forty-third session*, UN Doc A/46/10 (1991), which referred to a rule of customary international law that a waiver of immunity be "expressed … in no uncertain terms" (p 53), and gave examples of State practice where a State "has previously expressed its consent to such jurisdiction in the provision of a treaty or an international agreement": p 52, fn 89, referring to United Nations, *Materials on Jurisdictional Immunities of States and their Property* (1982) (the **1982 Report**), pp 150-178. The High Court said that one of those examples was the ICSID Convention: [75].

40 The Applicants rely on that last proposition, pointing out that another of the examples given in the 1982 Report was the New York Convention. However, as Mr Gleeson SC, counsel for India, pointed out, pp 150-178 of the 1982 Report referred to 11 multilateral treaties, the second of which was the New York Convention and the fifth was the ICSID Convention. Mr Gleeson SC submits, and I accept, that in the absence of the kind of detailed analysis of the text, context

and purpose of the New York Convention which the High Court undertook in relation to the ICSID Convention, it is reading far too much into the reasoning at [75] to suppose that the High Court intended to express any conclusion in relation to the New York Convention, and the reasoning in [75] therefore does not represent considered dicta that the signing of the New York Convention constitutes a submission to jurisdiction under s 10(2) of the FSI Act.

Did India, by signing the New York Convention, submit within the meaning of s 10(1) and (2) to the jurisdiction of this Court in relation to proceedings for recognition and enforcement of a foreign arbitral award in circumstances where the Applicants tender a copy of the award together with what appears on its face to be an agreement to arbitrate the underlying dispute?

41 As I have indicated above, the Applicants contend that India, having signed the New York Convention, submitted to the jurisdiction of this Court by agreement within the meaning of s 10(2) of the FSI Act, in relation to proceedings for recognition and enforcement of a foreign arbitral award, in circumstances where the Applicants have tendered a copy of the award to which India was a party together with what appears on its face to be an agreement with India to arbitrate the underlying dispute (that agreement comprising Art 8 of the BIT, the Notice of Arbitration and the Terms of Appointment). I have also referred above to the definition of "agreement" in s 3(1) as including "a treaty or other international agreement in writing". Putting to one side for the moment the various sub-issues which I have identified above in relation to this issue, I deal first with the broad question whether the terms of the New York Convention convey a submission to jurisdiction on the part of a State party.

42 The New York Convention does not explicitly use the words "waiver" or "foreign State immunity", and accordingly I approach this question on the basis that the Applicants must establish a clear and unmistakable implication by necessity from the words actually used, in the sense discussed above. Article III lies at the heart of the question, and begins by referring to the obligation of each Contracting State to recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon. Article III goes on to refer to the non-discriminatory promise of not imposing substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which the Convention applies than are imposed on the recognition or enforcement of domestic awards. I note also at this point, and will return in due course to the matter, that Art I refers in broad and general terms to "differences between persons, whether physical or legal" and Art II refers to differences "concerning a subject matter capable of settlement by arbitration".

43 Mr Gleeson SC sought to characterise Art III as imposing promises only upon the "receiving State", being the enforcing State, in both the first and second sentences of Art III (T56.32-57.24). The corollary in Mr Gleeson's argument was that nothing in Art III is a promise about what a State, which is a party to the Convention, will do if they are before the courts of a different Convention country (T57.28-30). In my view, those submissions do not capture the full force and scope of Art III in circumstances where it is sought to be applied against a Contracting State which is a party to an arbitral award. The promises contained in Art III are promises made by each Contracting State to all other Contracting States. In the present case, both India and Australia (among the 170 other signatories) are parties to that set of promises. India, along with all other Contracting States, requires by Art III that Australia relevantly shall recognise arbitral awards as binding and enforce them, just as Australia requires India to recognise and enforce relevant arbitral awards within its jurisdiction. That is, India is agreeing by the terms of the New York Convention that relevantly Australia will recognise and enforce arbitral awards which fall within the scope of the Convention. If India is a party to such an arbitral award, it is an obvious and necessary implication that India is requiring Australia to recognise and enforce that award. As Australia would be unable to do so if India were at liberty to oppose the recognition and enforcement of that award on the ground of foreign State immunity, the terms of Art III are inconsistent with India being able to deploy such a defence.

44 That reasoning assumes that there is an arbitral award to which India is a party, and that is a matter which the Applicants have established by their tender of both the Merits Award and the Quantum Award in the present case. In addition, Art IV requires that the Applicants also tender the arbitration agreement on which they rely. The Applicants have thus tendered the BIT, the Notice of Arbitration, and the Terms of Appointment. The Applicants submit that, at the stage of dealing with foreign State immunity, they need not go further than to tender what appears on its face to be an arbitration agreement, and need not establish that the apparent arbitration agreement is valid or applicable. The Applicants submit that those are questions to be deferred to a subsequent stage of the proceedings pursuant to Art V. In my view, that submission is correct, and correctly reflects the structure of the New York Convention, which deals in Art V with various grounds for a party subsequently to request the refusal of recognition and enforcement of the award, being the party against which the award is invoked. The grounds set out in Art V give ample opportunity to the party against which the award is invoked to contest the question whether there truly was a valid and applicable agreement to arbitrate in the circumstances which led to the award. However, because those grounds can only be invoked

at the request of that party, and thus would entail a submission to jurisdiction by that party, the question whether those grounds are established as a matter of fact is not relevant at the present initial stage of considering India's claim to foreign State immunity. Accordingly, I do not accept India's submission that it is necessary for the Applicants to establish at this stage that there was in fact an "investment" under the relevant laws of India within the meaning of the BIT so as to prove that the BIT (together with the Notice of Arbitration and the Terms of Appointment) gives rise to a valid and applicable agreement to arbitrate.

45 A number of cases in the United States have considered whether a foreign State, by becoming a signatory to the New York Convention, has waived immunity pursuant to § 1605(a)(1) of the Foreign Sovereign Immunities Act of 1976 (28 USC). In *Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co v Navimpex Centrala Navala* 989 F2d 572 (2d Cir 1993), the defendant was an agency or instrumentality of the State of Romania pursuant to § 1603(b) and thereby entitled to assert jurisdictional immunity under § 1604. The plaintiff brought an action to enforce an arbitral award under the New York Convention, relying relevantly on the waiver exception under § 1605(a)(1). The US Court of Appeals for the Second Circuit held that, as Romania was a Contracting State to the New York Convention, it had waived jurisdictional immunity. The Second Circuit rejected a wide view of § 1605(a)(1), whereby merely entering into an agreement to arbitrate in a Contracting State would be sufficient to constitute waiver, but held as follows (at 578-579):

> [W]hen a country becomes a signatory to the Convention, by the very provisions of the Convention, the signatory State must have contemplated enforcement actions in other signatory States … Seetransport seeks recognition and enforcement of the ICC arbitral award pursuant to the Convention, which expressly permits recognition and enforcement actions in Contracting States. Thus, when Navimpex entered into a contract with Seetransport that had a provision that any disputes would be submitted to arbitration, and then participated in an arbitration in which an award was issued against it, logically, as an instrumentality or agency of the Romanian Government – a signatory to the Convention – it had to have contemplated the involvement of the courts of any of the Contracting States in an action to enforce the award. Accordingly, we conclude that under § 1605(a)(1), Navimpex implicitly waived any sovereign immunity defense and, therefore, the district court had subject matter jurisdiction.

There was no issue in that case concerning the validity or applicability of the arbitration agreement. In light of the reliance placed by the High Court in *Kingdom of Spain* on United States authority concerning § 1605(a)(1), the reasoning in *Seetransport* provides strongly persuasive authority in relation to the application of s 10(2) of the FSI Act to the New York Convention.

46 In *Creighton Limited v Government of Qatar* 181 F3d 118 (DC Cir 1999), the US Court of Appeals for the District of Columbia Circuit held that Qatar had not waived its immunity in circumstances where Qatar was not a Contracting State to the New York Convention, but had merely agreed to arbitrate in France which was a Contracting State. However, the Court of Appeals (at 123) expressly approved the reasoning in *Seetransport* that when a country becomes a signatory to the Convention, by the very provisions of the Convention, the signatory State must have contemplated enforcement actions in other signatory states. That reasoning was also approved by the US Court of Appeals for the District of Columbia Circuit in *Tatneft v Ukraine* 771 Fed Appx 9 (DC Cir 2019) at 10, noting that there was no argument in that case to the effect that the arbitration agreement was invalid or inapplicable.

47 Those decisions may be contrasted with *Blasket Renewable Investments, LLC v Kingdom of Spain*, No. 21-3249, 2023 US Dist LEXIS 54502, decided by Judge Leon of the United States District Court for the District of Columbia on 29 March 2023. In that case the Kingdom of Spain successfully argued that its standing offer to arbitrate by reason of its signing of the *Energy Charter Treaty*, opened for signature 17 December 1994, 2080 UNTS 95 (entered into force 16 April 1998) (the **Energy Charter Treaty**) was void, and accordingly there was no valid agreement to arbitrate. Judge Leon held that a prerequisite to finding an intention to waive sovereign immunity by signing the New York Convention was the existence of an agreement to arbitrate, relying simply on the reasoning in *Creighton* and *Tatneft* (which, as I have indicated above, followed the reasoning in *Seetransport*). Judge Leon did not undertake any detailed analysis of the terms of the New York Convention to ascertain whether that proposition was correct as a matter of principle. I was informed by counsel in the present case that an appeal in *Blasket* has been filed. From the point of view of an Australian Court deciding whether to follow *Blasket* as a matter of persuasive authority, I do not regard that reasoning as persuasive in the context of the present dispute concerning s 10(2) of the Australian legislation. While I accept that the reasoning in *Seetransport* in the passage which I have extracted above does refer to the parties having entered into an arbitration agreement as a matter of fact, that was in the context of a case in which there was no issue as to the validity or applicability of the arbitration agreement. It was not necessary for the Court in *Seetransport, Creighton* or *Tatneft* to consider whether it would have been sufficient for the plaintiff to have tendered what appears on its face to be an arbitration agreement, together with the award. As I have indicated above, in my view those minimal requirements are all that are necessary for the Applicants in the present case to satisfy Art IV of the New York Convention, deferring for a subsequent stage in the proceedings

whether the apparent arbitration agreement is valid and applicable, in the event that at that subsequent stage India raises such issues pursuant to Art V. I note that the sufficiency of prima facie proof of an apparent arbitration agreement is consistent with the way in which ss 8 and 9 of the Arbitration Act have adopted Arts II-IV as a matter of Australian law: *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248; (2011) 38 VR 303 at [134]-[139] (Hansen JA and Kyrou AJA).

48 Mr Gleeson SC also draws attention to s 17 of the FSI Act as casting doubt on whether a submission within the meaning of s 10(2) arises with sufficient clarity and unmistakability from an agreement to arbitrate which falls within the operation of the New York Convention. As Mr Gleeson SC submits, s 17(2) is not deployed by the Applicants against India because the present circumstances do not fall within the carefully chosen parameters of that provision (T84.33-85.06). Mr Gleeson points out that the High Court in *Kingdom of Spain* did not give consideration to the presence of s 17(2) in reaching its conclusion as to a clear and unmistakable necessary implication of waiver arising from the ICSID Convention.

49 Mr Gleeson SC draws attention to the discussion of arbitrations involving foreign States in the Australian Law Reform Commission's Report No 24, *Foreign State Immunity* (1984) (the **ALRC Report**), which led to the FSI Act. That report referred to the New York Convention, and said that the Convention applied to "at least some" arbitral awards between States and private parties (para 105, fn 72). The report referred to the "wider view", that a foreign State in agreeing to arbitrate should be taken to have waived its immunity from enforcement of any resulting award against it, at least in the courts of the forum of the arbitration, but arguably anywhere in the world where foreign arbitral awards can be enforced (para 106). The Commission expressed the view that it was too much to say that a foreign State which agrees to arbitrate a dispute waives its immunity from jurisdiction to enforce the resulting award throughout the world, and in the absence of express submission, the more defensible view was that local courts should only be able to enforce an award against a foreign State if, had the underlying dispute been brought before those courts for resolution, the foreign State would not have been immune (para 107). The Commission noted that that would allow the enforcement of awards arising out of commercial transactions, or of other transactions of the foreign State over which the courts would have had jurisdiction (para 107). The Commission said that foreign States could not convincingly object, in view of the widespread acceptance of international commercial arbitration and of the New York Convention, if a foreign arbitral award was enforced in that way (para 107). Accordingly, it recommended that where, apart

from particular stipulations to the contrary, a foreign State would not be immune in a proceeding concerning a transaction or event, it should not be immune in a proceeding to enforce an arbitral award made with respect to the transaction or event (para 107).

50 That analysis does explain the rationale for s 17(2) of the FSI Act. However, the analysis does not deal directly with the intermediate position, between the so-called wider view and the view which the Commission adopted, where recognition and enforcement of an arbitral award is sought against a foreign State which is a signatory to the New York Convention in a court of a country which is also a signatory to the New York Convention. The Commission noted that at the time of its report in 1984, there were 61 States which were parties to the New York Convention (para 105, fn 72), which was a substantially smaller set of countries than was contemplated by the so-called "wider view", which comprised "anywhere in the world where foreign arbitral awards can be enforced" (para 106) or "throughout the world" (para 107). Nor was there any detailed discussion by the Commission as to the terms of the New York Convention or the way in which Art III reflected the contemplation of Contracting States that each of them would recognise arbitral awards as binding and enforce them, including by implication where they, as Contracting States, were parties to those arbitral awards. Accordingly, I do not regard s 17(2), or the Commission's explanation for it, as pointing away from the clarity of the necessary implication of waiver in the courts of a Contracting State arising from India being a party to the New York Convention, together with what appears on its face to be an agreement by India to arbitrate the dispute.

51 Accordingly, I conclude at this stage of the analysis that the text of the New York Convention supports the Applicants' argument as to submission by agreement in the present case by way of clear and unmistakable necessary implication. For completeness, I do not think there is any aspect of the purpose, objects or context of the New York Convention which would lead to a different conclusion. As Mr Gleeson SC expressed it, the purpose and object of the New York Convention was to overcome the perceived difficulties in the enforcement by countries of foreign awards, by creating a convenient mechanism for enforcement no more onerous than the enforcement of domestic awards (T57.41-45). That purpose or object is fulfilled in the case of recognition and enforcement of an arbitral award against a State party by the conclusion which I have reached thus far. I turn then to the various sub-issues which have been raised concerning the s 10(1) and (2) argument.

Sub-issue (a): To what extent are the terms of the New York Convention distinguishable from the ICSID Convention?

52 India submits that there are five considerations of text, context, purpose and drafting history which were critical to the High Court's finding of waiver of sovereign immunity in the *Kingdom of Spain* case, which distinguished the ICSID Convention relevantly from the New York Convention.

53 First, India refers to the reasoning of the High Court to the effect that the ICSID Convention was fundamentally concerned with stimulating foreign investment in signatory states by mitigating sovereign risk for investors: [34], [71]. India submits that the premise and subject matter of the New York Convention, as reflected in Art I, is wholly different. India submits that the premise of the New York Convention is the recognition and enforcement of arbitral awards made in the territory of one State which are sought to be recognised and enforced in another State on conditions no more onerous than are imposed on the enforcement of local awards (see eg T57.39-41). The whole purpose of the undertaking was submitted not to be the mitigation of sovereign risk or stimulating foreign direct investment, but recognition and enforcement of arbitral awards involving, as India submits, private law disputes. By way of response, the Applicants submit that those statements of object and purpose are directed primarily at the creation of the Centre and that Arts 53-55 of the ICSID Convention are facilitative of the closed or self-contained system for interpretation, revision and annulment of awards divorced from national courts of disputes arbitrated at the Centre. In any event, the Applicants submit that recognition and enforcement of awards are fundamental to any system of arbitration, whether it be institutional arbitration under the ICSID Convention or other arbitral systems or bodies such as arbitration under the UNCITRAL Rules. The Applicants dispute that the whole purpose of the New York Convention pertained to arbitral awards involving private law disputes, a topic to which I will turn below.

54 Second, India refers to Arts 53-55 being described by the High Court as "a central plank in giving effect to the primary object of the ICSID Convention: to encourage private international investment including by mitigating sovereign risk and providing an investor with the 'legal security required for an investment decision'": at [40]. India submits that, whereas Art 53 of the ICSID Convention contains an express agreement by State parties to the Convention for an award to which they are party to be "binding" on them, there is no equivalent in the New York Convention, and in *Kingdom of Spain* it was critical to the outcome that Spain had agreed to Art 53: see [69] and [71]. The Applicants respond by submitting that the point of making the

effect of the awards in Art 53(1) "binding" was to create a closed or self-contained system, in that the ICSID Convention leaves no grounds for refusal of recognition and enforcement of a Centre award by national courts, including on public policy grounds, referring to *Eiser Infrastructure Limited v Kingdom of Spain* [2020] FCA 157; (2020) 142 ACSR 616 at [79] (Stewart J). The Applicants submit that outside of the ICSID Convention, it is the parties' agreement to final and binding arbitration that limits the extent to which any award can be challenged, referring to *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* [2013] HCA 5; (2013) 251 CLR 533. The Applicants submit that the relevant difference between the ICSID Convention and the New York Convention is that the ICSID *ad hoc* annulment committees replace the role of the courts of the seat or an enforcing court in reviewing an award for error, including in relation to the grounds set out in Art V of the New York Convention and Arts 35-36 of the UNCITRAL Model Law on International Commercial Arbitration (being Sch 2 to the Arbitration Act).

55 Third, India submits that the High Court referred to express consideration having been given, during the consultative meetings on the drafting for the ICSID Convention, to the intersection of the obligations on signatory States contained in Arts 53-55 and State immunity: at [49]-[58]. India refers to the fact that the ICSID Convention contains express reference to State immunity (Art 55), but nowhere does the New York Convention mention immunity. The Applicants submit that Art 55 was thought necessary because it was accepted as necessarily implicit in the words of Art 54 that there was a waiver of immunity to proceedings to enforce awards, and it was included for the avoidance of doubt and in light of the possible danger of overreaching in a Convention explicitly dealing with proceedings against States. The Applicants submit that the presence of Art 55 of the ICSID Convention supports the view that an agreement for recognition and enforcement of an award carries with it a waiver of immunity and Art 55 merely prevented too wide an interpretation of Art 54 "enforcement" as encompassing a waiver of immunity from execution.

56 Fourth, India refers to the High Court's reasoning that in light of Arts 53 and 55, it would distort the terms of Art 54(1) to require separate conduct that amounted to a waiver of immunity before an award could be recognised and enforced against a foreign State, and would render Art 55 inaccurate, because Art 54(1) would then preserve to a Contracting State a much greater immunity than merely immunity from execution subject to the laws of the Contracting State: at [69]. India submits that no such consequence follows from an interpretation of the New York Convention as operating harmoniously with the preservation of State immunity. The fifth point

is allied to that fourth point, namely the High Court's statement that the underlying assumption in the drafting of Art 54 was an "assumption of parity" between parties to an award at [72]. In a context in which one party to an award would in every case be a "foreign State", it was significant that the terms of Art 54 do not distinguish between recognition and enforcement proceedings against investors, as opposed to States: at [72]. India submits that these points reflect the fundamentally different premises of the two conventions in that in every case to which Arts 53-55 of the ICSID Convention apply, a State is a party to the relevant arbitral award and has by Art 53 agreed to be bound by it, whereas the New York Convention applies to awards to which no State or State instrumentality may be a party, contains no agreement by States that such awards are binding on the award parties, and is founded on no premise of parity between States and non-State persons. The Applicants respond by submitting that it is erroneous to say that because the New York Convention can apply to awards between two private parties, there is no necessity to construe Arts III-VI as a waiver of foreign State immunity, and a clear implication can occur even if alternative applications and constructions could still give the provisions work to do. The Applicants submit that the correct methodology is to focus on the text of Art I, emphasising the generality of "award", "dispute" and "person" in Art I.

57 In my view, there is little, if anything, to be gained by asking whether the terms of the ICSID Convention or the terms of the New York Convention more clearly and unmistakably evince a waiver of foreign State immunity by necessary implication by the signatories to those treaties respectively. The real question is whether the New York Convention amounts to such a waiver, in the sense of submission by agreement. If the New York Convention evinces such an intention clearly and unmistakably, it is simply irrelevant whether the terms of the ICSID Convention are more, less or equally clear and unmistakable. Accordingly, while I note the significant differences between the terms of those two conventions, I regard this question as a false issue.

Sub-issue (b): Is any application of the New York Convention to arbitral awards to which a State is a party limited to only such awards involving a commercial or private law dispute (as opposed to disputes concerning the conduct of the State acting in its governmental capacity)?

58 I have referred above to the breadth and generality of the language used in Arts I and II of the New York Convention. Article I refers to arbitral awards "arising out of differences between persons, whether physical or legal". The term "differences" is not further defined. It is accepted by India that the concept of "legal persons" can include States, although India contends that it bears that meaning only in the context of States entering into the field of commerce or private

law. I cannot see any textual basis for that supposed limitation. Article I(3) in its last sentence permits States to declare that they will apply the Convention "only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration". While that kind of reservation is not directly relevant to the present dispute, in that Australia did not make any such reservation and Australia is the State where recognition and enforcement is presently sought, it is relevant to consider that the terms of the New York Convention do refer expressly to differences which may be regarded as "commercial" in that specific context. There is no indication in the language used in the Convention that any wider application of the concept of commercial disputes was intended.

59 Article II refers to each Contracting State recognising an agreement in writing under which the parties undertake to submit to arbitration differences which have arisen, or which may arise between them "in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration". India has not made any submission that the subject matter in the present case was not capable of settlement by arbitration. There is no specification of what the concept of "a defined legal relationship" might encompass, except for the specific reference to the inclusion of contractual relationships and the stipulation that such relationships are not exhaustive. In my view, that language cannot be taken as evincing an intention to confine the concept of "a defined legal relationship" to relationships which might be described as commercial or matters of private law. For example, a revenue authority and a taxpayer, or the grantor and holder of a mining permit, are in defined legal relationships, but which are of a governmental or public law character. Article II also contains the broad reference to "a subject matter capable of settlement by arbitration", and that concept is capable of application to a range of disputes which could not fairly be described as commercial or private law disputes.

60 India submits that the grounds of resisting enforcement under Art V are apposite where arbitration is used to settle private or commercial law disputes, but not readily apposite where there are fundamental issues concerning the State acting as State, particularly in matters of vital national interest. Although any application of Art V is a matter for a subsequent stage of the proceedings, the terms of Art V are relevant to the present issue of construction of the New York Convention as a whole. I do not agree with India's submission that Art V is not applicable to disputes which could not fairly be described as commercial or private law disputes. Questions of capacity or validity under Art V(1)(a) may well arise where the subject matter

concerns the proper use of powers by a public authority acting in a matter of public policy. Similarly, an arbitral award concerning matters which are neither commercial nor private law disputes may well purport to deal with a difference not contemplated by or falling within the terms of the submission to arbitration, within the meaning of Art V(1)(c). Article V(2)(a) provides a ground for refusal of recognition and enforcement of an arbitral award where the subject matter of the difference is not capable of settlement by arbitration under the law of the country where recognition and enforcement is sought, which may conceivably be due to the public non-commercial aspects of a controversy. It may also be considered that recognition and enforcement of an arbitral award dealing with matters of public policy or public law may be opposed on the grounds specified in Art V(2)(b), that is, on the ground that recognition or enforcement of the award would be contrary to the public policy of the country where recognition and enforcement is sought. Dealing with the grounds specified in Art V as a whole, I do not agree with the submission that any of those grounds would not be apposite to a dispute which could not fairly be described as a commercial or private law dispute.

61 As the High Court said in *Morrison v Peacock* in the passage extracted above, the effect of Art 31 of the Vienna Convention is that primacy must be given to the written text of the Convention. I do not see any textual support for India's submission limiting the application of the New York Convention to arbitral awards to which a State is a party only to where such awards involve a commercial or private law dispute. Nor do I find any support for that submission in the context, objects and purpose of the New York Convention, which India states as overcoming the perceived difficulties in the enforcement by countries of foreign awards by creating a convenient mechanism for enforcement which is no more onerous than the enforcement of domestic awards (T57.41-45).

62 I turn then to consider the submissions made in relation to the preparatory work of the New York Convention, to which recourse may be had pursuant to Art 32 of the Vienna Convention for the specific purposes referred to in Art 32.

63 On 28 October 1953, the United Nations Economic and Social Council (**ECOSOC**), issued a circular entitled *Enforcement of International Arbitral Awards: Statement submitted by the International Chamber of Commerce, a non-governmental organization having consultative status in category A* (UN Doc E/C.2/373), which enclosed the Report and Preliminary Draft Convention adopted by the Committee on International Commercial Arbitration of the

International Chamber of Commerce (**ICC**) at its meeting on 13 March 1953. Article I of the Preliminary Draft Convention (at p 12) provided as follows:

> The present Convention shall apply to the enforcement of arbitral awards arising out of commercial disputes between persons subject to the jurisdiction of different States or involving legal relationships arising on the territories of different States.

64 On 6 April 1954, ECOSOC established a Committee on the Enforcement of International Arbitral Awards (the **Committee**) to study the questions which the ICC had raised. On 21 January 1955, the Committee published the views expressed by members of the United Nations which had been received by 15 January 1955 (*Comments received from Governments regarding the Draft Convention on the Enforcement of International Arbitral Awards*, UN Doc E/AC.42/1). The response issued by Greece said that, in the interests of reciprocity, the draft Convention should only be applied if "all the parties concerned are nationals of States which are bound by the Convention" (p 3). The response of Luxembourg made the point that the rules of a particular country would be relevant to the classification of the dispute as a civil or as a commercial matter, stating that "the prevailing trend is to restrict the application of arbitration treaties to commercial disputes only" (p 7). The response of Sweden noted that the *Convention on the Execution of Foreign Arbitral Awards*, opened for signature 26 September 1927, 92 UNTS 301 (entered into force 25 July 1929) (**1927 Geneva Convention**) was applicable only to arbitral awards affecting parties which are respectively subject to the jurisdiction of different contracting States, and said that the provision was not clear and may mean either that the parties must be "citizens of different contracting States or that they must be domiciled in different contracting States" (p 9). Sweden noted that Art I of the ICC's preliminary draft sought to remove at least some of the limitations of the 1927 Geneva Convention in this respect, but it was still not sufficiently clear what the proper interpretation should be (pp 9-10).

65 From 1 to 8 March 1955, the Committee held eight meetings in New York. The Committee comprised the Chairman (from Australia) together with seven other members, being representatives of Belgium, Ecuador, Egypt, India, Sweden, the USSR and the UK. Also present were representatives of the International Monetary Fund, the International Institute for the Unification of Private Law, the ICC and the International Law Association, and two members of the Secretariat. At the second meeting, held on 2 March 1955 (UN Doc E/AC.42/SR.2), the representative of the USSR said that:

> The application of the convention should be limited to the enforcement of arbitral awards in disputes arising out of commercial dealings, and any provision suggesting that it had a larger scope should therefore not be included. (p 3)

The representative of the UK commented by way of "preliminary remarks" on the limitation of the effect of the draft convention to commercial disputes, saying:

> As common law countries had no separate commercial code and no statutory definition of the person described in French as *commerçant,* difficulties might arise in the application of the convention. (p 5)

The Chairman invited members to consider whether the draft convention should apply to commercial disputes only (p 7). The UK representative said the following:

> As to the problem involved in the limitation of the convention to awards in commercial disputes, it had been solved in the 1927 [Geneva] Convention by the inclusion of a permissive clause allowing reservations limiting its application to commercial disputes. (p 8)

The representative of the USSR said that his delegation maintained its view in favour of limiting the operation of the convention to commercial disputes (p 8). The representative of Sweden said that he saw:

> no need for the limitation, which might cause difficulties in countries having no commercial code. In only a few countries were *commerçants* and commercial disputes governed by special legislation. The best solution would be to follow the example of the 1923 [Geneva] Protocol [on Arbitration Clauses], which provided in the second sentence of its paragraph 1 that each contracting State reserved the right to limit its obligation to contracts considered as commercial under its national law. (p 8)

The representative of Belgium said that:

> his delegation would prefer the operation of the proposed convention to be limited to commercial disputes, but if the idea did not have the support of the majority, it could accept the Swedish proposal. (p 8)

66 The third meeting was held in the afternoon of 2 March 1955 (UN Doc E/AC.42/SR.3). The representative of the UK said that it should be made clear whether semi-state agencies would be able to claim immunity (p 4). The representative of the USSR said that the use of the term *commerçants*, which had no exact equivalent in the USSR, should be avoided, and preferred the expression "individuals or bodies corporate" (p 4). He also agreed with the UK representative that the categories of persons to which Art I applied should be enumerated both in Art I and in the Committee's report (p 4). The Chairman noted that all members of the Committee agreed on the substance, and proposed that the drafting sub-committee should settle the final wording of Art I (p 7).

67 On 28 March 1955, the Committee issued its *Report of the Committee on the Enforcement of International Arbitral Awards* (UN Doc E/2704; E/AC.42/4/Rev.1) (the **1955 Report**). The 1955 Report referred to the Committee having met in New York from 1 to 15 March 1955, and

having held 13 public meetings, and a drafting committee of the Committee also held a number of meetings (p 2). The 1955 Report referred to the view expressed by the ICC that the system established by the 1927 Geneva Convention no longer met the requirements of international trade, and for that reason the ICC had prepared a Preliminary Draft Convention which was before the Committee (p 5). The 1955 Report said the following (at p 5):

> 14. Having considered the general aspects of the question, the Committee concluded that it would be desirable to establish a new convention which while going further than the Geneva Convention in facilitating the enforcement of foreign arbitral awards, would at the same time maintain generally recognized principles of justice and respect the sovereign rights of States.
>
> 15. Although the Committee differed in several respects with the proposals made by the International Chamber of Commerce, it decided to use the ICC Preliminary Draft as a working paper for its deliberations.
>
> 16. At its 13th meeting of 15 March 1955 the Committee adopted by a vote of seven in favour, none against and one abstention, a Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the text of which is reproduced in the Annex to this report.

68 Art I of the Draft Convention in the Annex read as follows:

> 1. Subject to paragraph 2 of this Article, this Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State in which such awards are relied upon, and arising out of differences between persons whether physical or legal.
>
> 2. Any Contracting State may, upon signing, ratifying or acceding to this Convention, declare that it will apply the Convention only to the recognition and enforcement of arbitral awards made in the territory of another Contracting State. Similarly, any Contracting State may declare that it will apply the Convention only to disputes arising out of contracts which are considered as commercial under the national law of the Contracting State making such declaration.

That draft bears obvious similarities, although not precise identity, with what ultimately became Art I(1) and (3) of the New York Convention.

69 The 1955 Report provided some commentary on the draft of Art I, which it noted defined the scope and limit of the application of the Draft Convention, noting the differences between Art I of the ICC Draft and the corresponding provisions of the 1927 Geneva Convention (p 6). As part of that commentary, the Report said the following:

> 24. Article I provides that the Convention would apply to arbitral awards arising out of differences "between persons, whether physical or legal". The Representative of Belgium had proposed that the article should expressly provide that public enterprises and public utilities should be deemed to be legal persons for purposes of this article if their activities were governed by private law. The Committee was of the opinion that such a provision would be

> superfluous and that a reference in the present report would suffice. (p 7)
>
> …
>
> 26. The Committee considered whether the Convention should be limited to arbitral awards arising out of commercial disputes, as was envisaged in the ICC draft (Article I). While in some countries the word "commercial" and "commerçant" has a clear legal meaning, the law of other countries does not specifically differentiate between civil and commercial matters. For this reason the Committee decided not to include any qualification in paragraph 1 of Article I. However, paragraph 2 would enable any Contracting State to declare that it would apply the Convention only to disputes arising out of contracts considered as commercial under the law of that State. A similar provision is contained in the 1923 Protocol on Arbitration Clauses. (p 8)

70 The 1955 Report thus expressly stated that the Committee had rejected a limitation in Art I by reference to "commercial disputes". However, individual Contracting States could declare that they would apply the Convention only to disputes arising out of contracts considered as "commercial" under the law of the particular State. This was in effect an adoption of the position advanced by the representative of the UK at the second meeting on 2 March 1955. The upshot was that commercial disputes would be included within the scope of the Convention, but that concept would not be used to define the outer limits of the Convention. Further, in my view, the clarity of para 26 assists in resolving what may be seen to be an ambiguity in para 24, in which the Committee rejected as "superfluous" the proposal by the representative of Belgium that Art I should expressly provide that public enterprises and public utilities should be deemed to be legal persons for the purposes of the article if their activities were governed by private law. There is a clear correspondence, although possibly not a precise identity, between the concepts of being governed by private law, on the one hand, and commercial disputes, on the other hand. The proposal by the representative of Belgium was not to the effect that public enterprises and public utilities should be deemed to be legal persons "only" if their activities were governed by private law. Such a provision could hardly be described as "superfluous" in circumstances where the Committee had decided not to limit Art I to arbitral awards arising out of commercial disputes. In my view, the "superfluous" nature of the Belgium proposal was in making any express reference to public enterprises and public utilities, given that such entities were clearly "legal persons", and if their activities were governed by a private law, then there was no reason to think that those activities could not be the subject matter of an arbitral award within the intended scope of the Convention. Accordingly, I do not read the Report as expressing any view to the effect that it went without saying that States, or entities which were emanations of States, fell within the concept of "persons, whether physical or legal" *only* if their activities were governed by private law.

Rather, as the express language of para 24 says, the Committee regarded it as superfluous to say that such entities were legal persons in circumstances where their activities were governed by private law.

71 The 1955 Report concluded by setting out the Committee's resolution containing its recommendations to ECOSOC (p 18). That resolution included a recommendation that the Draft Convention and the Report of the Committee be transmitted to governments of Member and non-Member States for their consideration with respect to the text of the Convention and the desirability of convening a conference to conclude a convention. The Committee also recommended that the Draft Convention and the Report be sent for comment to the ICC and to such other non-governmental organisations in consultative status with ECOSOC as may be interested in international commercial arbitration.

72 On 31 January 1956, the Secretary-General of the United Nations issued a report on *Recognition and Enforcement of Foreign Arbitral Awards* (UN Doc E/2822) (the **1956 Report**). The 1956 Report began by referring to the resolution, adopted by ECOSOC on 20 May 1955, that the Secretary-General transmit to the governments of Members and non-Members of the United Nations the Report and the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards annexed thereto (p 1). The Secretary-General had asked governments for their comments with respect to the text of the Draft Convention and the desirability of convening a conference to conclude a convention on that subject, and said that comments on the Draft Convention had been received from 15 governments and four non-governmental organisations (p1).

73 In relation to the draft Art I, the response of Austria contained the following statement:

> Since the term "legal persons" includes States, the draft convention seems admittedly to cover arbitral awards made in their favour or against them in cases of disputes with subjects of private law. Nevertheless, it would be desirable to provide expressly that the convention is also applicable in cases in which corporate bodies under public law, and particularly States, in their capacity as entities having rights and duties under private law, have entered into an arbitration convention for the purpose of the settlement of disputes. (Annex I, p 11)

The response of Mexico contained the following statement:

> The Mexican Government further considers that it would be advisable to include in the draft Convention the stipulation contained in the [1927] Geneva Convention that the arbitral award must have been made in a dispute between persons who are subject to the jurisdiction of one of the Contracting States. The Mexican Government takes this view because Mexican law regards arbitral awards as acts which in themselves are private, since they are made pursuant to compromis concluded between private

> persons, and which become enforceable only when the logic of the award is, in addition supported by the authority of a judicial decision. (Annex I, pp 12-13)

The response of Switzerland contained the following statement:

> The text proposed by the United Nations experts is broader in scope than the ICC's text.
>
> In the first place – a feature which we welcome – it does not automatically limit the application of the convention to commercial disputes only. Since the different legal systems vary considerably in their idea of what "commercial law" embraces, it is wise not to invite difficulties by restricting the application of the Convention to disputes arising out of relations governed by commercial law. (Annex I, p 13)

As for responses by non-governmental organisations, the ICC said the following in relation to the draft Art I:

> Since all national systems of law do not provide for a distinct commercial law, their dissimilarity makes it difficult to limit the scope of the Convention to commercial disputes. Consequently, abandoning the position taken in the ICC's Preliminary Draft, the Commission agreed to the solution recommended in ECOSOC Committee's Draft of article 1, para. 2, which allows Contracting States the possibility of limiting their commitments to disputes considered as commercial under their national laws. (Annex II, p 7)

In the first sentence of that passage, the word "not" appears to be in the wrong place, and should be inserted immediately after the word "Since", and the word "do" deleted. The reference in the second sentence to "the Commission" appears to be a reference to the relevant Working Commission of the ICC. Importantly, the concept of limiting the Convention to "commercial disputes", which had originally been advanced by the ICC and later rejected by the Committee, was now abandoned by the ICC itself, and the ICC agreed with what it described as the "solution" recommended by the Committee of allowing Contracting States the ability to limit their commitments to disputes considered as commercial under their national laws.

74 The Society of Comparative Legislation suggested that after the words "persons whether physical or legal" there should be added a statement that that expression included States, public bodies and undertakings, public establishments and establishments serving the public interest, on the condition that the differences arose out of a commercial contract or a private business operation (Annex II, p 9). That response also contained a statement supporting the inclusion of the clause proposed by the Belgian representative, referred to in para 24 of the 1955 Report (p 9). The Society of Comparative Legislation appears to have been a lone voice in that regard by the time of the 1956 Report.

75 On 3 April 1956, the Secretary-General of the UN issued a supplementary report transmitting the comments received from the Netherlands and the United Kingdom on the Draft Convention on the Recognition and Enforcement of International Arbitral Awards (UN Doc E/2822/Add.4). The response of the United Kingdom observed that the present draft provided that each Contracting Party was, subject to two important reservations, required to enforce foreign awards "wherever they are made and irrespective of the relationship of the parties to any State bound by the Convention", the reservations being that a Contracting State may limit its obligations to the enforcement of awards made (a) in the territories of other Contracting States and (b) on disputes arising out of contracts regarded as "commercial" under the national law of that State (Annex I, p 3). The UK questioned the right reserved to a Contracting State to limit its obligations to awards on disputes arising from agreements regarded as "commercial" under the law of that State, pointing out that a formal distinction between "commercial" and "civil" law was unknown to the laws of the United Kingdom but was familiar to many other legal systems and therefore it was unlikely that the reservation could be omitted (Annex I, p 4). The response of the UK continued as follows:

> It seems, however, to be unreasonable for a State whose law does not distinguish between "commercial" and "civil" law to be allowed to restrict its obligations to "commercial" matters without at the same time indicating precisely what it understands by "commercial". Failing some such restriction of this right, there would be constant uncertainty about the scope of the obligations undertaken by the Contracting Parties who make the reservation. The United Kingdom is unwilling to be bound to enforce awards on "civil" agreements made in a country which is bound to enforce United Kingdom awards only if they are made on "commercial" agreements and it is thought that some reservation to this effect should be possible and that provision should be made accordingly. (Annex I, p 4)

76 From 20 May to 10 June 1958, the United Nations Conference on International Commercial Arbitration was held in New York. The second meeting took place on 21 May 1958 (UN Doc E/CONF.26/SR.2). The representative of Italy said that he was generally in favour of the Draft Convention, which he described as offering a "realistic solution that would make it possible to meet the needs of the business community while safeguarding the jurisdictional prerogatives of States" (p 7). The representative of Italy also said that the conference should seek criteria by which to define the awards to which the Convention would apply which were "better suited to the purpose of the Convention, which was intended to facilitate the settlement of international commercial disputes" (p 8). Those other criteria were not identified. The representative of the USA said that "it was necessary to improve both the law and practice of arbitration if it was desired that that institution should play its part properly in the settlement of disputes arising out of international trade" (p 8). He stated that the participation of the United States showed

that the United States realised the benefit to be derived from "the swift and inexpensive settlement in an atmosphere of goodwill of private disputes arising out of international trade" (p 8). The representative of Ecuador said that it would be desirable to adopt "universal rules dealing both with the substance and the procedure of international commercial arbitration" (p 9).

77 The third meeting was also held on 21 May 1958 (UN Doc E/CONF.26/SR.3). The representative of Japan referred to the significance of the Convention for "the requirements of international trade" (p 2). The representative of the ICC referred to its efforts over 40 years in urging "the adoption of measures that would facilitate the arbitration of international commercial disputes and the international enforcement of awards", referring to problems and changes in "the development of trade", "international business" and "international trade" (pp 4-5). The ICC representative made the following statement:

> Essentially, what the ICC was seeking was acceptance of the principle of freedom of contract and of the right of businessmen to arbitrate their differences and enforce awards in accordance with their own contractual commitments. In their view, one of the best ways to promote international trade was to interfere with contractual liberty as little as possible. (p 6)

78 The fourth meeting was held on 22 May 1958 (UN Doc E/CONF.26/SR.4). At that meeting, the representative of Iran said that "the development of foreign trade required the adoption of procedures for rapid settlement of commercial disputes by arbitration and prompt enforcement of arbitral awards" (p 2). He also made the following statement:

> Moreover, the Convention should be limited to arbitral awards arising out of commercial disputes, as recommended by the International Chamber of Commerce in its preliminary draft. Such a provision would meet the objections of States which drew a distinction between commercial and civil disputes. (p 2)

The representative of the Federal Republic of Germany said that it was "still necessary to find some criterion for defining the awards to which the Convention was to apply" (p 4), but did not suggest any criterion to the effect of limiting the Convention to commercial or private law disputes. Reference was made by the representative of Czechoslovakia to improving the Draft Convention to meet "the needs of international trade" (p 6), by the representative of Poland to "trade" and "the growth of trade" (pp 6-7), by the representative of the Netherlands to the Convention serving the interests of those engaged in "international trade" (p 7), by the representative of Switzerland to "foreign trade" (p 9) and by the representative of the International Law Association and International Association of Legal Science to "meeting the needs of the business world" (p 9).

79 The fifth meeting was also held on 22 May 1958 (UN Doc E/CONF.26/SR.5). The representative of India spoke of India being "acutely conscious of the importance of the arbitral procedure as a convenient and speedy method of resolving commercial disputes" (p 4). The representative of the USSR spoke of the "expansion and strengthening of international trade relations", referring to the United States being the only major country with which it did not have trade relations, and said that "commercial disputes involving Soviet foreign trade organs were rare and that provision had been made for their settlement by arbitration" (p 4). The representative of Argentina said that "his Government attached particular importance to arbitration as a means of settling international commercial disputes" (p 5). The representative of the Ukrainian Soviet Socialist Republic said that it considered the draft Convention "an important step in the normalization of international trade relations" (p 6). The meeting then turned to the consideration of the Draft Convention article by article. In the discussion concerning Art I, no attempt was made by any speaker to revive the idea of limiting Art I to "commercial disputes". Nor was any attempt made to revive the proposal originally expressed by the Belgian representative to provide that Art I applied to public enterprises and public utilities if their activities were governed by private law.

80 The seventh meeting was held on 23 May 1958 (UN Doc E/CONF.26/SR.7). The representative of Czechoslovakia said that his delegation "did not object to the fact that article I did not expressly limit the application of the Convention to commercial disputes, inasmuch as his country did not have a separate commercial code" (p 3). He referred also to the suggestions of the Austrian Government concerning the term "legal person", and although his delegation considered it superfluous, "it would not object to an express provision to the effect that the Convention was also applicable in cases in which corporate bodies under public law, in their capacity as entities having rights and duties under private law, had entered into an arbitration agreement" (p 3). The representative of El Salvador said that difficulties might be encountered in the application of the second sentence of Art I, paragraph 2, although the provision seemed logical "as not every State recognized the possibility of arbitration in non-commercial matters" (p 10). He said that "serious problems could arise in instances where, for instance, a claim and counter-claim were both upheld and enforcement of each was then sought in a different State", and a solution "might perhaps be found by adopting another principle and stating that the commercial or non-commercial nature of the contract would be determined by the law under which that contract had been concluded" (p 10). The representative of Ceylon expressed a desire for Sweden to delete the words in its proposal "on any matter susceptible of

arbitration", and said that he "shared the misgivings of the representative of El Salvador" which I have referred to above (p 10). The representative of Japan said that he hoped that the second sentence of Art I, paragraph 2, would be deleted, as many contracts were "on the borderline between commercial and civil agreements" and "an artificial demarcation could often operate unfairly" (p 12).

81 The tenth meeting was held on 27 May 1958 (UN Doc E/CONF.26/SR.10). The United Kingdom had submitted an amendment to Art II, the purpose of which was described by the UK representative as being "to ensure that no additional restrictions were imposed which might impede the free enforcement of the arbitral award, for instance in countries in which the Convention, in order to be given effect, would have to be translated into legislation", referring to the UK as a country in which a treaty had no direct effect internally and could become effective only as an Act of Parliament (p 2). The representative of the United States supported the UK amendment as establishing a rule of national treatment with respect to the procedural rules to govern the enforcement of foreign awards, and the costs and fees to be assessed, and regarded the principle of national treatment embodied in the UK proposal as deserving serious consideration "in any situation in the arbitral process in which discrimination based on nationality was possible" (p 3). This appears to have been the origin of what became the second sentence of Art III of the New York Convention, being the non-discrimination provision preventing the imposition of more onerous conditions than are imposed on the recognition and enforcement of domestic arbitral awards.

82 The eleventh meeting was also held on 27 May 1958 (UN Doc E/CONF.26/SR.11). The UK representative said that "delegations seemed to agree that enforcement should be governed by domestic procedure and that higher fees and charges should not be demanded for foreign than for domestic awards" (p 4). In order to expedite the work of the Conference, he expressed tentative support for an amendment proposed by Israel to use the following formula: "In accordance with rules of procedure not substantially more onerous than those applied to domestic awards" (p 4).

83 The sixteenth meeting was held on 3 June 1958 (UN Doc E/CONF.26/SR.16). The representative of the Philippines said that the English expression "physical or legal persons" had no specific legal meaning and should be replaced by "natural or juridical persons" (p 2). However, no attempt was made to revive any express reference being made to the Convention

applying to States or their instrumentalities. Nor was any attempt made to revive a limitation in Art I to "commercial disputes".

84 The *Final Act* of the United Nations Conference on International Commercial Arbitration (UN Doc E/CONF.26/8/Rev.1) contains the following statements. In para 1, reference is made to the decision of ECOSOC to convene a Conference of Plenipotentiaries "for the purpose of concluding a convention on the recognition and enforcement of foreign arbitral awards, and to consider other possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes". Paragraph 16 referred to the Conference having adopted a resolution which began by referring to the Conference:

> *Believing* that, in addition to the convention on the recognition and enforcement of foreign arbitral awards just concluded, which would contribute to increasing the effectiveness of arbitration in the settlement of private law disputes, additional measures should be taken in this field …

The resolution then expressed a number of views with respect to the principal matters dealt with, including (in para 5) that the Conference:

> considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes….

85 In my view, the references in that Final Act to "private law disputes" indicate no more than that the use of arbitration in the settlement of private law disputes was a matter of primary focus at the Conference, not that the Convention was intended to be limited *only* to what may be described as "private law disputes". The same may be said of the many references to facilitating international trade and commerce made during the Conference. The preparatory work evident in the minutes of the meetings of the Conference indicates that there was a consensus not to express any limitation in Art I to the effect that the Convention would apply only to "commercial disputes". As I have explained above, in my view the reference to it being superfluous to provide that State instrumentalities were covered in the Convention when engaged in activities which were governed by private law did not evince any intention that such State instrumentalities were not covered if their activities were not governed by private law.

86 I have referred above to Art 32 of the Vienna Convention, which permits recourse to be had to the preparatory work of the treaty in order to confirm the meaning resulting from the application of Art 31, or to determine the meaning when the interpretation according to Art 31 leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable. In my view, there is no ambiguity or obscurity in the meaning of the New York

Convention in its application to States or State instrumentalities resulting from the application of Art 31. The language used in Arts I-III is too broad and general to permit a construction whereby the Convention would apply to States only where the awards involve a commercial or private law dispute. Further, the meaning ascertained in accordance with Art 31 does not lead to a result which is manifestly absurd or unreasonable. In my view, the preparatory work does tend to confirm the meaning resulting from the application of Art 31, in evidencing a clear rejection of any limitation to awards involving a commercial dispute. The rejection of the proposal for an express provision stipulating that the Convention applied to State instrumentalities if their activities were governed by private law introduced its own ambiguity, which I have resolved in the way discussed above. However, Art 32 of the Vienna Convention does not contemplate that the preparatory work may be relied upon in order to create ambiguity where none appears from the text of the Convention when construed in accordance with the principles set out in Art 31.

87 Although the Vienna Convention does not refer to regard being had to the opinions of expert commentators on the treaty in question, it seems to me entirely appropriate to take the views of such commentators into account when considering the proper interpretation of a treaty. In relation to the New York Convention, there is an abundance of commentary, to which I now turn, in relation to the particular issue pertaining to the application of the New York Convention to States and State instrumentalities which are parties to an arbitral award.

88 India relies on views expressed by a number of commentators to the effect that States are within the meaning of "persons" in Art I(1) of the New York Convention only to the extent to which they perform private or commercial acts, such as entering into commercial contracts with private entities: Hans Bagner, "Article I", in Herbert Kronke, Patricia Nacimiento et al (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International, 2010) 19 at 27; Lionello Capelli-Perciballi, "The Application of the New York Convention of 1958 to Disputes between States and between State Entities and Private Individuals: The Problem of Sovereign Immunity" (1978) 12(1) *International Lawyer* 197 at 198-199; Daniel Girsberger and Nathalie Voser, *International Arbitration: Comparative and Swiss Perspectives* (4th ed, Schulthess Juristische Medien AG, 2021) at [1689]; Pieter Sanders, "New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (1959) 25(3) *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 100 at 103. To those references there might be added Pieter Sanders, "The New York Convention" in Pieter Sanders (ed) *Arbitrage*

International Commercial / International Commercial Arbitration (Martinus Nijhoff, 1960) vol 2, 293 at 299. However, these commentators do not explain the distinction between private and non-private acts or law, or the distinction between commercial and non-commercial acts or law, or how such distinctions might apply to disputes arising from bilateral investment treaties.

89 Another commentator regarded the New York Convention as applicable to arbitral awards relating to States acting in a non-commercial capacity provided that the dispute is of a private law nature rather than a matter of public international law: Paolo Contini, "International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (1959) 8(3) *American Journal of Comparative Law* 283 at 294.

90 Another group of commentators has treated the application of the New York Convention as including awards against States arising from commercial or private law disputes, but without apparently ruling out its possible application to non-commercial or non-private law disputes: Leo M Drachsler, "Comments" (1959) 53 *Proceedings of the American Society of International Law* 284 at 285; International Council for Commercial Arbitration, *ICCA's Guide to Interpretation of the 1958 New York Convention: A Handbook for Judges* (2011) at p 85; Oscar Schachter, "Private Foreign Investment and International Organization" (1960) 45(3) *Cornell Law Quarterly* 415 at 429.

91 Professor James Crawford said that it was not clear on the face of the New York Convention that States or State instrumentalities (as distinct from separate state trading corporations) were covered by the term "persons, whether physical or legal": "A Foreign State Immunities Act for Australia?" (1980) 8 *Australian Year Book of International Law* 71 at 101. A similar stance was taken by Edwin Nwogugu, *The Legal Problems of Foreign Investment in Developing Countries* (Manchester University Press, 1965) at pp 253-4. However, India does not dispute that the New York Convention applies to States, relying on the qualification that it only applies to States acting in a commercial or private law capacity. As to that qualification, Professor Crawford commented that it was an "unfortunate omission" for the drafting committee to have rejected a specific amendment to that effect because it was thought to be superfluous (p 101). Professor Crawford's first reason for that comment was that "if the term 'persons' in Article 1(1) includes States, then it would seem to include them in whatever capacity (at least in those jurisdictions where the State is accorded a unitary legal personality extending beyond private law matters)" (p 101). That reasoning points against India's submission that an Australian court

considering an issue as to submission by agreement arising from the New York Convention would distinguish between the conduct of India in commercial or private law disputes and the conduct of India in its other capacities.

92 Professor Albert Jan van den Berg expressed the views that (a) it is generally accepted that the New York Convention applies to an arbitration agreement and arbitral award to which a State is a party if it "relates to a transaction concerning commercial activities in their widest sense", and (b) that the New York Convention does not exclude from its field of application an arbitration agreement or award between a State and a foreign national relating to an investment dispute: *The New York Arbitration Convention of 1958* (Kluwer Law International, 1981) at pp 279 and 99 respectively. Professor van den Berg treated the views of Contini and Sanders as consistent with proposition (a) in his fn 134 at p 279. Professor van den Berg has been described as "the acknowledged authority on the New York Convention": Hazel Fox QC, "State Immunity and Enforcement of Arbitral Awards: Do We Need an UNCITRAL Model Law Mark II for Execution Against State Property?" (1996) 12(1) *Arbitration International* 89 at 90. Similarly, Professor Andrea Bjorklund has said that many bilateral investment treaties permit investors to choose either to submit a dispute to the Centre under the ICSID Convention or to convene proceedings under other arbitral rules, and that under the latter option, no matter which rules govern the arbitration, awards will nearly always be subject to enforcement under the New York Convention: "State Immunity and the Enforcement of Investor-State Arbitral Awards", in Christina Binder et al (eds), *International Investment Law: Essays in Honour of Christoph Schreuer* (OUP, 2009) 302 at 303; "Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: the Re-Politicization of International Investment Disputes" (2010) 21 *American Review of International Arbitration* 211 at 217-8. In my view, the commentary by Professors van den Berg and Bjorklund to this effect is the most illuminating in relation to the present controversy, as it deals specifically with disputes with States under the New York Convention concerning investments or bilateral investment treaties. I was not referred to any academic commentary which disagrees with those particular views.

93 The research undertaken by the Applicants' legal representatives has revealed 30 occasions when the New York Convention has been applied to investor-State arbitral awards, 20 of them involving breaches by States of bilateral investment treaties. Most of the others concerned the Energy Charter Treaty. I have set out the Applicants' references to, and summaries of, those 30 cases in the Appendix to these reasons, in which the 20 cases involving breaches by States

of bilateral investment treaties are marked with an asterisk. The Applicants relied on those occasions as evidence of subsequent State practice within the meaning of Art 31(3)(b) of the Vienna Convention. None of those occasions involved India as the State whose courts were recognising and enforcing the arbitral awards, or indeed at all. Accordingly, even assuming that the history of enforcement of awards by courts demonstrates the practice of States generally, it cannot serve to clarify India's intentions as to the meaning of the New York Convention in the absence of evidence of the courts of India adopting such a practice: *Li v Zhou* at [69] (Basten JA). However, the instances in which the New York Convention has been applied to investor-State arbitral awards, including those arising under bilateral investment treaties, do support the cogency of the views expressed by Professors van den Berg and Bjorklund. Further, it is important that international treaties should be interpreted uniformly by contracting states: *Povey v Qantas Airways Ltd* [2005] HCA 33; (2005) 223 CLR 189 at [25] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

Sub-issue (c): Is any waiver by States pursuant to Art III of the New York Convention subject to local "rules of procedure", including the forum's laws of foreign State immunity?

94 The first sentence of Art III requires each Contracting State to recognise arbitral awards as binding and enforce them "in accordance with the rules of procedure of the territory where the award is relied upon", which in the present case is Australia. As a matter of the choice of law rules under Australian private international law, sovereign immunity is regarded as substantive rather than procedural: *Garsec Pty Ltd v His Majesty the Sultan of Brunei* [2008] NSWCA 211; (2008) 250 ALR 682 at [108]-[136] (Campbell JA, with whom Spiegelman CJ and Hodgson JA agreed). However, as India submits, the content and construction of Art III is a question of international law, and accordingly the words "rules of procedure" in Art III can include rules which the domestic court would classify under local private international law rules as substantive. India has assembled a substantial body of commentary to the effect that the reference to "rules of procedure" in Art III includes the forum State's law of foreign State immunity: Professor James Crawford, "A Foreign State Immunities Act for Australia?" (1980) 8 *Australian Year Book of International Law* 71 at 102, fn 42; Andrea Bjorklund, "Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicisation of International Investment Disputes" (2010) 21 *American Review of International Arbitration* 211 at 218-219; Andreas Börner, "Article III" in Herbert Kronke et al (eds)*, Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International, 2010) at p 126; George Bermann,

"Chapter 4: Procedures for the Enforcement of New York Convention Awards", in Franco Ferrari and Friedrich Rosenfeld (eds), *Autonomous Versus Domestic Concepts under the New York Convention* (Kluwer Law International, 2021) at p 74; Javier Olmedo, "Chapter 12: Immunity Defences and the Enforcement of Awards in Investor-State Disputes", in Kiran Gore, Elijah Putilin et al (eds), *International Investment Law and Investor-State Disputes in Central Asia: Emerging Issues* (Kluwer Law International, 2022) at p 341; Emmanuel Gaillard and George Bermann (eds), *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 2016) at pp 88-89 [31]. I note, however, that the International Court of Justice referred to the rules of State immunity, as a matter of customary international law, as "procedural in character" in *Jurisdictional Immunities of the State* (*Germany v Italy: Greece Intervening*) [2012] ICJ Reports 99 at [93], being a decision cited with approval by Gageler J in *Firebird Global Master Fund II Ltd v Republic of Nauru* [2015] HCA 43; (2015) 258 CLR 31 (***Firebird***) at [133].

95 The Applicants accept that the relevant question is not whether any particular forum State might classify the law of foreign State immunity as substantive or procedural, but submit that as a matter of construction the phrase "in accordance with the rules of procedure" in Art III does not extend to the law of sovereign immunity. Rather, the Applicants submit that that phrase relates to procedural rules facilitating the recognition and enforcement of awards and not grounds for refusing such relief.

96 Ultimately, in the present case the question whether sovereign immunity is within the notion of "rules of procedure" is, as Mr Walker SC, counsel for the Applicants, expressed it, "a completely arid point of taxonomy" (T224.37). The question whether sovereign immunity under Australian law may be relied upon by India is the very question which I have to decide, irrespective of whether the Australian law of sovereign immunity is regarded as substantive or procedural. Similarly, in India's submission, Art III does not create an additional substantive ground for local courts to refuse the recognition and enforcement of an award, but rather preserves sovereign immunity to the extent that it exists under the national law of the forum State as a jurisdictional defence that precludes a forum court from proceeding to exercise jurisdiction on the merits, including consideration of the conditions and considerations in Arts IV-V (India's Rejoinder Submissions dated 8 May 2023 at [48]). Accordingly, it is not necessary to answer this particular question.

Sub-issue (d): Does the New York Convention, to the extent it supplies conduct which may give rise to a waiver of immunity, limit such waiver to awards arising from arbitral proceedings to which the respondent State voluntarily submitted?

97 There does not appear to be any real dispute between the parties as to the essential character of arbitration being one of voluntary agreement or submission. Rather, the issue, at this initial stage of considering whether India is entitled to claim foreign State immunity or has waived that immunity, is whether it is sufficient for the Applicants to establish such agreement or submission only at a prima facie level from the tender of documents appearing on their face to constitute an agreement to arbitrate, or whether India is entitled at this stage to seek to establish that, despite an apparent agreement to arbitrate, there was no such agreement in fact. India's argument focused on the definition of "arbitral awards" in Art I(2) as including not only awards made by arbitrators appointed for each case, but also those made by permanent arbitral bodies "to which the parties have submitted". India submits that it was not necessary in the drafting of Art I(2) to qualify the reference to *ad hoc* arbitration with the words "to which the parties have submitted" because voluntariness is a fundamental aspect of *ad hoc* arbitration. The inclusion of the words "to which the parties have submitted" in Art I(2), in India's submission, has the effect of ensuring that, as with awards made pursuant to *ad hoc* arbitration in respect of which voluntariness is inherent, any awards made by a permanent arbitral tribunal to which the New York Convention might apply also have the requisite element of voluntary submission to arbitration. India also points to various aspects of the preparatory work for the New York Convention which, it submits, confirm that Art I(2) was included to highlight the voluntary nature of the two types of arbitration included in it. India submits that there is no discussion in the preparatory work contemplating that "arbitral awards" within the meaning of Art I(2) include arbitral outcomes absent consent to arbitrate. India points to the use of the term "arbitral awards" in Art I(1) and Art III, thereby picking up the definition provided by Art I(2) and confining the operation of the New York Convention to such arbitral awards.

98 I agree at a general level with India's submission to the effect that, on the proper construction of the term "arbitral awards" in the New York Convention, that term is intended to refer to the resolution of disputes by the voluntary submission of parties to arbitration. However, the real question for present purposes is the kind of proof which is required to establish such voluntary submission at this initial stage of considering a jurisdictional challenge on the ground of foreign State immunity. As I have said above, in my view, the Applicants seeking recognition and enforcement of the arbitral award need only prove the existence of an agreement to arbitrate by documents which on their face appear to establish such an agreement. That is all that is

required by Art IV(1)(b), together with tender of the award itself. In my view, that is sufficient to establish the power of the Court to exercise jurisdiction over the foreign State. The State may wish to contend in due course that the apparent arbitration agreement does not in fact represent an agreement which was valid or applicable to the particular dispute, but those are matters for the State to raise pursuant to Art V once the claim for foreign State immunity has been determined.

Sub-issue (e): What, if anything, is the content and relevance of State practice to the Applicants' s 10 case?

99 As indicated above, Art 31(3)(b) of the Vienna Convention requires that there be taken into account any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation. In their initial written submissions, the Applicants provided an annexure in which the Applicants summarised 125 cases which showed the application or accepted applicability of the New York Convention to disputes involving States, within which there were 30 instances involving the recognition and enforcement of investor-State awards. As I have indicated above, India does not dispute that the New York Convention is capable of applying to States, but submits that its application to States or State instrumentalities is limited to commercial or private law disputes. The full list of 125 cases does not bear on the controversy as to whether the application of the New York Convention is so limited. The subset of 30 cases involving investor-State disputes does have some relevance to this case in the manner to which I have referred at the end of the analysis of sub-issue (b) above. However, as I have indicated, I do not regard those 30 occasions (or the further subset of 20 involving breaches by States of bilateral investment treaties) as constituting subsequent State practice within the meaning of Art 31(3)(b) of the Vienna Convention, in circumstances where none of those occasions involved India as the State whose courts were recognising and enforcing the arbitral awards.

100 It does not appear to me that the Applicants relied on the US cases on § 1605(a)(1) of the Foreign Sovereign Immunities Act of 1976 as evidence of subsequent State practice. Rather, those decisions were relied upon as persuasive authority for this Court to consider in its approach to s 10(2) of the FSI Act. There does not appear to me to have been any other respect in which any evidence of subsequent State practice was sought to be relied upon.

Sub-issue (f): What is the impact, if any, of findings of fact and law contained in judgments given in winding up proceedings in India, including as to whether the Applicants are

precluded from presenting various documents as documents which appear to be an agreement to arbitrate by reason of the findings made?

101 India relies on expert evidence of Mr Sudipto Sarkar SA to the effect that the "investments" which the Applicants claim to have made within the meaning of the BIT (upon which their status as "investor" within the meaning of the BIT depends) cannot be said to be, under Indian law, investments made in accordance with Indian law and regulations, or ones "established or acquired under the relevant laws and regulations" of India. That is said to follow from findings of the Supreme Court of India in proceedings for the winding up of Devas India, which are said to be proceedings *in rem* and which give rise to a *res judicata* binding on all the world. The key findings in the winding up proceedings were that the management and affairs of Devas India, the local company in which the Original Applicants claimed to have invested, were found by the Supreme Court to be tainted by fraud, and the Devas/Antrix Agreement was also found to be vitiated by fraud and consequently null and *void ab initio*. India submits that those findings undermine the Applicants' contention as to the existence of an agreement to arbitrate, and further submit that India never agreed to waive immunity at the recognition and enforcement stage, where the underlying investment involved wholesale fraud, particularly fraud found *in rem* by the highest Court of India. Those contentions, as a matter of Indian law, were disputed by Mr Nakul Dewan SA, who was called by the Applicants.

102 In my view, it is not necessary on this application to consider the rival merits of those sets of contentions and the expert evidence adduced in relation to them. As I have said, Art IV requires only that, at this stage, the Applicants tender a document or documents which, on their face, appear to constitute an agreement to arbitrate, together with the award itself. Any question as to the validity or applicability of that apparent agreement to arbitrate is a matter to be dealt with subsequently pursuant to Art V. Accordingly, these questions of Indian law do not arise on the present application. As it appears to me likely that the questions relating to Indian law will arise at a subsequent stage in these proceedings, it seems to me that the preferable course is that I should not express any views in relation to those questions at this stage. I also bear in mind that the evidence on these issues, when they do subsequently arise for determination, may not be the same as the evidence which has been adduced before me.

Conclusion on Issue 2

103 In my view, none of the sub-issues to Issue 2 detract from what I have found to be the clear and unmistakable submission by agreement within the meaning of s 10(2) of the FSI Act on the part of India to the recognition and enforcement by this Court of the Quantum Award.

Accordingly, India is not immune from the jurisdiction of this Court in these proceedings, and its interlocutory application should be dismissed with costs. Although it is not strictly necessary to do so, I will now deal with the Applicants' argument pursuant to s 11 of the FSI Act.

Can the commercial transaction exception in s 11 supply a freestanding exception to immunity in relation to proceedings to recognise and enforce a foreign arbitral award?

104 The Applicants submit that s 11 of the FSI Act operates independently of the other exceptions contained in Pt II of the FSI Act. The Applicants submit that it is well established that the exceptions in ss 10-22 of the FSI Act are to be read disjunctively, and may overlap where the same facts engage more than one exception, citing *Firebird* at [59]-[64] (French CJ and Kiefel J, with whom Gageler J relevantly agreed at [131]). That proposition is also reflected in the ALRC Report at [88], as was pointed out in *PT Garuda Indonesia Limited v Australian Competition and Consumer Commission* [2011] FCAFC 52; (2011) 192 FCR 393 at [213] (Rares J, with whom Lander and Greenwood JJ agreed).

105 India submits that s 11 does not have any application to proceedings to recognise or enforce a foreign arbitral award independently of whether the requirements of s 17 are satisfied, and s 11 does not supply an alternative route to cut down foreign State immunity. India submits that *Firebird* did not involve proceedings to recognise or enforce a foreign arbitral award, but involved proceedings to register a foreign judgment which is a circumstance in respect of which the FSI Act makes no specific provision.

106 While India is correct in submitting that the facts in *Firebird* did not concern the recognition and enforcement of an arbitral award, the reasoning of French CJ and Kiefel J (with whom Gageler J relevantly agreed) dealt specifically with s 17(2). The point was made by French CJ and Kiefel J at [62] that the exceptions to foreign State immunity provided by the FSI Act may overlap with each other, including s 17(2), and where one exception applies, the immunity will be lost. At [64], French CJ and Kiefel J explained that so far as concerns s 17(2), the potential overlap is brought about by particular provision being made for an exception to immunity with respect to arbitral proceedings based upon an agreement to arbitrate, while the other exception provisions relate to proceedings concerning particular subject matters. Further, at [64], French CJ and Kiefel J said that the explanation of the Australian Law Reform Commission for what became s 17(2) does not require that other exceptions be read down in order to ensure that s 17(2) has a wider operation.

107 In light of those passages, I agree with the Applicants' submission that s 11 can operate independently of s 17, and it is not necessary that the elements of s 17(2) be established in order for s 11 to apply in the context of proceedings for the recognition and enforcement of an arbitral award against a foreign State. That then raises the question whether the elements of s 11 are established in the present case, which comprises the two issues dealt with below.

What is the construction and application of s 11(1) ("concerns a commercial transaction"), including having regard to the findings of fact and law made in the winding up proceedings?

108 As I have indicated above, the Applicants' argument on s 11 is based solely on the Annulment as "a like activity in which the State has engaged" within the meaning of s 11(3). The Applicants expressly disavow any contention that the BIT or the Devas/Antrix Agreement falls within the definition of "commercial transaction" in s 11(3), the former not being commercial and the latter not being a transaction to which India itself was a party. The question thus arises whether the present proceeding "concerns" the Annulment. By contrast, India submits that the question requires identification of the source of rights in dispute in the underlying proceedings, and submits that in the underlying arbitral proceedings in this case, the alleged source of rights was the promises contained in the BIT, together with an allegedly qualifying "investment" within the meaning of the BIT.

109 In *Firebird*, the High Court considered the application of s 11 in circumstances where the appellant company obtained judgment in the Tokyo District Court against the Republic of Nauru as guarantor for bonds held by the company. Nauru sought to rely on foreign State immunity in the registration proceedings, and argued in relation to the exception in s 11 that the relevant proceeding was the proceeding for the registration of a foreign judgment, and that the proceeding was thus concerned with the foreign judgment which was not a commercial transaction, so the Court was not required to inquire into the underlying transaction (258 CLR 31 at 36). The appellant company argued that a proceeding for registration of a foreign judgment arises out of, and therefore concerns, an underlying transaction, and the question was whether the underlying transaction was commercial, and further argued that there was no reason why a proceeding for registration of a foreign judgment cannot concern both the issue of registration and the underlying transaction (258 CLR 31 at 34). French CJ and Kiefel J at [70] held, that in the context of proceedings for registration of a foreign judgment to which s 9 of the FSI Act applies, the language of s 11(1) should be read as "referring to the commercial transaction on which that foreign judgment is based". Their Honours had earlier stated that it

had "never been disputed that the foreign judgment in this case was based upon a commercial transaction, namely the guarantee of the bonds", and said that such a transaction was clearly one which fell within the definition of "commercial transaction" in s 11(3): [58]. There was therefore no issue in *Firebird* as to whether the underlying transaction should be characterised as the guarantee itself, or the breach of the guarantee constituted by Nauru's refusal to meet its obligations as guarantor. Consequently, in my view, the judgments in that case cannot be read as if they were dealing with any such issue. Gageler J relevantly agreed with the reasons of French CJ and Kiefel J in relation to immunity from jurisdiction (at [131]), and said at [135] that "concerns" in s 11(1) should be construed as requiring the Court "to look to the source of rights in issue in the proceeding; thereby excepting from the general immunity that is conferred by s 9 an application for registration of a foreign judgment where the rights determined by that foreign judgment arose out of a commercial transaction". Nettle and Gordon JJ at [187] said that according to the plain and ordinary meaning of the words used in s 11(1), a proceeding for the registration of a foreign judgment for a money sum owed under a commercial transaction is a proceeding which "concerns" a commercial transaction. Their Honours said that the fact that such a proceeding might also be described as one which concerns the registration of a foreign judgment does not detract from the propriety of describing it as a proceeding which concerns a commercial transaction, and there was nothing in the term "concerns" that suggests that a proceeding which concerns a commercial character must be one that bears only that single character: [187].

110 In *PT Garuda Indonesia Limited v Australian Competition and Consumer Commission* [2012] HCA 33; (2012) 247 CLR 240, the High Court considered a claim for foreign State immunity by an airline corporation, which was almost wholly owned by the Republic of Indonesia, in circumstances where it was sued by the Australian Competition and Consumer Commission (**ACCC**) in this Court in relation to alleged anti-competitive activities in which it engaged with other airlines which were implemented by way of the prices the airline corporation charged its customers in contravention of Pt IV of the *Trade Practices Act 1974* (Cth). The airline corporation contended in the High Court that s 11 did not apply to the proceeding because the proceeding did not seek to vindicate a private law right. The plurality (comprising French CJ, Gummow, Hayne and Crennan JJ) held that the definition of "commercial transaction" does not require that the activity be of a nature which the common law of Australia would characterise as contractual, and held that the arrangements and understandings into which the ACCC alleged the airline corporation entered were dealings of a commercial, trading and

business character, respecting the conduct of commercial airline freight services to Australia: [42]. Accordingly, the definition of a "commercial transaction" was satisfied: [42]. The plurality then said that the proceeding in this Court "concerned" a commercial transaction within the meaning of s 11(1) in an immediate sense, which was apparent from the relief sought: [43]. The ACCC sought declarations that the arrangements and understandings contravened Australian law, pecuniary penalties, and injunctive relief against the giving of effect to the arrangements and understandings: [43] (and see [25]).

111 In the present case, the conduct of India which was the subject matter of the dispute in the arbitration which produced the Quantum Award was the alleged breach by India of its obligations under the BIT, giving rise to a claim for monetary compensation for those alleged breaches. The rights in issue in the arbitration were not merely the rights as expressed in the BIT, but also the alleged right of the Claimants to compensation for the alleged breaches. To adopt the word used by French CJ and Kiefel J in *Firebird* at [70], the Quantum Award was "based" on both the BIT and the Annulment, being the agreement and the breach of the agreement which gave rise to the right to compensation. To adopt Gageler J's expression at [135] of looking to "the source of rights in issue in the proceeding", the source of the right to compensation was both the Annulment and the BIT, in that the BIT alone did not give rise to a right to compensation without there also being a breach of the BIT constituted by the Annulment. In my view, it is wrong to regard the BIT alone as the source of rights in the present proceeding. The point may be illustrated by the reasoning of the High Court in *Garuda*. If the source of rights was limited to the primary obligations in the proceeding (as distinct from the conduct which gave rise to the claims for contravention and relief), then the source of rights in that case would have been the *Trade Practices Act 1974* (Cth). That public interest statute could not properly have been characterised as a "commercial transaction", and certainly not one which the foreign airline corporation had entered into. Rather, the source of rights was the alleged conduct of the airline in contravention of that statute, that being the conduct which gave rise to the right to the relief sought.

112 As Nettle and Gordon JJ said in *Firebird*, the term "concerns" does not require that the proceeding must be one that bears only the single character of a "commercial transaction". Accordingly, in my view, it is irrelevant that the BIT itself is not a "commercial transaction". The proceeding also concerned the Annulment, and that is sufficient to satisfy s 11(1), provided that the Annulment falls within the definition of "commercial transaction" in s 11(3), to which I turn next.

113 For the reasons given above, I do not regard the findings of fact and law made in the proceedings for the winding up of Devas India in India as being relevant at this stage of the proceedings.

What is the construction and application of s 11(3) ("commercial transaction") to the impugned conduct of India, being a decision of its highest executive organ, including having regard to the findings of fact and law made in the winding up proceedings?

114 As I have indicated above, the Applicants rely solely on the Annulment as "a like activity in which the State has engaged" within the meaning of s 11(3). The expression "like activity" refers back to the concept of "a commercial, trading, business, professional or industrial or like transaction". The question therefore is whether the Annulment had that character.

115 The Applicants rely on the following four documents, each of which was admitted subject to an agreed limitation pursuant to s 136 of the *Evidence Act 1995* (Cth) that each of the documents is admitted only as evidence that the document was in those terms and formed part of the arbitration record but not as proof of the truth of any statement within the document. The first document was a Note for the CCS by the Department of Space dated 16 February 2011 seeking the approval of the CCS for annulling the Devas/Antrix Agreement "in view of priority to be given to nation's strategic requirements including societal ones" (para 1). The Note contained the following passage at para 45.1:

> Taking note of the fact that government policies with regard to allocation of spectrum have undergone a change in the last few years and there has been a [sic] increased demand for allocation of spectrum for national needs, including for the needs of defence, para-military forces, railways and other public utility services as well as for societal needs, and having regard to the needs of the country's strategic requirements, the Government will not be able to provide orbit slot in S Band to Antrix for commercial activities including for those which are the subject matter of existing contractual obligations for S Band.

The second document is a press release dated 17 February 2011 issued by the Press Information Bureau of the Cabinet to the effect that the CCS had decided to annul the Devas/Antrix Agreement, and quoting a statement by the Law Minister on the decision taken by the CCS which had met in New Delhi that day, the statement being in the same terms as para 45.1 of the Note for the CCS. The third document is a letter by the Department of Space to Antrix dated 23 February 2011, the first paragraph of which is as follows:

> I am directed to convey that, on account of increased demand for allocation of spectrum for national needs, such as Defence, para-military forces, Railways and the country's strategic requirements, the Government will be unable to provide orbit slot in S-Band to Antrix for commercial activities including those which are the subject matter of existing agreements. Consequently, Antrix would be unable to lease any transponders

in the S-Band.

The letter then said that in light of the above, the Devas/Antrix Agreement "shall be annulled forthwith". The fourth document was a letter by Antrix to Devas dated 25 February 2011 saying as follows in the second paragraph:

> The Central Government has communicated that it has taken a policy decision not to provide orbital slot in S-Band to our Company for commercial activities including those which are the subject matter of the existing agreements.

116 The Applicants also rely upon the terms of the Merits Award and the Quantum Award. In particular, the Applicants rely on the decisions set out at [501] of the Merits Awards relevantly as follows:

> For the reasons set out above, the Tribunal decides and awards as follows:
>
> …
>
> (d) By majority, that the Respondent has expropriated the Claimants' investment insofar as the Respondent's decision to annul the Devas Agreement was in part motivated by considerations other than the protection of the Respondent's essential security interests;
>
> (e) By majority, that the protection of essential security interests accounts for 60% of the Respondent's decision to annul the Devas Agreement, and that the compensation owed by the Respondent to the Claimants for the expropriation of their investment shall therefore be limited to 40% of the value of that investment …

The Applicants also rely on the Quantum Award in which the Tribunal decided, by majority, at [663](b) that:

> Each Claimant is entitled to compensation pursuant to the Award on Jurisdiction and Merits dated July 25, 2016 in an amount corresponding to 40% of USD 740 million, multiplied by the percentage of its shareholding.

117 India relies on an expert opinion of Mr Sudipto Sarkar SA concerning the nature and status of the CCS, which was not challenged in cross-examination or by any competing report. Mr Sarkar refers to the Constitution of India vesting the executive power of the Union in the President of India, although the President is essentially a formal or constitutional head and the real executive power is exercised by the Council of Ministers headed by the Prime Minister. The President is mandated to act in accordance with the aid and advice of the Council of Ministers. The Council of Ministers is a large body comprising a number of ministers of various ranks, within which there is a smaller body known as the Union Cabinet (the **Cabinet**). The Cabinet is the effective policy-making organ within the Council of Ministers and is the driving and steering body responsible for the governance of the country. The Cabinet is divided into

various Standing Committees of the Cabinet, which take the final decision in respect of matters which are assigned to them respectively. Only Cabinet Ministers (as specified by the Prime Minister) are members of any Standing Committee. One of those Standing Committees is the CCS. The CCS is the final authority in Government in respect of a number of matters, including all defence related issues. India submits, and I accept, that Cabinet decision-making is classically the highest form of executive policy-making, and is an act of State with no comparison with the activities of commercial parties or the entry into, or performance of, commercial transactions. Accordingly, as India submits, a decision of the CCS is a decision of India exercising its highest governmental functions.

118 Mr Walker SC placed substantial reliance on the apportionment in the Merits Award and the Quantum Award to the effect that the protection of essential security interests accounted for 60% of India's decision for the Annulment, and thus the compensation owed by India to the Claimants for the expropriation of their investment was limited to 40% of the value of that investment. Mr Walker submitted that the 40% bears a commercial character, and it is that amount which is the subject of the Quantum Award which the Applicants seek to have recognised and enforced in these proceedings (T237-9). In my view, that submission faces insuperable obstacles. First, it is contrary to the agreed limitation pursuant to s 136 of the *Evidence Act 1995* (Cth) in relation to the tender of the Merits Award and the Quantum Award, being that each document may be used as proof that the Tribunal made the award (with all of its content) but not as proof of: (i) any of the underlying matters in dispute; or (ii) the existence of any fact or conclusion of law that was in issue in the arbitration. The issue of the apportionment (if any) was a disputed issue in the arbitration. Second, even if that agreed limitation had not been made, the submission proceeds on a misunderstanding of the Tribunal's reasoning. The apportionment arose out of Art 11(3) of the BIT, which stipulated relevantly that the provisions of the BIT shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its "essential security interests". That is why [501](d) and (e) were expressed in terms of the protection of India's "essential security interests". That does not mean that the balance of 40% was attributable to commercial activities or motivations. The Tribunal's reasoning at [373] of the Merits Award attributed the balance of 40% to "other public interest purposes", being the matters referred to in the documents above, namely "railways and other public utility services as well as societal needs, and having regard to the needs of the country's strategic requirements": see [354]-[373] of the Merits Award. By characterising those matters

as "other public interest purposes", the Tribunal cannot be taken as having characterised them as commercial activities. Finally, even if one takes Mr Walker's submission at its highest, the commercial character of the Annulment would only have been quantified as 40% of the reasons and motivation for the Annulment, which would not be sufficient to persuade me that the Annulment as a whole bears a commercial character.

119 Mr Walker SC also submits that the Annulment should be regarded as a "like activity" to a commercial transaction because it operated with respect to a commercial transaction, namely the Devas/Antrix Agreement. Mr Walker submitted that the entering and repudiating of that agreement were "on the same plane" and "with the same measurable effect", being the grant of rights and the acceptance of obligations, and the abolition of the same rights and obligations. Mr Walker submitted that, as an activity, the epithet "like" can be satisfied by opposites (T239.31-41). I do not accept that submission. In the first place, India could not have repudiated the Devas/Antrix as it was not a party to it. Further, in my view, the repudiation of a commercial agreement by a State is not necessarily a commercial activity, and may well be made as an act of State for reasons which are not at all commercially based. I do not regard the reasons of Almond J in *Lighthouse Corporation Ltd v Republica Democratica de Timor Leste* [2019] VSC 278; (2019) 59 VR 492 at [57]-[58] as inconsistent with that proposition, as Almond J based the finding as to the application of s 11 on the proposition that the dispute was (apparently meaning "concerned") in substance a commercial transaction "essentially of a private law character" (noting that there was no challenge to that finding on appeal: *Republica Democratica de Timor Leste v Lighthouse Corporation Ltd* [2019] VSCA 290 at [4]). The argument was put differently in the Applicants' initial written submissions, to the effect that the Annulment "formed part of" the commercial activity of India in seeking the commercialisation of its satellite spectrum: at [189], [191] and [196] of those written submissions. However, as India submits, reading the words "formed part of" a commercial transaction or like activity into s 11(3) would substantially expand the scope of acts which might meet the definition of "commercial transaction". There is no textual or contextual warrant for reading those words into s 11(3).

120 In the present case, the Annulment was made by the body vested with the highest form of executive policy-making in India, and was stated to be for reasons of public policy. Such an act of State cannot be characterised as a "like activity" to "a commercial, trading, business, professional or industrial or like transaction" within the meaning of s 11(3). It certainly bears no resemblance to any of the non-exhaustive list of commercial transactions in s 11(3). There

is no evidence that the Annulment satisfied the definition of "commercial transaction" in s 11(3), let alone sufficient evidence for the Applicants to have discharged their onus of proof.

121 Accordingly, in my view the Applicants have failed to make good their submission based on s 11 of the FSI Act. For the reasons already given, it is not necessary for me to consider the findings of fact and law made in the proceedings for the winding up of Devas India in India.

Conclusion

122 Accordingly, the interlocutory application of India should be dismissed with costs. I will stand the proceedings over to 10 November 2023 for a case management hearing to deal with the preparation of the matter for final hearing. I have selected that date having regard to the time for the filing of an application for leave to appeal pursuant to r 35.13 of the Rules.

I certify that the preceding one hundred and twenty-two (122) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jackman.

Associate:

Dated: 24 October 2023

Appendix

Application of New York Convention to investor-State arbitral awards.

(Asterisks denote application of the New York Convention to investor-State arbitral awards in relation to bilateral investment treaties)

Jurisdiction	Case citation	Summary
*Germany	*Investor v Republic of Poland* (Bundesgerichtshof (Supreme Court), 17 August 2000). See summary and translation of selected extracts of the judgment in: (2001) XXVI *YBCA* 771.	A German investor commenced arbitration proceedings against the Republic of Poland, relying on the Germany-Poland BIT. An arbitral award was rendered in Zurich, and the investor sought enforcement of the award in Germany. On 8 July 1999, the Court of Appeal in Frankfurt enforced the award. Poland appealed to the Supreme Court, alleging that the investor had failed to comply with the requirements in Art IV(1)(a) of the 1958 New York Convention. Poland relied on the 1958 New York Convention, thereby accepting that it applied to the enforcement of this investor-State award. The Supreme Court of Germany applied the 1958 New York Convention and affirmed the lower court's decision enforcing the award.
*Germany	*Debtor (Russian Federation) v Franz Sedelmayer*, Case No 26 W 101/02 (Oberlandesgericht (Court of Appeal), Frankfurt am Main, 26 September 2002). See summary and translation of selected extracts of the judgment in: (2005) XXX *YBCA* 505.	A Stockholm arbitral panel rendered an investor-State award against the Russian Federation, in favour of Sedelmayer. Russia sought annulment of the award in Sweden; on 26 October 1998, the Stockholm city court granted a temporary stay of execution of the award. Sedelmayer sought enforcement of the award in Germany. On 16 February 2001, the Court of Appeal in Berlin granted enforcement. On 22 January 2002, the Court of First Instance in Frankfurt granted attachment of certain sums held in bank accounts of the Embassy of the Russian Federation in Germany; on 19 March 2002, it denied Russia's opposition to

		attachment. Russia appealed from this decision. The Frankfurt Court of Appeal dismissed the appeal, holding that Russia was estopped from raising the objection that the award was not final and binding in the execution proceedings, because it had not raised that objection in the enforcement proceedings in Berlin. Further, execution in Germany can only be based on an executory title – here, the Berlin enforcement decision – rather than on the claim granted in the underlying arbitration. The Berlin decision was final and binding as Russia had failed to attack it properly through recourse to the Federal Supreme Court. The Court also dismissed Russia's objection that execution would violate its sovereign immunity, since Russia failed to prove that the commercial accounts were earmarked for sovereign aims. The Frankfurt Court of Appeal noted that the Germany-USSR BIT "*refers for enforcement to the [1958 New York Convention]*". The Court did not question the applicability of the 1958 New York Convention to the award.
*Germany	*Werner Schneider as liquidator of Walter Bau A.G. v The Kingdom of Thailand*, Case No 20 Sch 10/11 (Court of Appeal, Berlin, 4 June 2012) and Case No III ZB 40/12 (Federal Supreme Court, 30 January 2013). See summary and translation of selected extracts of both judgments in: (2013) XXXVIII *YBCA* 384. *Liquidator of Walter-Bau AG v Kingdom of Thailand*, Case No I ZB 13/15 (Bundesgerichtshof, 6 October 2016). See summary and translation of selected extracts of the judgment in: (2018) XLIII *YBCA* 445.	An investor-State award rendered in Switzerland in arbitration under the 2002 Germany-Thailand BIT was declared enforceable. The claimant sought a declaration of enforceability of the investor-State award in Germany. By the first reported decision, rendered on 4 June 2012, the Berlin Court of Appeal granted the claimant's request for a declaration of enforceability of the BIT award, finding that Thailand had waived its sovereign immunity from enforcement and that a declaration of enforceability would not violate public policy. The Berlin Court of Appeal applied the 1958 New York Convention to the award.

		By the second reported decision, rendered on 30 January 2013, the Federal Supreme Court reversed and remanded the case to the Court of Appeal. The Supreme Court also applied the 1958 New York Convention to the award. The Court of Appeal granted the declaration of enforceability again on 23 February 2015; Thailand again appealed, and the Federal Supreme Court denied the appeal, holding that the investor-State award could be recognised under Art III of the 1958 New York Convention. None of the grounds in Art V of the 1958 New York Convention was made out.
*Germany	*Republic of Bulgaria v ST-AD GmbH*, Case No 1 Sch 7/13 (Oberlandesgericht, Thuringia, 20 November 2013). See summary and translation of selected extracts of the judgment in: (2015) XL *YBCA* 422.	ST-AD commenced an investor-State arbitration against the Republic of Bulgaria under the 1986 Bulgaria-Germany BIT in respect of an alleged expropriation. The arbitral tribunal found in Bulgaria's favour (on jurisdiction) and directed ST-AD to pay the costs of the arbitration and Bulgaria's legal costs. Bulgaria sought a declaration of enforceability of the award in its favour under the 1958 New York Convention. By the present decision, the Court of Appeal of Thuringia granted recognition of the PCA award on costs in Bulgaria's favour. The Court applied the 1958 New York Convention, finding that Bulgaria had satisfied the requirements of Art IV, and rejecting various potential grounds for refusal of recognition and enforcement under Art V.
Italy	*The Republic of Kazakhstan v Anatolie Stati et al*, Decision No 1490/2019 (Corte d'Appello, Rome, 27 February 2019). See summary and translation of selected extracts of the judgment in: (2019) XLIV *YBCA* 562.	The Stati parties were successful in an investor-State arbitration against the Republic of Kazakhstan pursuant to the dispute settlement provision of the Energy Charter Treaty (ECT). By an Award of 19 December 2013 (and an Addendum of 17 January 2014 – collectively, the Award), an SCC

		arbitral tribunal found that Kazakhstan had breached its obligation to provide fair and equitable treatment under the ECT, and it awarded the Stati parties US$497,685,101 for the expropriation of their assets in Kazakhstan. Kazakhstan sought the annulment of the Award in Sweden before the Svea Court of Appeal, while the Stati parties sought its enforcement in, *inter alia*, the UK, the US, and Italy. In Italy, on 29-30 January 2018, the Rome Court of Appeal issued a decree granting the *ex parte* application of the Stati parties for recognition and enforcement of the Award. On 14 May 2018, Kazakhstan notified its opposition to the decree. The Rome Court of Appeal denied Kazakhstan's opposition, finding that it was admissible but unfounded. Kazakhstan relied on three grounds for opposition of recognition and enforcement under the 1958 New York Convention, and the Rome Court of Appeal considered and rejected each ground.
*Lithuania	*L.B. v State Property Fund of the Republic of Lithuania*, Civil Case No 3K-3-363/2014 (Supreme Court of Lithuania, 27 June 2014). See summary and translation of selected extracts of the judgment in: (2014) XXXIX *YBCA* 437.	L.B. had commenced arbitration against the Republic of Lithuania, alleging that Lithuania violated its obligations under the 1994 Italy-Lithuania BIT and seeking damages, interest and costs. An *ad hoc* tribunal was instituted at the Permanent Court of Arbitration pursuant to the BIT and under the 1976 UNCITRAL Arbitration Rules. By an award of 17 May 2013, the arbitral tribunal found in L.B.'s favour. L.B. sought recognition and enforcement of the award in Lithuania. The Supreme Court confirmed that the award was governed by the 1958 New York Convention, and granted recognition.
*Luxembourg	*Bolivarian Republic of Venezuela v Company 1 INC.* (Cour d'Appel, Luxembourg, 25 June 2015).	Gold Reserve Inc. claimed that Venezuela's rescission of concessions and permits and seizure of assets of Gold Reserve for alleged breaches of

	See summary and translation of selected extracts of the judgment in: (2017) XLII *YBCA* 425.	mining and environmental obligations were a failure to accord equitable treatment and amounted to an unlawful expropriation in violation of the Canada-Venezuela BIT. It filed for arbitration pursuant to the ICSID Additional Facility Rules, seeking compensation for itself and its Venezuelan subsidiary Gold Reserve de Venezuela. The arbitration was seated in Paris and governed by French law. By an award of 22 September 2014, the arbitral tribunal found Venezuela in breach of the BIT for failure to accord fair and equitable treatment to Gold Reserve's investment, and awarded Gold Reserve in compensation, plus pre- and post-award interest and legal costs. A rectification award was issued on 15 December 2014. Venezuela petitioned the Paris Court of Appeal to set aside the award; Gold Reserve requested the Court to confirm it. On 29 January 2015, the Paris Court granted *exequatur* and denied Venezuela's request to suspend enforcement pending an appeal from the *exequatur* order. In the meantime, Gold Reserve sought confirmation of the award in the US. On 20 November 2015, the US District Court for the District of Columbia confirmed the award and, on a balance of relevant factors, declined to stay enforcement pending a final decision in the French annulment action. Gold Reserve also sought enforcement of the award in Luxembourg. On 28 October 2014, the Luxembourg District Court declared the award enforceable. Venezuela appealed. The Luxembourg Court of Appeal stayed the enforcement decision and denied Gold Reserve's request for security. Venezuela relied on Art VI of the 1958 New York Convention, thereby accepting that the Convention applied to the award.

		The Court of Appeal first held that since the investor-State award was rendered in France, where the 1958 New York Convention is in force, and its enforcement was sought in Luxembourg, also a Convention country, its *exequatur* was governed solely by the Convention and the enforcement provisions of Luxembourg law did not apply. The Court of Appeal concluded that under Arts V and VI of the 1958 New York Convention, pending annulment proceedings may justify a stay. The Court of Appeal considered that a decision of the Paris court was expected within a few months and decided to stay a decision on the appeal from the *exequatur* order and to await the outcome of the set aside action.
Netherlands	*Ascom Group SA et al v Republic of Kazakhstan*, Case No 200.224.067/01 (Gerechtshof, Amsterdam, 6 November 2018). See summary and translation of selected extracts of the judgment in: (2019) XLIV *YBCA* 614.	On 26 July 2010, Anatolie and Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd (collectively, the Stati parties) filed a Request for Arbitration with the Arbitration Institution of the Stockholm Chamber of Commerce (SCC), as provided in the dispute settlement provision of the Energy Charter Treaty (ECT), to which Kazakhstan was a party. They alleged that Kazakhstan's actions were intended to intimidate and harass them into selling their investments to a state-owned company, KazMunaiGas (KMG), at a substantial discount. By an Award of 19 December 2013 (and an Addendum of 17 January 2014 – collectively, the Award), an SCC arbitral tribunal found that Kazakhstan breached its obligation to provide fair and equitable treatment under the Energy Charter Treaty, and it awarded the Stati parties compensation for the expropriation of their assets in Kazakhstan. Kazakhstan sought the annulment of the Award in Sweden before the Svea Court of Appeal, while the Stati parties

		sought its enforcement in, *inter alia*, Italy, the Netherlands, the UK and the US. In the Netherlands, on 26 September 2017 the Stati parties sought recognition and leave for enforcement of the SCC Award against Kazakhstan, including the National Fund of Kazakhstan, and Kazakhstan's National Welfare Fund Samruk-Kazyna JSC (Samruk) in the Court of Appeal of Amsterdam. The Court of Appeal held that it was the competent court to hear the *exequatur* request; held that it could not grant the request of the Stati parties in respect of Samruk and the National Fund on grounds of due process and public policy; and granted a stay of the proceedings in respect of Kazakhstan. Kazakhstan and Samruk relied on various grounds under the 1958 New York Convention to object to the grant of leave for enforcement, thereby accepting that the Convention applied to the award. The Court applied the 1958 New York Convention in its decision.
*Russian Federation	*Public Joint Stock Company Tatneft v Ukraine* (Arbitrazh Court, City of Moscow, 4 July 2017) and Case No A40-67511/17-29-659 (Arbitrazh Court, Moscow District, 29 August 2017). See summary and translation of selected extracts of the judgment in: (2018) XLIII *YBCA* 538. *PAO Tatneft v Ukraine*, Case No 308-ES19-17745 (Supreme Court of the Russian Federation, 21 October 2019). Unofficial English translation available from italaw: <https://www.italaw.com/cases/4736>.	Tatneft commenced an arbitration against Ukraine under the 1998 Russia-Ukraine BIT, claiming that it lost its shareholding in a Ukrainian company in which it had invested, as a consequence of Ukraine's breach of its obligations under the BIT. The arbitration was conducted under the auspices of the Permanent Court of Arbitration and in accordance with the 1976 UNCITRAL Arbitration Rules; the seat of the arbitration was Paris. On 29 July 2014, the arbitral tribunal rendered an Award in favour of Tatneft. Tatneft sought recognition and enforcement of the Award in Russia. By the first decision, dated 4 July 2017, the *Arbitrazh* (Commercial) Court of the City of Moscow terminated the

		proceedings brought by Tatneft. The Court granted Ukraine's objections, finding that (i) Ukraine enjoyed sovereign immunity, and (ii) the Court lacked effective jurisdiction as there was no property of Ukraine available for execution in the Court's district. By the second decision, dated 29 August 2017, the *Abitrazh* Court of the Moscow District granted Tatneft's cassation appeal and reversed the decision below, sending the case back to the court of first instance for reconsideration. The appellate Court confirmed that the 1958 New York Convention applied to the award, noting Russia's obligation under Art III to recognise arbitral awards as binding and enforce them in accordance with local rules of procedure, and the applicability of Art V of the Convention. The Court considered that as a party to the 1958 New York Convention, Ukraine could not invoke jurisdictional immunity, because State immunity is not contemplated in the Convention as a ground for refusal of recognition and enforcement of an arbitral award. The Supreme Court of the Russian Federation dismissed a cassation appeal brought by Ukraine from the decision of the *Arbitrazh* Court, Moscow District.
Switzerland	*A Limited v Republic of Uzbekistan*, Case No 5A 942/2017 (Bundesgericht, II. zivilrechtliche Abteilung, 7 September 2018). See summary and translation of selected extracts of judgment in: (2019) XLIV *YBCA* 680.	On 17 December 2015, an arbitral tribunal rendered an award in favour of B, an English company, in an investor-State dispute between B and the Republic of Uzbekistan. The arbitration was held in Paris in accordance with the UNCITRAL Arbitration Rules. B subsequently assigned its rights under the award to A Limited. On 25 August 2016, A Limited filed a request with a single judge of the District Court of March, in Switzerland, to attach a property owned by the Republic of Uzbekistan in

		Switzerland as security for the enforcement of the French award. The single judge granted the request and the property was attached on 29 August 2016. On 30 September 2016, Uzbekistan filed an opposition to the attachment. On 8 February 2017, the opposition was granted and the attachment lifted. A Limited appealed against this decision to the Cantonal Court of Schwyz. On 27 October 2017, the Cantonal Court denied the appeal. On 23 November 2017, A Limited filed an appeal with the Federal Supreme Court. The Federal Supreme Court denied A Limited's appeal, finding that the Swiss courts lacked jurisdiction over the action because there was prima facie no "sufficient internal connection" with Switzerland. In so holding, however, the Court confirmed that the 1958 New York Convention applied to the underlying investor-State award against the Republic of Uzbekistan: "The New York Convention does indeed apply to arbitral awards rendered against a state, a state-controlled enterprise or a state-controlled organization."
Ukraine	*Remington Worldwide Limited v The State of Ukraine*, Case No 2-8-8/12 (District Court of the Pechersk Raion of the City of Kiev, 11 July 2012). See summary and translation of selected extracts of the judgment in: (2013) XXXVIII *YBCA* 471.	On 28 April 2011, an arbitral tribunal of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) rendered an award in favour of Remington Worldwide Ltd and against the State of Ukraine. This was an investor-State award rendered under the Energy Charter Treaty. Remington sought enforcement of the SCC award in Ukraine. The Pechersky District Court of Kiev granted permission for enforcement. The Court noted that the representative of the Ministry of Justice, which represented the State of Ukraine as provided by Ukrainian law, did not oppose the motion.

		The District Court held that all formal and substantive requirements for granting permission for enforcement under the 1958 New York Convention and the Ukrainian Code of Civil Procedure were met. Further, the award was final and binding; there had been no violation of due process and enforcement would not be contrary to public policy; enforcement was sought within the prescribed time limit; and there was no Ukrainian court decision or pending proceeding in Ukraine on the same dispute.
Ukraine	*JKX Oil & Gas PLC et al v State of Ukraine, represented by the Ministry of Justice of Ukraine*, Case No 757/5777/15-4 (Pechersk District Court, Kyiv City, 8 June 2015). See summary and translation of selected extracts of the judgment in: (2015) XL *YBCA* 492. *The Ministry of Justice of Ukraine v JKX Oil & Gas Plc*, Case No 22-u/796/9284/2015 (Court of Appeal of the City of Kiev, 17 September 2015). See summary and translation of selected extracts of the judgment in: (2016) XLI *YBCA* 577. *Ministry of Justice of Ukraine v JKX Oil Plc et al* (Supreme Court, 24 February 2016 and Court of Appeal, Kyiv, 17 May 2016). See summary and translation of selected extracts of the judgment in: (2016) XLI *YBCA* 581.	JKX Oil, Poltava Gas and JV Poltava (collectively, the Applicants) were engaged in the production of natural gas in an investment in Ukraine falling under the Energy Charter Treaty. On 7 January 2015, the Applicants commenced SCC emergency arbitration, claiming that Ukraine had violated its obligations under the ECT. On 14 January 2015, an emergency arbitrator issued an Emergency Award in the Applicants' favour, and the Applicants sought enforcement of the Emergency Award in Ukraine. The Pechersk District Court of Kyiv City granted enforcement of the SCC Emergency Award, denying all of Ukraine's objections. Ukraine relied on grounds for resisting recognition and enforcement of the award under Art V(1)(b) of the 1958 New York Convention, thereby accepting the applicability of the New York Convention to the investor-State award. The Ukrainian court confirmed that the 1958 New York Convention governed the dispute, and it rejected Ukraine's arguments, granting permission to enforce the Emergency Award in Ukraine. The Court of Appeal reversed the decision and denied enforcement of the SCC Emergency Award. The Court held that enforcement should be denied

		on grounds of public policy under both the 1958 New York Convention and the Ukrainian CCP, because enforcement would be contrary to the public policy of Ukraine. The Court of Appeal confirmed that the legal relations in the dispute were governed by the 1958 New York Convention. The High Specialized Court reversed the decision of the Court of Appeal. The High Specialized Court held that recognition and enforcement of the SCC emergency award did not violate fundamental principles of Ukrainian public policy. On 17 May 2016, the Court of Appeal rendered a new decision confirming the recognition and enforcement order of the District Court, on the grounds given by the High Specialized Court.
*United Kingdom	*Republic of Ecuador v Occidental Exploration and Production Company* [2005] EWHC 774 (Comm); [2005] 2 Lloyd's Rep 240. *Republic of Ecuador v Occidental Exploration and Production Co* [2006] 1 QB 432.	An investor-State arbitration occurred pursuant to the USA-Ecuador BIT between Occidental and the Republic of Ecuador. The arbitration was seated in London, and the tribunal rendered an award in Occidental's favour. Ecuador brought proceedings challenging the award in the English courts under s 67(1) of the Arbitration Act 1996 on the ground that the arbitrators had exceeded their jurisdiction. In the course of considering Ecuador's challenge to the award, the High Court observed that it was agreed between the parties that the investor-State award, if not challenged, could be given recognition and could be enforced under the provisions of the 1958 New York Convention. Occidental appealed from the judgment of the High Court. The Court of Appeal dismissed the appeal, and had no doubt that the 1958 New York Convention applied to the investor-State award.
United Kingdom	*Stati v The Republic of Kazakhstan* [2017] EWHC 1348 (Comm); [2017] 2 Lloyd's Rep 201.	The claimants operated a joint venture with the defendant (Kazakhstan). Disputes arose and they were referred to

	Stati v Republic of Kazakhstan (No 2) [2019] 1 WLR 897.	an arbitral tribunal, seated in Stockholm, pursuant to the Energy Charter Treaty. The arbitral tribunal rendered an award in the claimants' favour on 19 December 2013. The claimants sought permission to enforce the award in the English High Court and on 28 February 2014 permission was initially granted, on the claimant's without notice application. On 7 April 2015, Kazakhstan applied to set aside the permission that had been granted to enforce the award in the UK. When the application came before the English High Court, the Court noted at [3]: "*The award is within the New York Convention (the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958).*" In a subsequent related judgment, the Court of Appeal stated (at [4]): "*The award is an 'arbitral award' for the purposes of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (1976) (Cmnd 6419) ('the New York Convention') and steps have been taken by the claimants to enforce the award in numerous jurisdictions including the United States, Belgium, the Netherlands, Luxembourg, Italy and Sweden.*"
*United Kingdom	*PAO Tatneft v Ukraine* [2021] 1 WLR 1123.	Tatneft commenced an arbitration against Ukraine under the 1998 Russia-Ukraine BIT, claiming that it lost its shareholding in a Ukrainian company in which it had invested, as a consequence of Ukraine's breach of its obligations under the BIT. The arbitration was conducted under the auspices of the Permanent Court of Arbitration and in accordance with the 1976 UNCITRAL Arbitration Rules; the seat of the arbitration was Paris. On 29 July 2014, the arbitral tribunal rendered an Award in favour of Tatneft, together with interest. Tatneft sought

		recognition and enforcement of the Award in the UK. By an order made *ex parte* on 9 August 2017, the High Court granted Tatneft permission to enforce the award. By an application dated 31 January 2020, Ukraine applied to set aside the order in part. Previous challenges to the order brought by Ukraine had been rejected by Butcher J (*PAO Tatneft v Ukraine* [2018] 1 WLR 5947) and by Cockerill J (*PAO Tatneft v Ukraine* [2019] EWHC 3740 (Comm)). At no stage was it doubted that the 1958 New York Convention applied to the award, the High Court here referring to the award as "*a New York Convention award*" (see at [1], [7]).
United Kingdom	*Hulley Enterprises Ltd v Russian Federation* [2021] 1 WLR 3429.	The claimants are entities incorporated in Cyprus (the first and third claimants) and the Isle of Man (second claimant). They are former shareholders in OAO Yukos Oil Company (Yukos), which was an oil company based in Russia. By final awards of the PCA dated 18 July 2014 (the Final Awards), the claimants were awarded over US$50bn in compensation, arising out of allegations that Yukos' assets were unlawfully expropriated in Russia. The claimants brought proceedings for the recognition and enforcement of these investor-State awards in the UK, and the High Court confirmed in the opening paragraph of its judgment that these awards were "*subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (1976) (Cmnd 6419) ('the New York Convention')*" (see [1]), and the Court applied the 1958 New York Convention in considering the claimants' application: see e.g. [58]-[59].
*United States	*Chevron Corporation v Republic of Ecuador*, 949 F.Supp.2d 57 (D.D.C. 2013).	Chevron and Texaco (together, 'Chevron') entered into a contract with Ecuador in 1973, permitting Chevron to exploit oil reserves in Ecuador's

	Chevron Corporation v Ecuador, 795 F.3d 200 (D.C. Cir. 2015). *Cert.* denied: *Republic of Ecuador v Chevron Corporation*, 578 U.S. 1023; 136 S.Ct. 2410.	Amazon region. The agreement was amended in 1977 and expired in June 1992. As Chevron began winding up its work in Ecuador in 1991, it filed seven breach-of-contract cases there against the Ecuadorian government, seeking damages for various breaches of the 1973 and 1977 agreements. In 1997, the US-Ecuador BIT entered into force. After more than a decade had elapsed without a determination of its claims pending in the Ecuadorian courts, Chevron filed a Notice of Arbitration in 2006, alleging that Ecuador had breached the BIT by allowing its claims to languish in those courts without a resolution. An investor-State tribunal seated in The Hague issued an Interim Award in December 2008 finding that it had jurisdiction to hear the case, a Partial Award on the Merits in March 2010 in Chevron's favour, and a Final Award in August 2011 concerning damages. Chevron sought an order in the District Court for the District of Columbia confirming the Final Award under the 1958 New York Convention. Ecuador objected, relying first on foreign sovereign immunity under the FSIA 1976. On immunity, Chevron asserted that its petition fell under the arbitration exception in §1605(a)(6) because the Final Award was made pursuant to the BIT and was governed by the 1958 New York Convention. The District Court agreed, holding that the Final Award was "*clearly governed by the New York Convention*". Ecuador relied, secondly, on several grounds for resisting enforcement under the 1958 New York Convention (thereby accepting that the 1958 New York Convention applied to the arbitral award). The District Court considered, and rejected these grounds. On appeal, the D.C. Circuit affirmed the District Court's judgment, confirming and entering judgment on the award.

		The D.C. Circuit (like the District Court) considered that the 1958 New York Convention applied to the award. The D.C. Circuit denied rehearing *en banc*, and the US Supreme Court denied *certiorari*.
*United States	*Republic of Ecuador v Chevron Corporation*, 638 F.3d 384 (2d Cir. 2011).	There has been protracted litigation and arbitration proceedings between Ecuador, and citizens of Peru and Ecuador, on the one hand, and Chevron Corporation and Texaco Petroleum Company (collectively, 'Chevron'), on the other hand. The Republic of Ecuador and a group of Ecuadorian citizens sought relief for environmental devastation allegedly caused by TexPet's oil exploration and drilling operations in the Ecuadorian rainforest. In 2001, the District Court for the Southern District of New York dismissed the plaintiffs' initial action, granting Chevron's *forum non conveniens* motion. The plaintiffs refiled their claims in Lago Agrio, Ecuador. Chevron invoked the arbitration clause in the US-Ecuador BIT and commenced (a second) investor-State arbitration against Ecuador in September 2009, asserting that Ecuador had improperly interfered in the Lago Agrio litigation and requesting, *inter alia*, a declaration that Chevron had no liability for environmental damages arising out of TexPet's drilling operations in Ecuador. The Ecuadorian citizens (who were not parties to the BIT arbitration) responded by commencing proceedings in the District Court for the Southern District of New York seeking a stay of the BIT arbitration; Ecuador also moved for a stay. The District Court assumed, without deciding, that it had the power to stay the BIT arbitration, but declined to exercise that authority in this case. Ecuador and the citizen plaintiffs appealed. The Second Circuit affirmed the District Court's refusal to stay the

		BIT arbitration. In the course of doing so, the Second Circuit noted that all parties (including Ecuador) agreed "*that BIT arbitration falls under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'), which governs agreements that are 'commercial and … not entirely between citizens of the United States*"' .
*United States	*Republic of Argentina v BG Group PLC*, 715 F.Supp.2d 108 (D.D.C. 2010). *Republic of Argentina v BG Group PLC*, 764 F.Supp.2d 21 (D.D.C. 2011). *Republic of Argentina v BG Group PLC*, 665 F.3d 1363 (D.C. Cir. 2012). *BG Group PLC v Republic of Argentina*, 134 S.Ct. 1198; 572 U.S. 25 (2014). *Republic of Argentina v BG Group PLC*, 555 Fed.Appx. 2 (Mem) (D.C. Cir. 2014).	BG Group, a UK company, invested in a gas distribution company in Argentina. When disputes arose, BG initiated an investor-State arbitration against Argentina pursuant to the UK-Argentina BIT. On 24 December 2007, the arbitral tribunal issued an award in favour of BG Group against Argentina. Argentina filed a petition in the D.C. District Court to vacate or modify the award; BG Group filed a cross-motion to recognise and enforce the award under the 1958 New York Convention. In its 2010 judgment denying Argentina's petition to vacate, the District Court noted that whether it had subject-matter jurisdiction over the dispute depended on "*whether the Award is one that is covered under the New York Convention*". It set out Art I(1) of the Convention. The award was made in the District of Columbia, and thus it was only covered by the Convention if it met the description in the second sentence of Art I(1), being "*arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought*". The District Court held that the award fell within the 'non-domestic' provision of Art I(1) of the Convention), and thus that the Convention applied to the award. The Court rejected Argentina's motion to vacate. In a 2011 judgment, the District Court granted BG Group's cross-motion to recognise and enforce the award under the 1958 New York Convention,

		rejecting Argentina's arguments based on Art V of the 1958 New York Convention. Argentina appealed both judgments of the District Court. The D.C. Circuit allowed the appeal, without directly addressing the applicability of the 1958 New York Convention. BG Group appealed to the US Supreme Court, which allowed the appeal and reversed the D.C. Circuit's judgment. The Supreme Court did not discuss the applicability of the 1958 New York Convention, which was not in issue before it. As a result, the D.C. District Court's judgment granting the cross-motion to confirm the award under the 1958 New York Convention was confirmed.
*United States	*The Argentine Republic v National Grid PLC* (unreported, 7 June 2010) (D.D.C. 2010). *Argentine Republic v National Grid PLC*, 637 F.3d 365 (D.C. Cir. 2011). *Cert*. denied: *Argentine Republic v National Grid PLC*, 132 S.Ct. 761; 565 U.S. 1059 (2011).	On 3 November 2008, an investor-State arbitral tribunal, convened pursuant to the UK-Argentina BIT, determined that Argentina had violated the treaty and was liable to National Grid Plc for some $53 million plus costs and interests. The Republic of Argentina filed a petition in the District Court for the District of Columbia seeking to vacate the award against it. In response, National Grid filed a cross-motion to confirm the award under the Federal Arbitration Act and the 1958 New York Convention, arguing *inter alia* that Argentina's petition was time-barred. The District Court dismissed Argentina's petition as time-barred and granted National Grid's cross-motion to confirm the award under the 1958 New York Convention. Argentina appealed to the D.C. Circuit, which affirmed the District Court's judgment, confirming the award under the 1958 New York Convention. The D.C. Circuit denied rehearing *en banc*.

*United States	*Schneider v Kingdom of Thailand* (unreported, 14 March 2011) (S.D.N.Y. 2011). *Schneider v Kingdom of Thailand*, 688 F.3d 68 (2d Cir. 2012).	Petitioner Werner Schneider, acting as insolvency administrator of Walter Bau Ag, petitioned the District Court of the Southern District of New York to confirm an investor-State arbitral award against the Kingdom of Thailand. Walter Bau submitted a Request for Arbitration under the 2002 Germany-Thailand BIT. The arbitral tribunal issued a final award in Walter Bau's favour against the Kingdom of Thailand on 1 July 2009. The District Court confirmed that the 1958 New York Convention applied to the recognition and enforcement of the award. The District Court granted Walter Bau's petition to confirm the arbitral award and entered judgment thereon. On appeal, the Second Circuit affirmed the District Court's judgment and confirmed that the 1958 New York Convention applied to the award.
*United States	*Gold Reserve Inc. v Bolivarian Republic of Venezuela*, 146 F.Supp.3d 11 (D.D.C. 2015).	An investor-State tribunal awarded over $700 million in damages to Gold Reserve, in an arbitral award rendered on 22 September 2014 against Venezuela under the 1998 Canada-Venezuela BIT. Gold Reserve petitioned the District Court for the District of Columbia to enforce the award under the 1958 New York Convention. The D.C. District Court confirmed that the 1958 New York Convention applied to the award. Venezuela raised various grounds for refusing recognition and enforcement, relying on Art V of the 1958 New York Convention (and thereby accepting that the Convention applied). The District Court rejected these challenges and granted the petition to confirm the award.
United States	*Stati v Republic of Kazakhstan*, 199 F.Supp.3d 179 (D.D.C. 2016).	Investors Anatolie Stati, Gabriel Stati, Ascom Group SA, and Terra Raf Traiding Ltd, filed a petition in the District Court for the District of Columbia to confirm an investor-State

	Anatolie Stati v Republic of Kazakhstan, 302 F.Supp.3d 187 (D.D.C. 2018). *Stati v Republic of Kazakhstan*, 773 Fed.Appx. 627 (D.C. Cir. 2019). *Cert.* denied: *Republic of Kazakhstan v Stati*, 140 S.Ct. 381 (2019).	arbitral award rendered against Kazakhstan on 19 December 2013, pursuant to the Energy Charter Treaty. The investors sought to confirm the award under the Federal Arbitration Act and the 1958 New York Convention. The D.C. District Court found that the 1958 New York Convention applied to the investor-State award and provided a basis to enforce the award. The District Court decided to stay the proceedings in light of pending set-aside proceeding in Sweden, in accordance with Art VI of the 1958 New York Convention. On 9 December 2016, the Svea Court of Appeal rejected Kazakhstan's set-aside petition, and on 24 October 2017, the Swedish Supreme Court ruled in favour of the Stati parties. The D.C. District Court granted the investors' motion to lift the stay on 6 November 2017. The District Court then granted the investors' petition to confirm the award, finding that none of the 1958 New York Convention grounds for refusal or deferral of recognition and enforcement of the award applied. The D.C. Circuit affirmed the District Court's grant of the investors' petition to confirm the arbitral award and confirmed that the 1958 New York Convention applied to the award. The D.C. Circuit denied rehearing *en banc*, and the U.S. Supreme Court denied *certiorari*.
*United States	*Sistem Muhendislik Insaat Sanayi Ve Ticaret, A.S. v Kyrgyz Republic* (unreported, 30 September 2016) (S.D.N.Y. 2016). *Sistem Mühendislik Inşaat Sanayi Ve Ticaret, A.Ş. v Kyrgyz Republic*, 741 Fed.Appx. 832 (2d Cir. 2018).	Sistem, a Turkish entity, filed a petition in the District Court for the Southern District of New York seeking to confirm an arbitral award against the Kyrgyz Republic. Sistem filed a Request for Arbitration against the Kyrgyz Republic pursuant to the arbitration clause in the 1992 Turkey-Kyrgyzstan BIT and, on 9 September 2009, the investor-State arbitral tribunal found in Sistem's favour. The District Court for the Southern District of New York

		confirmed that the 1958 New York Convention and the Federal Arbitration Act applied to the award, and granted confirmation of the award. On appeal, the Second Circuit affirmed the District Court's judgment.
*United States	*Crystallex International Corporation v Bolivarian Republic of Venezuela*, 244 F.Supp.3d 100 (D.D.C. 2017). *Crystallex International Corporation v Bolivarian Republic of Venezuela*, 760 Fed.Appx. 1 (D.C. Cir. 2019).	Crystallex, a Canadian corporation, invested in gold deposits in Venezuela in 2002. When disputes arose, Crystallex pursued arbitration under the Canada-Venezuela BIT against Venezuela. The investor-State tribunal awarded Crystallex over $1.2 billion. Crystallex sought confirmation of the arbitral award in the District Court for the District of Columbia, pursuant to the 1958 New York Convention. The D.C. District Court granted Crystallex's petition to confirm the award. The District Court confirmed that the award was "*governed by the New York Convention*" (at 109) and rejected Venezuela's arguments based on Art V of the Convention. On appeal, the D.C. Circuit affirmed the District Court's judgment.
*United States	*Rusoro Mining Limited v Bolivarian Republic of Venezuela*, 300 F.Supp.3d 137 (D.D.C. 2018).	Rusoro Mining Ltd was a Canadian corporation engaged in the exploration and production of gold. Between 2006 and 2008, Rusoro acquired controlling interests in 24 Venezuelan companies, which held a total of 58 mining concessions and contracts in Venezuela. On 17 July 2012, Rusoro submitted a Request for Arbitration to ICSID, pursuant to the 1996 Canada-Venezuela BIT. The arbitral tribunal rendered an award on 22 August 2016 in Rusoro's favour, against Venezuela. Rusoro sought confirmation of the arbitral award in the District Court for the District of Columbia. The D.C. District Court held that the recognition and enforcement of the award was governed by the 1958 New York Convention. Venezuela resisted enforcement of the award in reliance on

		Art V(1)(c) of the Convention (thereby accepting that the Convention applied to the award). The D.C. District Court granted Rusoro's petition and confirmed the arbitral award.
*United States	*Tatneft v Ukraine*, 301 F.Supp.3d 175 (D.D.C. 2018). *Tatneft v Ukraine*, 771 Fed.Appx. 9 (D.C. Cir. 2019). *Cert.* denied: *Ukraine v PAO Tatneft*, 140 S.Ct. 901 (2020). *PAO Tatneft v Ukraine* (unreported, 24 August 2020) (D.D.C. 2020). *Tatneft v Ukraine*, 21 F.4th 829 (D.C. Cir. 2021).	Tatneft sought recognition and enforcement of a merits award rendered in an investor-State arbitration conducted under the auspices of the PCA, seated in Paris, pursuant to the UNCITRAL Rules and the 1998 Russia-Ukraine BIT. Ukraine argued against the confirmation and enforcement of the Merits Award in reliance on Art V of the 1958 New York Convention (thereby accepting that the Convention applied to the Merits Award). The D.C. District Court noted that there was "*no dispute that the Merits Award is governed by the New York Convention*" (at 187). On appeal, the D.C. Circuit affirmed the District Court's judgment. The U.S. Supreme Court denied *certiorari* on 13 January 2020, and the matter returned to the D.C. District Court. On 24 August 2020, the District Court granted Tatneft's petition to confirm the arbitral award, rejecting Ukraine's various arguments based on Art V of the 1958 New York Convention. The D.C. Circuit subsequently rejected a further appeal, affirming the District Court's judgment granting Tatneft's petition.
United States	*Gretton Ltd v Republic of Uzbekistan* (unreported, 6 February 2019) (D.D.C. 2019).	Gretton Ltd sought to enforce an arbitral award against the Republic of Uzbekistan in the D.C. District Court. The dispute arose between Uzbekistan and a company called Oxus Gold, PLC, over Oxus' investments in two gold-mining operations there. As of February 2019, the underlying investor-State award was still subject to direct-appeal proceedings in France. Gretton – Oxus' litigation funder and assignee of the Award's proceeds – sought enforcement in the US.

		Uzbekistan moved to dismiss the petition, or alternatively to stay the case. In its judgment of 6 February 2019, the D.C. District Court found it appropriate to stay the proceedings pending the decision of the Paris Court of Appeal. In so holding, the District Court confirmed that the 1958 New York Convention applied to the award, relying on Art VI of the Convention to order the stay. There was no dispute between the parties that the 1958 New York Convention applied and permitted a stay of the proceedings.
United States	*LLC Komstroy v Republic of Moldova*, (unreported, 13 November 2018) (D.D.C. 2018). *LLC Komstroy v Republic of Moldova*, (unreported, 23 August 2019) (D.D.C. 2019). *LLC SPC Stileks v Republic of Moldova*, 985 F.3d 871 (D.C. Cir. 2021).	LLC Komstroy filed an action in 2014 in the D.C. District Court to confirm an arbitral award pursuant to the 1958 New York Convention. The arbitral award was issued by an investor-State tribunal in favour of Komstroy and against the Republic of Moldova in Paris on 23 October 2013, pursuant to the Energy Charter Treaty, under the UNCITRAL Rules. On 25 November 2013, Moldova applied to the Paris Court of Appeal to set aside the arbitral award. During the pendency of the set-aside proceedings, in June 2014, Komstroy requested and received *exequatur* from the High Court of Paris. In November 2014, Komstroy initiated the case in the US. On 4 April 2016, Moldova requested a stay pending resolution of the set-aside proceeding before the Paris Court of Appeal. On 12 April 2016, the Paris Court of Appeal vacated the 2013 award for lack of jurisdiction; Komstroy explained that it intended to appeal the adverse decision to the Cour de Cassation, and requested a stay of the US proceedings pending resolution of that appeal. On 22 April 2016, the D.C. District Court stayed the proceedings. On 15 August 2018, Komstroy informed the D.C. District Court that in March 2018, the Cour de Cassation had issued a decision in Komstroy's favour,

		reversing and rendering void the 2016 Paris Court of Appeal decision that had set aside the arbitral award. The Cour de Cassation remanded the case to be reconsidered by a different panel of the Paris Court of Appeal. Komstroy moved the D.C. District Court to lit the stay and reopen the US case. Moldova requested an extension of the stay pending the further proceedings in the Paris Court of Appeal. In its judgment of 13 November 2018, the D.C. District Court confirmed that the investor-State award was "*presently enforceable*" under the 1958 New York Convention, and granted Komstroy's motion to lift the stay, notwithstanding the pending proceedings before the Paris Court of Appeal. In its judgment of 23 August 2019, the D.C. District Court proceeded to the merits of Komstroy's confirmation petition. Moldova made challenges to confirmation of the award under Art V of the 1958 New York Convention (thereby accepting that the Convention applied to the award). The D.C. District Court found that the FSIA's arbitration exception to immunity applied, and that the 1958 New York Convention "*plainly*" applied to the award. The Court rejected Moldova's challenges, and granted Komstroy's petition to confirm the award. Moldova appealed to the D.C. Circuit, which affirmed the District Court's confirmation of the award. The D.C. Circuit confirmed that the 1958 New York Convention applied to the investor-State award against Moldova (noting also that there was no dispute that the New York Convention applied).
*United States	*State of Libya v Strabag SE* (unreported, 30 September 2021) (D.D.C. 2021).	Libya and Strabag SE went to investor-State arbitration over a series of construction contracts that were disrupted by the 2011 Libyan revolution, pursuant to the 2002 Austria-Libya BIT. Libya brought a petition in the District

	State of Libya v Strabag SE (unreported, 27 May 2022) (D.C. Cir. 2022).	Court of the District of Columbia to vacate the arbitral award, and Strabag brought a cross-motion to confirm it. The D.C. District Court confirmed the arbitral award pursuant to the Federal Arbitration Act and the 1958 New York Convention. On appeal, the D.C. Circuit affirmed the District Court's judgment.