

Sovereign immunity and compliance with ISDS awards: a look at recent cases from the USA, UK, and Australia

Szilárd Gáspár-Szilágyi 

Abstract

When an investor-state arbitral tribunal issues an adverse award against a host State, the postaward phase opens a range of possibilities. The ideal scenario for the investor is for the State to voluntarily comply with the adverse award and pay the damages in full. However, this ideal situation is frequently replaced by an intricate web of annulment proceedings [in the case of International Centre for the Settlement of Investment Disputes (ICSID) awards], domestic set-aside proceedings (for non-ICSID cases), postaward settlement agreements, and domestic enforcement and recognition proceedings. The success of the latter is often hampered by domestic state immunity rules. The article looks at US, UK, and Australian recognition and enforcement cases from 1 January 2020 onwards, since these are preferred jurisdictions for the recognition and enforcement of awards, with well-developed rules on sovereign immunity. There are positive signs that between the three common law jurisdictions, there is some level of convergence, primarily due to cross-border ‘persuasive precedent’, judicial dialogue, and investors trying to enforce the same awards in the three countries. Some issues, such as whether Articles 53–55 ICSID Convention represent exceptions to jurisdictional immunity, have been settled in all three countries in the affirmative. There are also positive developments at the District of Columbia Circuit when it comes to the burden

*Szilárd Gáspár-Szilágyi, Senior Lecturer at Cardiff University, School of Law & Politics (Cardiff, Wales, United Kingdom); Former Jean Monnet Fellow at the European University Institute, Robert Schuman Centre for Advanced Studies (Florence, Tuscany, Italy); and Managing Editor of the *European Investment Law and Arbitration Review*; emails: gaspar-szilagyis@cardiff.ac.uk; szilard.gaspar@eui.eu. I would like to thank the peer reviewers, as well as the participants and organizers of the ‘ISDS Reform: Past, Present, and Future’, Academic Forum on ISDS 2025 Conference (held at the Robert Schuman Centre, EUI, Florence, 29–30 April 2025) and the ‘Investment Protection and Domestic Courts’ Conference (University of Vienna, 19 December 2025) for their constructive comments. The research was partially funded by the Norwegian Research Council, Project No 326269, ‘Compliance Politics and International Investment Disputes’ and the Jean Monnet Fellowship at the EUI. Neither the author nor his employers have been involved in any of the cases or developments discussed in this article.

of proof for the application of the arbitration exception to jurisdictional immunity. Nevertheless, investors still face several challenges, including divergent outcomes before the same domestic courts, jurisdictional differences for the application of the waiver and arbitration exceptions, and the ongoing difficulty for investors to defeat execution immunity.

1. Introduction

When an investor-State arbitral tribunal issues an adverse award against a host State, the postaward phase opens a range of possibilities for the State and the foreign investor.¹ The ideal scenario for the investor is for the State to voluntarily comply with the adverse award and pay the damages in full. However, this ideal situation is frequently replaced by an intricate web of annulment proceedings (in the case of International Centre for Settlement of Investment Disputes—ICSID—awards), domestic challenge and set-aside proceedings (for non-ICSID cases), postaward settlement agreements, and domestic enforcement and recognition proceedings. The success of the latter is often hampered by domestic rules on the immunity of foreign sovereigns.

State or sovereign immunity—and more specifically immunity from jurisdiction and execution—is well discussed in the literature.² Nevertheless, the role of state immunity in domestic proceedings to recognize and enforce investors-state dispute settlement (ISDS) awards has undergone new developments worthy of discussion. As more countries like Spain and Venezuela refuse to comply with ISDS awards,³ domestic recognition and enforcement cases are becoming more numerous and protracted. Therefore, the article aims to critically discuss the application of state immunity in recent domestic cases for the recognition and enforcement of ISDS awards. The article further aims to look at how state immunity influences State compliance with adverse ISDS awards. Out of considerations of simplicity, the term ISDS is used to refer to treaty-based investor-State arbitration (ITA), acknowledging that the term ISDS is broader than ITA.

The article looks at US, UK, and Australian cases⁴ from 1 January 2020 onwards, since these are preferred common law jurisdictions for the recognition and enforcement of awards, with well-developed rules on sovereign immunity. Furthermore, investors have tried to have the same awards recognized and enforced in all three jurisdictions, which raises further issues, such as cross-border ‘persuasive’ precedent, and possible convergence between the three jurisdictions.

¹ N Strain and others, ‘Compliance Politics and International Investment Disputes: A New Dataset’ (2024) 27 JIEL 70; T St John and others, ‘Bargaining in the Shadow of Awards’ (2024) 35 EJIL 603; Y Chernykh and M Sattorova, ‘The Afterlife of ISDS Awards: Post-Award Settlements and The Limits of Transparency Reforms’ (2025) 16 JIDS 1.

² Y Dautaj, ‘Enforcing Arbitral Awards Against States and the Defense of Sovereign Immunity from Execution: A U.S. Perspective’ (2023) 11 Penn State J of Law & Int’l Affairs 98; M Brenninkmeijer and F Gélinas, ‘Execution Immunities and the Effect of the Arbitration Agreement’ (2020) 37 J Int’l Arb 549; H Fox and Ph Webb, *The Law of State Immunity* (Revised and Updated 3rd edn, OUP 2015); A Reinisch, ‘European Court Practice Concerning State Immunity from Enforcement Measures’ (2005) 19 EJIL 803; A K Bjorklund, ‘Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-politicization of International Investment Disputes’ (2010) 21 American Rev of Int’l Arb 211.

³ N Lavranos, ‘Report on Compliance with Investment Treaty Arbitration Awards 2023 (2nd updated edition)’ (2023) International Law Compliance, Issue 2 <<https://internationallawcomplianceinstitute.org/product/compliance-report/?cn-reloaded=1>> accessed 29 April 2026.

⁴ For recent developments in other jurisdictions, see: *NextEra Energy Global Holdings BV and another v Kingdom of Spain* [2026] SGHC 43 in which the Singapore High Court dismissed an application to set aside the registration of the *NextEra* award and rejected the state immunity and intra-EU objections raised by Spain; *Republic of India v. CCDM Holdings* [2024] QCCA in which the Quebec Court of Appeal confirmed that India had waived its immunity from enforcement by consenting to arbitration under the BIT in question and by being a contracting party to the NY Convention.

Since the resolution of a dispute between an investor and the host State does not end with the delivery of an ISDS award,⁵ and because the rules on sovereign immunity consist of an intricate web of international treaty and customary law, domestic statutory law, and most importantly, domestic case law, Section 2 first provides a short overview of the postaward phase, followed by a quick presentation of sovereign immunity, and its two types: immunity from jurisdiction and immunity from execution. It will briefly discuss the 2004 UN Convention on Jurisdictional Immunities of States and Their Property that codifies the restrictive approach to state immunity, Article 55 of the ICSID Convention, the New York Convention's silence on state immunity, as well as the three domestic statutes: the 1976 US Foreign Sovereign Immunities Act (FSIA), the 1978 UK State Immunity Act (SIA), and the 1985 Foreign States Immunities Act (FSIA) of Australia.

Section 3 critically looks at several cross-cutting issues, starting with divergence in case law before the same domestic courts concerning the same or similar legal issues. The article then turns to a more positive development: the cross-border usage of 'persuasive precedent' by the courts of the selected jurisdictions, ie the reliance on judgments of foreign courts in similar cases that can lead to some level of convergence between the three jurisdictions. The third issue is one that all three jurisdictions have struggled with, the precise meaning of the international terms 'recognition, enforcement, and execution' in a domestic setting. Next, the article covers recent developments on the two most common exceptions to jurisdictional immunity in ISDS recognition and enforcement cases: the waiver and arbitration exceptions. The last two issues focus on execution immunity and the burden of proof.

Due to the complexity of such domestic cases and their ability to spread across different jurisdictions, knowing whether a State has complied with an adverse award becomes challenging. Therefore, Section 4 examines the compliance challenges investors face due to domestic state immunity rules, which can weaken the effectiveness of ISDS, affect how compliance is assessed, and influence investors' prelitigation and postaward behaviour.

2. A quick look at sovereign immunity and the postaward phase

2.1 What happens in the postaward phase?

Until quite recently, the presumption—especially of the founders of ICSID—was that losing States will simply comply with an adverse ISDS award⁶ because non-compliance carries reputational damage, or States will simply honour their international commitments, or the system of enforcement is robust, or a combination of these and other factors. This belief in the robustness of the enforcement of ISDS awards often helped fuel the view that ISDS offers 'exceptional protection' to foreign investors.⁷ However, recent empirical studies have shown that non-compliance with ISDS awards is in no way trivial. For example, in their 2020 article, Gaillard and Penushliski concluded that the ICSID founders' prognosis that compliance with ISDS awards would be a non-issue 'has not held true' as there are important instances of non-compliance or 'significantly delayed compliance'.⁸ Strain and others, in their 2024 study, looked at 260 ISDS awards lost by the host State and concluded that for 46 per cent of the awards, the status of payment is unknown.⁹ As Lavranos argued in his 2023 report on non-compliance with ISDS awards, there are clear cases of non-compliance, such as in the case of the *Spanish Renewables* cases.¹⁰

⁵ See (n 1).

⁶ Strain and others (n 1) 3.

⁷ G van Harten, *The Trouble with Foreign Investor Protection* (OUP 2020) 56.

⁸ E Gaillard and IM Penushliski, 'State Compliance with Investment Awards' (2020) 35 ICSID Rev 540, 593.

More recent research¹¹ has also revealed the complexities of the postaward phase. Traditionally, the literature discusses the following options the losing party has in the postaward phase. For localized, non-ICSID awards, the losing party can challenge the award and have it annulled in the courts of the forum or rely on Article V of the 1958 New York (NY) Convention to have the recognition and enforcement of the award refused by the non-forum courts. In the case of delocalized ICSID awards, pursuant to Article 53 of the ICSID Convention, the contracting parties shall treat such awards as binding, local appeals or remedies being prohibited, with the only available recourse the setting up of an ICSID Annulment Committee pursuant to Article 52 of the Convention.¹²

However, the postaward phase is much more complex. St John and others argue that the award can become an important bargaining chip for the investor to reach a settled outcome or gain some further leverage to have the host State modify its measures. Thus, '[e]ven after an award is handed down, there are often many possible outcomes that can resolve a dispute'.¹³ Awards can also be sold to other investors or various hedge funds.¹⁴ Furthermore, even when an investor seeks to have the award recognized and enforced pursuant to the NY or ICSID Conventions in a contracting country where the host State has assets, there is no guaranteed positive outcome for the investor. As the *Micula* and *Devas* enforcement epics¹⁵ illustrate, the investors and States will often be involved in lengthy, protracted, and mushrooming enforcement and recognition proceedings in multiple jurisdictions. These domestic cases raise further issues such as how local courts should handle requests for antisuit injunctions¹⁶ or judicial comity. Moreover, the losing State will often invoke the enforcing State's sovereign immunity laws to shield it from the recognition and enforcement case and/or from having its assets attached.

Section 3.3 will analyse in more detail the terms 'recognition', 'enforcement', and 'execution', as they can have different meanings depending on the applicable international and domestic rules. However, for the purposes of a more general understanding of *how* and *when* state immunity from jurisdiction and execution apply, it is important to understand what happens in recognition and enforcement cases. When the losing State chooses not to comply with the award, the investor will need to have the award *recognized* and *made enforceable* by the courts of the State where recognition and enforcement is sought, a process through which the international award will be treated like/converted to a local, final and enforceable judgment. In this phase of the proceedings, the losing State will invoke the local rules on immunity from jurisdiction (unless this is done *proprio motu* by the local court, such as in the UK pursuant to sec 1(2) of the SIA). If the investor is successful in rebutting this defence, the local authorities of the State where recognition and enforcement is sought should proceed to execute the award by attaching State assets. This is when the losing State will invoke another defence; that of immunity from execution. As Reinisch argues, '[i]n investment dispute settlement, State immunity is primarily a post-arbitral phenomenon'.¹⁷

⁹ Strain and others (n 1) 14.

¹⁰ Lavranos (n 3).

¹¹ See (n 1).

¹² See KB Reisenfeld and JM Robbins, 'Finality under the Washington and New York Conventions: Another Swing of the Pendulum?' (2017) 32 ICSID Rev 371; MB Feldman, 'The Annulment Proceedings and the Finality of ICSID Arbitral Awards' (1987) 2 ICSID Rev 85; A Broches, 'Observations on the Finality of ICSID Awards' (1991) 6 ICSID Rev 321; LM Bohmer, 'Finality in ICSID Arbitration Revisited' (2016) 31 ICSID Rev 236.

¹³ St John and others (n 1) 622.

¹⁴ Strain and others (n 1) 77, with reference to *El Paso v Argentina* (ICSID, ARB/03/15) that was purchased by Gasas Investments.

¹⁵ On the enforcement of the *Micula v Romania* ICSID award, see Sz Gáspár-Szilágyi, 'State Compliance with Intra-EU Investment Awards or the EU "Elephant" in the Investment "Porcelain Shop"' in G Butler and others (eds), *Investment Treaties and the EU Legal Order: Litigation, Modernisation, and Sustainability* (Hart/Bloomsbury 2025).

¹⁶ *NextEra Energy Global Holdings BV and NextEra Energy Spain Holdings B.V (and others) v Kingdom of Spain*, No. 23-7031, 7032, 7038 (DC Circuit Court), Judgment of 16 August 2024.

Let us now turn to a short overview of state immunity and its two components, immunity from jurisdiction and execution.

2.2 Immunity from jurisdiction and execution, and other matters

The topic of sovereign immunity is well discussed in the international law literature. Reinisch's 2006 article focused on the practice of European courts on state immunity from enforcement measures, arguing that most European jurisdictions had adopted the restrictive approach to sovereign immunity, with exceptions for non-governmental (commercial) State property.¹⁸ In her 2010 article, Björklund honed in on the difficulties caused by immunity from execution and how this can lead to a re-politicization of investor-State disputes.¹⁹ More recent articles have focused on execution immunity and the problems arising from the double waiver of jurisdictional and execution immunity;²⁰ the enforcement of arbitral awards and the defence of state immunity in the USA;²¹ and the broader question of whether state immunity only covers actions of the judiciary, or also the legislative and the executive when those branches do not enforce a judicial measure of constraint.²² Given this rich literature, this section only provides a quick overview of state immunity.

State immunity finds its origins in the Latin maxim, *par in parem non habet imperium* ('equals have no sovereignty over each other') and straddles two competing principles: territorial sovereignty and sovereign equality.²³ State immunity, in its more traditional understanding, should protect a foreign State from another State's adjudicatory jurisdiction (the power of the courts) and enforcement jurisdiction (the power of the executive) when the latter is connected to adjudicatory proceedings. However, it should not apply to prescriptive jurisdiction (the power of the legislature). Janig also argues that in certain non-adjudicatory enforcement cases (eg the freezing of assets due to sanctions), a customary rule of state immunity could be constructed.²⁴

For this article, it is enough to understand that state immunity protects a foreign State from the courts of another State (immunity from jurisdiction) and from enforcement measures carried out pursuant to court orders (immunity from execution). In most States, in the second half of the 20th century, the concept changed from an absolute understanding—that allowed no derogations from sovereign immunity—to a more functional, restrictive understanding that allows for limited exceptions as a result of the widening role of the State.²⁵

This restrictive approach is also reflected in the 2004 UN Convention on Jurisdictional Immunities of States and Their Property (not yet in force) which, in part, reflects customary rules. The UN Convention includes limited exceptions and differentiates between immunity from jurisdiction (Articles 7–13) and immunity from pre- and postjudgment measures of constraint, such as attachment, arrest, or execution (Articles 18–19). Until recently, there were notable outliers from the restrictive approach, such as China, which preferred an absolute understanding of state immunity.²⁶ Nonetheless, the new 2024 Foreign State Immunity

¹⁷ A Reinisch, 'State Immunity in Investment Arbitration' in A Kulick and M Waibel (eds), *General International Law in International Investment Law* (OUP 2024) 489.

¹⁸ Reinisch (n 2).

¹⁹ Björklund (n 2).

²⁰ Brenninkmeijer and Gélinas (n 2).

²¹ Dautaj (n 2).

²² Ph Janig, 'State Immunity from Non-Judicial Measures of Constraint' (2025) 74 ICLQ 179.

²³ Ibid, at 182–183 with reference to *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* [2012] ICJ Rep 99, para 57. See also Reinisch (n 17) 490.

²⁴ Ibid, at 183.

²⁵ Reinisch (n 2) 804.

Law of the People's Republic includes limited exceptions for civil cases involving foreign States and their property.²⁷

Staying with the international rules, one should also not forget about the NY and ICSID Conventions. Whilst the NY Convention says nothing about sovereign immunity, Article 55 of the ICSID Convention states that nothing in Article 54 'shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution'. These international provisions, in turn, influence how domestic courts interpret the relationship between these conventions and domestic exceptions to State immunity (see Section 3.4).

As Fox and Webb argue, 'there is no general law enforceable in national courts governing the attachment, seizure and collection of debts owed by a sovereign State'.²⁸ Therefore, besides international treaty and customary law, the rules on sovereign immunity also consist of domestic statutory and case law. For example, the US FSIA of 1976²⁹ has been amended several times, incorporates some aspects of the UN States Immunities Convention, and must be read together with frequently divergent case law (see Section 3.1). Furthermore, in a federal State like the USA, one must also consider state-level rules that govern the actual process of recognition and enforcement, and how they interact with the federal-level FSIA,³⁰ since the latter allows foreign States to use the sovereign immunity defence (for both jurisdiction³¹ and execution³²) with limited exceptions. In the UK, the 1978 SIA also recognizes state immunity from jurisdiction (sec 1(1)) and from 'relief'/execution (sec 13(3)) with limited exceptions. The same also holds true for the 1985 FSIA of Australia.³³ Similarly to the US, the UK, and Australian statutes must also be read together with frequently contradictory case law.

The types of exceptions that apply to sovereign immunity also need to be mentioned, because in the selected jurisdictions (unlike, for example, in Switzerland³⁴) exceptions must be proven separately for *both* immunity from jurisdiction and execution. The exact wording of the exceptions to jurisdictional immunity differs in the three statutes, but are broadly the following: (i) a foreign State's express or implied waiver of sovereign immunity (the waiver exception);³⁵ (ii) acts carried out by the foreign State in a private/commercial capacity (*acta iure gestionis*) or commercial transactions, as opposed to those carried out in a sovereign capacity (*acta iure imperii*);³⁶ (iii) the arbitration exception;³⁷ (iv) disputes concerning

²⁶ Dautaj (n 2) 106.

²⁷ S Chang, H Blackwell and Y Zhen, 'Procedural Rules for the PRC Foreign State Immunity Law Released' (2025) Insight, KWM <<https://www.kwm.com/cn/en/insights/latest-thinking/spc-issues-supporting-rules-for-foreign-state-immunity-law.html#:~:text=,The%20FSIL%2C%20which%20became%20effective,foreign%20states%20and%20their%20property>> accessed 29 April 2026. The exceptions in the new Chinese law include express consent to jurisdiction, voluntary participation in Chinese court proceedings, commercial activity disputes, employment and service contract disputes, tort claims, and intellectual property disputes.

²⁸ Fox and Webb (n 2) 480.

²⁹ Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. sec 1602–1611.

³⁰ The preferred US states for the recognition of foreign/international arbitral awards tend to be New York and Washington DC (not technically a state). One of the purposes of the FSIA was to transfer the determination of sovereign immunity from the executive to the judiciary, thus minimizing the foreign policy implications and providing clarity. See Fox and Webb (n 2) Chapter 8.

³¹ FSIA 1976, sec 1604.

³² Ibid, sec 1609.

³³ AU FSIA 1985, sec 6 (immunity from jurisdiction) and sec 30 (execution immunity). See also Sz Gáspár-Szilágyi and M Usynin, 'Procedural Developments in Investment Arbitration' (2020) 19 LPICT 260, 298–300.

³⁴ Ibid.

³⁵ FSIA 1976, sec 1605(a)(1); UK SIA 1978, sec 2; AU FSIA 1985, sec 10.

³⁶ FSIA 1976, sec 1605(a)(2); UK SIA 1978, sec 3; AU FSIA 1985, sec 11. See also Fox and Webb (n 2) 504.

³⁷ FSIA 1976, sec 1605(a)(6); UK SIA 1978, sec 9; AU FSIA 1985, sec 17.

immovable property;³⁸ (v) tortious liability for personal injury;³⁹ and (vi) disputes arising from contracts of employment.⁴⁰

The exceptions to immunity from execution can also be quite complex and follow the general rule that *only* commercial property can be attached.⁴¹ Generally, assets of the foreign State's central bank, diplomatic premises, and military equipment cannot be attached.⁴² Problems do occur when, for example, a foreign State's bank accounts contain money for both sovereign and commercial purposes.⁴³ The exceptions include (i) an explicit (or implied) waiver;⁴⁴ (ii) the arbitration exception;⁴⁵ and (iii) claims arising out of property disputes,⁴⁶ etc. The domestic statutes also include complex rules on the attachment of property that belongs to State instrumentalities or other entities exercising State functions.⁴⁷

To sum up, an investor that seeks to recognize, enforce, and execute an ISDS award against a non-complying host State will need to follow several steps in American, UK, and Australian courts. Firstly, they need to locate host State assets in these countries that can be attached. Secondly, they will need to have the award recognized and enforced by the local courts. This will require defeating the losing State's immunity from jurisdiction. Thirdly, if successful, the foreign investor must prove that the assets in question are commercial and not sovereign property. Lastly, the investor will, separately, have to defeat the losing State's immunity from execution. And, potentially, this will have to be done in multiple jurisdictions, often in a parallel fashion.

3. Recent issues

Over the years, authors have discussed multiple issues, such as the different exceptions that apply to sovereign immunity, the interpretation of waivers,⁴⁸ the differences between sovereign and commercial property,⁴⁹ the relationship between consent to arbitration and execution immunity,⁵⁰ mixed-use assets,⁵¹ etc. This Section focuses on recent, cross-cutting issues that have arisen in the selected jurisdictions.

3.1 Divergence before the same domestic courts

Even though the NY and ICSID Conventions lay down uniform rules on recognition and enforcement that bind the three jurisdictions, differences between them arise due to their different domestic rules on state immunity. This variance between different jurisdictions is understandable. However, what happens when, in the same jurisdiction, judges of the same court decide similar cases completely differently?

³⁸ FSIA 1976, sec 1605(a)(3)–(4); UK SIA 1978, sec 5; AU FSIA 1985, sec 14.

³⁹ FSIA 1976, sec 1605(a)(5); UK SIA 1978, sec 5; AU FSIA, sec 13.

⁴⁰ UK SIA 1978, sec 4; AU FSIA 1985, sec 12.

⁴¹ FSIA 1976, sec 1610(a); UK SIA 1978, sec 13(4); AU FSIA 1985, sec 31–32.

⁴² FSIA 1976, sec 1611; UK SIA 1978, sec 14(4); AU FSIA 1985, sec 31.

⁴³ See Dautaj (n 2) 127–129; M Douglas and C Carr, 'The Commercial Exceptions to Foreign State Immunity' (2017) 45(3) Federal Law Rev 445, at 459–460.

⁴⁴ FSIA 1976, sec 1610(a)(1); UK SIA 1978, sec 13(3); AU FSIA 1985, sec 31.

⁴⁵ FSIA 1976, sec 1610(a)(6); UK SIA 1978, sec 13(4)(b).

⁴⁶ FSIA 1976, sec 1610(a)(4)–(5); AU FSIA 1985, sec 33.

⁴⁷ FSIA 1976, sec 1610(b); UK SIA 1978, sec 14; AU FSIA 1985, sec 3.

⁴⁸ Reinisch, (n 2) 817; Björklund (n 2) 224–225.

⁴⁹ Reinisch (n 2) 821–834; Björklund (n 2) 225–230.

⁵⁰ Brenninkmeijer and Gélinas (n 2) 565–572.

⁵¹ Dautaj (n 2) 127.

Three enforcement cases initiated by investors/award creditors⁵² against Spain, before the DC District Court in the USA, are illustrative.⁵³ The facts and legal issues are very similar, hence the reason they were later joined together in appeal before the DC Circuit Court of Appeals (DC Circuit).⁵⁴ The cases are part of the *Spanish Renewables* saga.⁵⁵ Dutch and Luxembourgish companies invested in Spain's renewable energy industry 'in reliance on promised economic subsidies'.⁵⁶ Following the 2008 financial crisis, Spain removed the subsidies, and the investors commenced separate arbitration proceedings (two ICSID and one UNCITRAL) under Article 26 of the Energy Charter Treaty (ECT). The investors won their respective arbitrations⁵⁷ and initiated recognition and enforcement cases in the USA, since enforcement in the EU became impossible after the EU Court of Justice's (CJEU) judgments in *Achmea*⁵⁸ and *Komstroy*.⁵⁹

[Before the DC District Court] Spain defended itself in two ways [...]. It moved to dismiss the petitions on the ground that it enjoys sovereign immunity under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 et. seq. And Spain filed its own lawsuits in Dutch and Luxembourgish courts seeking, among other things, an anti-suit injunction to prevent the companies from proceeding with their petitions to enforce their arbitral awards in United States courts.⁶⁰

For this article, Spain's first defence is relevant. In all three cases, before different judges of the DC District Court, the main issue was whether Spain could avail itself of the FSIA's immunity from jurisdiction, or whether the sec 1605(a)(1) 'waiver' and the sec 1605(a)(6) 'arbitration' exceptions applied (see Section 3.4).

The DC District Court in *NextEra*⁶¹ and *9REN*⁶² denied Spain's motion to dismiss and held that Spain could not avail itself of immunity from jurisdiction since the 'arbitration' exception applied, as there was a valid agreement to arbitrate. The same court, but presided over by a different judge, came to the opposite conclusion in *Blasket*.⁶³ The *Blasket* Court held that Spain's standing offer to arbitrate was void under EU law; therefore, there was no valid agreement to arbitrate.⁶⁴ Thus, the same facts and rules, invoked before the same court, resulted in opposite outcomes.

⁵² Sometimes the awards are assigned to/bought by other creditors. For example, the AES Solar award was assigned to Blasket Renewable Investments LLC.

⁵³ *NextEra Energy Global Holdings B.V. v Kingdom of Spain*, 656 F. Supp. 3d 201 (D.D.C. 2023) No. 1:19-cv-01618; *9REN Holding S.A.R.L. v Kingdom of Spain*, No. 19-cv-1871, 2023 WL 2016933 (D.D.C. Feb. 15, 2023); *Blasket Renewable Investments, LLC v Kingdom of Spain*, 665 F. Supp. 3d 1 (D.D.C. 2023) No. 1:21-cv-03249.

⁵⁴ See C Ramos-Mrososky and others, 'US Court of Appeals for the D.C. Circuit Holds That Spain Does Not Enjoy Sovereign Immunity from Enforcement of Intra-EU ECT Awards' (2024) 9 EILAR 309.

⁵⁵ See I. Mehranvar and S Sasmal, 'The Role of Investment Treaties and Investor-State Dispute Settlement in Renewable Energy Investments' (2022) Columbia Center on Sustainable Investment (CCSI) <https://scholarship.law.columbia.edu/sustainable_investment/5/> accessed 29 April 2026; M Scherer and I Giacometti, 'When Worlds Collide—How Repealing Renewables Incentives Could Infringe Investment Protection Treaties and Lead to Arbitration' (2024) Lalive, Insights <<https://www.lalive.law/when-worlds-collide-how-repealing-renewables-incentives-could-infringe-investment-protection-treaties-and-lead-to-arbitration/>> accessed 29 April 2026.

⁵⁶ DC Circuit, *NextEra v Spain* (n 16) 6.

⁵⁷ *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v Kingdom of Spain*, ICSID Case No. ARB/14/11, Final Award (31 May 2019); *9REN Holding S.a.r.l v Kingdom of Spain*, ICSID Case No. ARB/15/15, Award (31 May 2019); *AES Solar and others (PV Investors) v Kingdom of Spain*, PCA Case No. 2012-14, Final Award (28 Feb 2020).

⁵⁸ C-284/16, *Slowakische Republik v Achmea BV*, ECLI:EU:C:2018:158.

⁵⁹ C-741/19, *République de Moldavie v Komstroy LLC*, ECLI:EU:C:2021:655.

⁶⁰ DC Circuit, *NextEra v Spain* (n 16) 7.

⁶¹ *NextEra Energy Global Holdings B.V. v Kingdom of Spain*, 656 F. Supp. 3d 201 (D.D.C. 2023).

⁶² *9REN Holding S.A.R.L. v Kingdom of Spain*, No. 19-cv-1871, 2023 WL 2016933 (D.D.C. Feb. 15, 2023).

⁶³ *Blasket Renewable Investments, LLC v Kingdom of Spain*, 665 F. Supp. 3d 1 (D.D.C. 2023).

⁶⁴ *Blasket Renewable Inv., LLC v Kingdom of Spain*, 665 F. Supp. 3d 1 (D.D.C. 2023), at 4, 12, and 13.

Luckily for the investors, the appeals were joined together before the same DC Circuit bench,⁶⁵ which brought clarity to the opposing lower court decisions. The DC Circuit, after providing a thorough overview of the facts, the applicable international norms (NY Convention, ICSID Convention, and the ECT), and the CJEU's *Achmea* and *Komstroy* judgments, went on to discuss the 'waiver' and 'arbitration' exceptions under the FSIA. As these exceptions will be discussed in more detail in Section 3.4, for now it suffices to say that the Circuit Court focused on the arbitration exception and concluded that Spain, pursuant to Article 26 ECT, had entered into an arbitration agreement for the benefit of the investors.⁶⁶ Finally, the DC Circuit held that only the district courts have jurisdiction to enforce the arbitration awards. However, this 'does not mean they must or should do so' as the Court did 'not address the merits question whether [the ECT's] arbitration provision extends to EU nationals and thus whether Spain ultimately entered into legally valid agreements with the companies'.⁶⁷ In other words, this was a decision to assert that the District Court had jurisdiction in this case, and it would be up to the District Court to decide whether to enforce the three awards.

In August 2025, the DC District Court followed the Circuit Court's judgment and rejected Spain's arguments on the merits against enforcing the intra-EU awards.⁶⁸ This was followed by summary judgments of the District Court enforcing the *9REN*, *NextEra*, and *Infrastructure Services* awards.⁶⁹ However, earlier in 2025, Judge Leon of the District Court had 'stayed Blasket's action to enforce its UNCITRAL award pending Spain's Supreme Court petition'.⁷⁰ The DC Circuit's reasoning in *NextEra* was later followed by the same court in *MOL Hungarian Oil v. Croatia*.⁷¹

Whilst the DC Circuit seems to have settled the matter, there are nine Circuit Courts of Appeal in the USA. Therefore, there is no guarantee that a different Circuit Court would not decide this issue differently, unless the US Supreme Court (SCOTUS) were to clarify the matter following a pending petition for certiorari that Spain had filed.⁷² On 6 October 2025, SCOTUS invited the Solicitor General to file briefs 'expressing the views of the United States'.⁷³ 'While the US Government previously supported Spain before the DC Circuit',⁷⁴ the Solicitor General recommended the Supreme Court deny certiorari.

On this side of the Atlantic, a similar divergence occurred before the same domestic court, involving similar cases, and similar national and international rules. In 2024, the English High Court in *Border Timbers v Zimbabwe*⁷⁵ held that Article 54 of the ICSID does not represent a sufficiently clear and unequivocal submission to the jurisdiction of English courts, while a

⁶⁵ Circuit Judges Pillard and Pan, and Senior Circuit Judge Rogers. Judge Pan filed a dissenting opinion in part.

⁶⁶ DC Circuit, *NextEra v Spain* (n 16) 25.

⁶⁷ Ibid, 28.

⁶⁸ Noiana Marigo and others, 'Another major hurdle cleared: DC District Court enforces intra-EU ICSID Awards in the US', Freshfields (18 August 2025) <<https://riskandcompliance.freshfields.com/post/102105b/another-major-hurdle-cleared-dc-district-court-enforces-intra-eu-icsid-awards-in>> accessed 19 April 2026.

⁶⁹ Susannah Moody, 'Three More Awards Against Spain Enforced in US', GAR (1 October 2025). See also Memorandum Opinion of the US District Court for the District of Columbia in *9REN Holding S.A.R.L. v. Kingdom of Spain* (29 September 2025) and Memorandum Opinion of the US District Court for the District of Columbia in *NextEra Energy Global Holdings B.V. v. Kingdom of Spain* (30 September 2025).

⁷⁰ Ibid. See also Minute Order of the US District Court for the District of Columbia (22 January 2025).

⁷¹ *MOL Hungarian Oil & Gas PLC v. Republic of Croatia*, No. 23-cv-00218 (AHA), 16 April 2025.

⁷² Marigo and others (n 69).

⁷³ Order of the US Supreme Court of 6 October 2025 in *9REN Holding S.A.R.L. v. Kingdom of Spain*.

⁷⁴ David W Bowker and others, 'Enforcement of Foreign Arbitral Awards in the Post-NextEra Era', WilmerHale (16 March 2026) <<https://www.wilmerhale.com/en/insights/client-alerts/20260316-enforcement-of-foreign-arbitral-awards-in-the-post-nextera-era>> accessed 27 April 2026.

⁷⁵ *Border Timbers Limited and another v Republic of Zimbabwe*, Judgment of the High Court of England and Wales [2024] EWHC 48 (Justice Dias).

different judge at the same court, in *Infrastructure Services v Spain*,⁷⁶ held that Articles 54 ICSID and 26 ECT constituted ‘prior agreements’ for the waiver of State immunity, under the SIA.

In England and Wales, ICSID awards must be registered before the High Court of England and Wales, pursuant to the 1966 Arbitration (International Investment Disputes) Act that implements the ICSID Convention⁷⁷ and Rule 62.21 of the Civil Procedure Rules.⁷⁸ The investors applied to the High Court to have the *Border Timbers v Zimbabwe* ICSID award registered and enforced. Zimbabwe applied to set aside the registration of the award, claiming that it had sovereign immunity pursuant to sec 1(1) of the SIA. In response, the investors argued that the exceptions under sec 2 (the waiver exception) and 9 (the arbitration exception) of the SIA applied. More specifically, Article 54 of the ICSID Convention amounted to a ‘prior written agreement [under sec 2 of the SIA] submitting to the jurisdiction of the English courts’.⁷⁹

According to Justice Dias in her 2024 decision, prior to the SIA, ‘England was almost alone in continuing to adopt a pure, absolute doctrine of State immunity in all cases’.⁸⁰ However, now, the absolute rule was subject to limited exceptions, for the application of which ‘the applicant bears the burden of proving’.⁸¹ Justice Dias acknowledged that ‘these are deep waters’ and it is only in recent years that English courts had to explore the relationship between the ICSID Convention and state immunity, praising the ‘comprehensive and impressive’ judgment of the English High Court Judge Fraser in *Infrastructure Services v Spain*.⁸² Justice Dias relied on Articles 31 and 32 of the VCLT to interpret the meaning of Articles 53–55 ICSID, considering the text, context, and object of the Convention, as well as the *travaux préparatoires* and writings of the father of ICSID, Mr Aron Broches.⁸³ Moreover, she embarked on a lengthy discussion of the related, but undefined, terms of ‘recognition’, ‘enforcement’, and ‘execution’ (discussed in Section 3.3). The Justice argued that as a matter of English law, any waiver of sovereign immunity, even when in writing—for example in a treaty provision—must be expressed ‘and cannot be implied’.⁸⁴ She admitted that whether Article 54 of the ICSID was an express waiver of immunity was no easy question. Disagreeing with Justice Fraser in *Infrastructure Services v Spain*, she concluded that Article 54 of the ICSID ‘is not a sufficiently clear and unequivocal submission to the jurisdiction of the English courts for the purposes of recognising and enforcing the award’.⁸⁵

Having dismissed the claimants’ sec 2 SIA arguments, the Justice then looked at whether sec 9, the arbitration exception, could apply and held that it was also not applicable.⁸⁶ A more detailed presentation of this will follow in Section 3.4. For now, it is important to focus on the divergences with the previous High Court judgment in *Infrastructure Services*. In his 2023 judgment in *Infrastructure Services*, Justice Fraser first clarified that the application in question, to recognize the ICSID award, concerned ‘adjudicative jurisdiction’ and not ‘enforcement jurisdiction’.⁸⁷ He flat out disagreed with Spain’s objections and concluded after a brief analysis that Article 54 of the ICSID and Article 26 of the ECT constituted ‘prior written agreement’ under sec 2 of the SIA and that the arbitration exception also applied.⁸⁸

⁷⁶ *Infrastructure Services Luxembourg Sarl v Spain*, Judgment of the High Court of England and Wales (Commercial) [2023] EWHC 1226 (Comm) (Justice Fraser).

⁷⁷ *Ibid*, para 15.

⁷⁸ Which refers specifically to the registration of awards under the ICSID Convention.

⁷⁹ *Border Timbers*, High Court (n 75) para 17.

⁸⁰ *Ibid*, para 8.

⁸¹ *Ibid*, para 10.

⁸² *Ibid*, para 18.

⁸³ *Ibid*, paras 24.

⁸⁴ *Ibid*, para 55.

⁸⁵ *Ibid*, paras 62–72.

⁸⁶ *Ibid*, para 90.

⁸⁷ *Infrastructure Services*, High Court (n 76) para 56

⁸⁸ *Ibid*, paras 95–103.

The divergence between the two High Court judgments, similar to the one before the DC District Courts, was settled on appeal and later by the UK Supreme Court (UKSC). The Court of Appeal for England and Wales in its 22 October 2024 judgment in the *Border Timbers and Infrastructure Services* appeal⁸⁹ settled the issue of whether Article 54 of the ICSID Convention constitutes a written agreement under sec 2 of the SIA. Lord Justice Phillips disagreed with most of Justice Dias' arguments and some of the smaller arguments of Justice Fraser. Firstly, the recognition of ICSID awards by English courts constituted an 'adjudicative act' and not merely an administrative one.⁹⁰ Secondly, the courts of Australia, New Zealand, the USA, France, and Malaysia had also interpreted Article 54 of the ICSID as a waiver of adjudicative immunity.⁹¹ The Lord Justice then cited extensively the High Court of Australia (HCA) to substantiate his conclusion that Article 54 of the ICSID 'is just as clearly an agreement by Contracting States, including Spain and Zimbabwe, to waive immunity and submit to the jurisdiction of the courts of the United Kingdom [...] sufficient for section (2) of the SIA'.⁹²

The respondent States appealed to the UKSC, which had to decide whether Article 54(1) of the ICSID Convention constituted an agreement by the appellant States, under sec 2(2) of the SIA 1978, to waive their adjudicative immunity and submit to the jurisdiction of English courts.⁹³ The UKSC first clarified that the appeal concerned immunity from adjudication and not execution.⁹⁴ After looking at the UN and European Conventions on State Immunity, the US FSIA and its interpretation by US courts, and disagreeing with Lord Goff's dissent in *Pinochet 3*, the Supreme Court held that 'a waiver of immunity by treaty requires a clear and unequivocal expressions of the state's consent to the exercise of jurisdiction [...] which does not require such words as waiver or submission'.⁹⁵ Interpreting Articles 53 to 55 ICSID Convention using the methods of treaty interpretation under the VCLT, the Supreme Court dismissed the appeal and concluded that the 'obligation to recognise and enforce an arbitral award as binding necessarily involves an exercise of adjudicative jurisdiction that must have overcome any jurisdictional bar to the exercise of that jurisdiction'.⁹⁶ Therefore, the appellant States had submitted to the jurisdiction of English courts by virtue of Article 54 of the ICSID Convention.⁹⁷

While writing this article, the *Devas v India* enforcement saga⁹⁸ also reached English shores. The High Court was faced with the question of whether India waived its immunity from jurisdiction under sec 2 of the SIA by becoming a party to the NY Convention. Sir William Blair, in his 17 April 2025 judgment, argued that Article III of the NY Convention did not represent such a waiver. He referred to both Justice Dias in *Border Timbers* and the Court of Appeal's judgment to argue that the conclusion that Article 54 of the ICSID was found to be a prior written agreement under sec 2 of the SIA does not imply that the same

⁸⁹ *Border Timbers v Republic of Zimbabwe*, Judgment of the Court of Appeal of England and Wales [2024] EWCA CIV 1257 (Lord Justice Phillips). For a commentary, see K Reece Thomas and D Gültutan, 'Enforcement of ICSID Awards and State Immunity: Should Immunity Trump All? Analysis of the English Court of Appeal's ISL/ Border Timbers Conjoined Judgment, Advocating for a Domestic Teleological Interpretation' (2024) 41 Arb Int'l 607.

⁹⁰ Ibid, para 38.

⁹¹ Ibid, para 60.

⁹² Ibid, para 96.

⁹³ *The Kingdom of Spain (Appellant) v Infrastructure Services Luxembourg S.À.R.L. and another (Respondents); Republic of Zimbabwe (Appellant) v Border Timbers Ltd and another (Respondents)*, Judgment of the UK Supreme Court [2026] UKSC 9, para 19.

⁹⁴ Ibid, para 21.

⁹⁵ Ibid, para 69.

⁹⁶ Ibid, para 88.

⁹⁷ Ibid, para 144.

⁹⁸ *CC/Devas (Mauritius) Ltd and others v The Republic of India*, Judgment of the High Court of England and Wales [2025] EWHC 964 (Comm) (Sir Blair). See A Mammadzada, 'When States Say "No": The Devas Case and the Limits of Waiving Immunity' (2025) IISTL Blog <<https://iistl.blog/2025/04/25/when-states-say-no-the-devas-case-and-the-limits-of-waiving-immunity/>> accessed 29 April 2026.

conclusions can be reached for Article III of the NY Convention.⁹⁹ Looking at the *travaux préparatoires* of the NY Convention and contrasting the silence of the Convention on state immunity with Article 55 of the ICSID, Sir William came to the conclusion that Article III of the NY Convention ‘preserves’ state immunity and the ratification of the Convention is ‘not on its own a waiver of [s]tate immunity’.¹⁰⁰ The case is currently under appeal before the UKSC.¹⁰¹

Before we move on to the next issue, some comments are warranted. Firstly, it is striking that even in jurisdictions—such as the USA and UK—where enforcement and recognition proceedings are more common and investors use them as favoured jurisdictions, there are several unsettled issues concerning state immunity. The underlying causes are multiple: the potential number of issues that apply to state immunity is high because this concept applies to a multitude of situations, not just to the recognition and enforcement of ISDS awards; the cases are technical and complex, involving domestic statutory law, local and foreign case law, international treaties, and international law; and judges have significant interpretative freedom.

Secondly, the same issue can be decided in a completely opposite manner by judges sitting on the same court. Thus, both investors and States can face significant uncertainty during domestic recognition and enforcement cases. Luckily, the UKSC has clarified that Article 54 of the ICSID Convention represents a waiver of adjudicative immunity. However, it does not follow that said provision is also a waiver of immunity from execution. Furthermore, while the DC Circuit settled the disagreements over the application of the arbitration exception between the different judges of the District Court, the clarification only applies to the courts subject to the jurisdiction of the DC Circuit. It remains to be seen if SCOTUS will opine on the matter. Moreover, in the UK, the *Devas* case before the High Court illustrates that just because the Court of Appeal/UKSC clarified that Article 54 of the ICSID Convention constitutes a waiver of state immunity, a lower court will not apply the same reasoning *mutatis mutandi* to Article III of the NY Convention.

Thirdly, all the cases referred to jurisdictional immunity, but not execution immunity. Thus, whether the NY or the ICSID Conventions can be considered waivers of execution immunity is yet to be settled.

3.2 ‘Persuasive precedent’ creating some level of convergence between foreign jurisdictions

For someone originally trained in a civil law jurisdiction, what strikes the eye when reading these cases is the ease with which American, British, and Australian courts cite each other’s judgments and those of other foreign courts. This cross-border citation is rare in civil law countries and deserves some attention, as such judicial dialogue can foster convergence between the different jurisdictions.¹⁰² This in turn can provide more clarity and stability for investors wishing to enforce awards against non-complying States.

The three countries are common law jurisdictions that recognize ‘binding’ and ‘persuasive’ precedent. The doctrine of binding precedent, in broad terms, binds a lower court to the decisions of a higher court. For example, the aforementioned High Court of England and Wales is bound by decisions of the hierarchically superior Court of Appeal and the UKSC, but a High Court justice is not bound by the decisions of their peers (hence, why the divergence between

⁹⁹ Ibid, paras 45–47.

¹⁰⁰ Ibid, paras 80–81.

¹⁰¹ UKSC/2025/0045.

¹⁰² On the mutual referencing of foreign judgments in a so-called ‘transnational judicial dialogue’, see MS Kuo, ‘Whither Judicial Dialogue after Convergence? Finding Transnational Public Law in Nomos-Building’ (2021) 19 *Int’l J of Const Law* 1536.

Justices Dias and Fraser was possible).¹⁰³ However, there is also *persuasive precedent* through which courts will rely on decisions from another court or jurisdiction (normally a high court) when there is no such precedent in the home court or no binding precedent.¹⁰⁴ Since the issues discussed above had not been fully settled, it is no wonder that the different courts referred to cases discussing similar/the same issues in other jurisdictions as a way to give more legitimacy to their own interpretations and conclusions. This cross-border judicial dialogue is also enhanced by the same or similar ISDS awards being enforced in the selected jurisdictions.

A favourite source of persuasive precedent has been the HCA's judgment in *Spain v Infrastructure Services*.¹⁰⁵ For example, the DC Circuit in the *Nextera* appeal relied on it to argue that both courts had arrived at the same conclusion: the ratification of the ICSID and NY Conventions amounted to a waiver of immunity from jurisdiction.¹⁰⁶ The UKSC in *Infrastructure Services/Border Timber* also referred to a part of the aforementioned Australian judgment in which the HCA held that Article 54(1) of the ICSID Convention involved 'a waiver of immunity from jurisdiction in relation to recognition and enforcement'.¹⁰⁷ Moreover, there was 'broad international consensus as to the meaning and effect of article 54(1)' in the courts of Australia, New Zealand, Malaysia, and the USA.¹⁰⁸

Lower English courts have also followed a similar approach. For example, High Court Justice Fraser in *Infrastructure Services* mentions the large volume of 'authorities' used by both parties to substantiate their arguments, which among others also included decisions of foreign courts from the USA, Australia, France, Luxembourg, etc.¹⁰⁹ He recognized that even though the laws of those countries are different from that of the UK, 'there are distinct similarities' that 'merit attention'.¹¹⁰ The Justice then, on the claimant's initiative, also referred to the aforementioned HCA judgment in *Infrastructure Services* and the judgment of the Federal Court of Australia (FCA) that preceded it.¹¹¹ He characterized the HCA's judgment as 'separate free-standing support, in the highest appellate court of another common law jurisdiction, for the analysis which I have undertaken', since they are both consistent and reach the same conclusions.¹¹² The Justice was then reminded by the parties of the three DC District Court cases, which at that point had yet to be appealed to the DC Circuit. In response, the Justice highlighted that foreign judgments are only persuasive in 'character', stating that the 'ratio and decisions in other countries are potentially persuasive and of interest, but [...] they do not bind this court'.¹¹³ Nevertheless, he found it 'heartening' that different courts in the USA and Australia had arrived at near-identical conclusions on the lack of state immunity, 'due to the existence of a binding arbitration agreement'.¹¹⁴ Just as in the case of the DC Circuit, these foreign judgments helped give legitimacy to the UK judge's decision and demonstrated, in his words, that his conclusion 'is correct'.¹¹⁵

¹⁰³ Lord Sales, 'Default Rules in the Common Law: Substantive Rules and Precedent', Presentation at International Workshop on Default Rules in Private Law Oxford, 24 March 2023 <https://supremecourt.uk/uploads/Default_Rules_in_Common_Law_Lord_Sales_5fbadb54a.pdf> accessed 29 April 2026.

¹⁰⁴ On the distinction between 'authoritative' and 'persuasive' precedent, see S Lewis, 'Precedent and the Rule of Law' (2021) 41 Oxford J of L Studies 873.

¹⁰⁵ *Kingdom of Spain v Infrastructure Servs. Luxembourg S.à.r.l.* [2023] HCA 11. For a commentary, see Rachel Jupp, 'Australia's Pro-Arbitration Stance Confirmed in Kingdom of Spain v Infrastructure Services Luxembourg S.A.R.L.' (2024) 24 Int'l Trade & Bus L Rev 185.

¹⁰⁶ DC Circuit, *NextEra v Spain* (n 16) at 19.

¹⁰⁷ UKSC [2026] (n 93) paras 135–137.

¹⁰⁸ *Ibid.*, para 135.

¹⁰⁹ *Infrastructure Services*, High Court (n 76) para 7.

¹¹⁰ *Ibid.*, para 111.

¹¹¹ *Ibid.*, para 114–115.

¹¹² *Ibid.*, para 116.

¹¹³ *Ibid.*, para 119.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

Nonetheless, not all courts are persuaded by the judgments of foreign courts. English High Court Justice Dias in *Border Timbers* was referred to the *Infrastructure Services* enforcement cases before the FCA and HCA, as well as other decisions in New Zealand and the USA. She argued that all those decisions ‘were made in different statutory contexts’.¹¹⁶ For example, ‘the Australian equivalent to the State Immunity Act does not have an arbitration exception equivalent to section 9 of the 1978 [SIA]’, while the ‘US statutory framework is very different and contains a very broad arbitration exception. While [she had] found some of the reasoning illuminating and instructive, [she] did not propose to rehearse them in detail since none of them [was] directly binding on [her]’.¹¹⁷ Furthermore, the English High Court in the recent *Devas* enforcement case argued that the terms of sec 10(2) of the Australian FSIA were ‘significantly different from the terms of the UK’s s.2(2) of the SIA’¹¹⁸ and relied on India’s appeal before the FCA to argue that Article III of the NY Convention did not constitute a waiver of sovereign immunity, as this was limited by India in its reservation to the Convention.¹¹⁹

These cases lead to several important conclusions. Firstly, whilst there is often divergence between judges of the same domestic courts, common law courts (and the parties to these disputes) are cognizant of recent cases involving similar matters, ie exceptions to sovereign immunity, in other jurisdictions. Furthermore, they are willing to use these judgments as persuasive authorities to substantiate and legitimize their own conclusions and arguments. Some judges even note the similarity of outcomes in different jurisdictions, which does lead to some level of convergence in an otherwise highly fragmented area of the law. This convergence might be reinforced by the fact that it is mainly the judges of the higher courts that refer to the decisions of foreign, higher courts. This in turn could ensure some level of clarity and stability for investors wishing to enforce their judgments in different, but somewhat similar, domestic systems. Nevertheless, some judges focused on the differences between the local and foreign jurisdictions (especially the statutory ones) to substantiate their own conclusions that differed from those of their foreign peers. Even so, this was done by lower court judges whose decisions were later appealed or are in the course of being appealed.

3.3 Which terms should be used: recognition, enforcement, or execution?

In several of the cases analysed, the meaning of the different terms had to be clarified. The English version of Article 54 of the ICSID Convention speaks of the obligation of the contracting State to *recognize* the award as binding and to *enforce* ‘the pecuniary obligations imposed on that award’. It then introduces a third term, *execution* of the award, in Articles 54(3) and 55. Article III NY Convention mentions the obligation of the contracting parties to *recognize* the awards as binding and to *enforce* them in accordance with their domestic rules. However, unlike the ICSID Convention, the NY Convention does not mention *execution*. These terms are also not settled in the literature. For example, Reinisch refers to immunity from execution as immunity from *enforcement*, drawing an equivalence between the terms *execution* and *enforcement*, at least for the purposes of state immunity. Similarly, Fox and Webb refer to immunity from execution as immunity from enforcement.¹²⁰ The UKSC also noted that the drafters of the ICSID Convention conflated the terms *enforcement* and *execution*.¹²¹

It is no wonder then that domestic courts and the disputing parties struggle to reconcile the different international terms with those found in domestic laws. Firstly, each State has a

¹¹⁶ *Border Timbers*, High Court (n 75) para 54.

¹¹⁷ *Ibid*, paras 54–55.

¹¹⁸ *CC/Devas (Mauritius)*, High Court (n 98) para 61.

¹¹⁹ *Ibid*, para 62.

¹²⁰ Fox and Webb (n 2).

¹²¹ UKSC [2026] (n 93) para 128.

different procedure through which it makes the foreign arbitral award ‘recognisable’ in its domestic legal order. Secondly, concepts like immunity from jurisdiction and execution, and the exceptions to them, will apply to different parts of the domestic proceedings. Thus, a domestic judge can ask the question whether immunity from execution covers both the enforcement and the execution of the award, or whether the latter terms mean the same thing. Lastly, there can be significant procedural and terminological differences between civil and common law jurisdictions when it comes to the execution of judgments and the attachment of assets. Therefore, investors wishing to achieve compliance by a losing State should know how the international terms translate into domestic concepts and remedies.

In its 2021 judgment in *Stileks v Moldova (Stileks I)*, the DC Circuit had to clarify some of the stages of the domestic recognition and enforcement proceedings and the terms. The case, while under a different name, forms part of the *Komstroy (formerly Energoalians) v Moldova* saga and the efforts of the investor to enforce a 2012 UNCITRAL award.¹²² The investor filed a petition under 9 U.S.C. § 207 to have the (UNCITRAL) award ‘confirmed’ in the USA. According to this provision, within 3 years after the arbitration, any of the disputing parties may apply to any of the courts having jurisdiction for an order *confirming* the award against the other party. According to the DC Circuit, ‘confirmation is the process by which an arbitration award is *converted* to a legal judgment’.¹²³ Once the investor had a ‘judgment in hand, it could go about *enforcing* the [award] by, for example, attaching Moldova’s commercial assets in the United States’.¹²⁴ The DC Circuit relied on this passage from *Stilex I* in the *NextEra* appeal, but it used the term execution instead of enforcement. According to the *NextEra* court, ‘[i]t is only once an award is confirmed that the prevailing party may seek to *execute* on the resulting judgment “by, for example, attaching [the sovereign’s] commercial assets in the United States”’.¹²⁵

Thus, in the USA, it seems that the postaward procedure consists of two steps. The first one is the *confirmation* of the foreign arbitral award (either under 22 U.S.C. § 1650a(a) for ICSID awards or 9 U.S.C. § 207 for UNCITRAL awards), a judicial process through which the award is converted into a local judgment. To this part of the procedure, immunity from jurisdiction applies. Confirmation is followed by the attachment of the losing State’s commercial assets in the USA, which the *Stileks I* court calls *enforcement* but the *NextEra* one calls *execution*. This is when the State can invoke immunity from execution. Interestingly, the *NextEra* court equates the ICSID term ‘to enforce’ with the US term ‘to confirm’.¹²⁶ Thus, there does not seem to be terminological unity in the USA, not even in the same court.

The UKSC also mentions that the line between enforcement and execution under the ICSID Convention ‘may not be clear and neither term is defined’. Nonetheless, the Convention draws a ‘sharp distinction between recognition and enforcement on the one hand [...] and execution on the other [...]’.¹²⁷ Thus, the award must first be recognized and only after that stage ‘can any execution steps be taken’.¹²⁸ High Court Justice Dias also spent a considerable part of her judgment in *Border Timbers* dissecting the meaning of the three terms found

¹²² *Komstroy (formerly Energoalians) v Republic of Moldova*, UNCITRAL, Award (23 October 2013).

¹²³ *LLC SPC Stileks v Republic of Moldova*, 985 F.3d 871, 875 (D.C. Cir. 2021) at 4. For a commentary, see Patricia Zghibarta, ‘Stileks v. Moldova: A Chance to Go Back to Square One After the Preliminary Ruling of the CJEU?’ (2021) Kluwer Arbitration Blog <<https://arbitrationblog.kluwerarbitration.com/2021/03/16/stileks-v-moldova-a-chance-to-go-back-to-square-one-after-the-preliminary-ruling-of-the-cjeu/>> accessed 29 April 2026.

¹²⁴ *Ibid.*

¹²⁵ DC Circuit, *NextEra v Spain* (n 16) 15.

¹²⁶ *Ibid.*

¹²⁷ UKSC [2026] (n 93) para 87.

¹²⁸ *Ibid.*

in Article 54 of the ICSID. According to Justice Dias, Article 54(1) contains two distinct obligations. The first one is an obligation of the contracting parties to *recognize* an award as binding. The second obligation is limited to the *enforcement* of pecuniary obligations in the award ‘as if they were contained in a final judgment of a national court’.¹²⁹ However, this composite obligation is not ‘self-executing’ and requires some formal steps. In some countries, the obligation to recognize and enforce ‘is given effect by entering judgment in the amount of the pecuniary obligations, while in others it may simply be by ordering that the award be recognised or take effect as if it were a judgment of the court’.¹³⁰ According to Justice Dias, Article 54(3) of the ICSID is directed at the *execution* of the award, and Article 55 refers to immunity from execution.

She then recognizes the clear distinction between recognition and enforcement, but finds the relationship between the terms *enforcement* and *execution* more ‘elusive’ (similar to the DC Circuit).¹³¹ The equally authentic French and Spanish versions of the ICSID Convention do not make a difference between enforcement and execution, using the same terms: *exécution* and *ejecución*, respectively.¹³² After looking at the Convention’s *travaux* and the writings of Aaron Broches, Justice Dias came to the conclusion that *enforcement* under Article 54 of the ICSID means no more than according the same status to an ICSID award as a final judgment of a national court, but it does not refer to the question of execution, which is left to the domestic laws and courts.¹³³

After looking at the judgment of the HCA in *Infrastructure Services* and the proposed US Restatement of the Law of International Commercial and Investor-State Arbitration, she accepted that the proposed US definitions are correct and consistent with the 2020 UKSC’s decision in *Micula*.¹³⁴ According to the proposed US definitions:

- (a) “recognition” is defined as the court’s determination that an award is “entitled to be treated as binding”, which involves “acceptance of the award’s binding character and its preclusive effects”;
- (b) “enforcement” is defined as “the legal process by which an international award is reduced to a judgment of the court that enjoys the same status as any judgment of that court”;
- (c) “execution” is defined as “the means by which a judgment enforcing an international arbitral award is given effect” commonly by taking measures against the property of the judgment debtor pursuant to a writ of execution.¹³⁵

The HCA in the *Spain v Infrastructure Services* appeal¹³⁶ also embarked on a lengthy discussion of the terms recognition, enforcement, and execution and held that in common parlance—recognized by leading arbitration practitioners—the terms *enforcement* and *execution* are used ‘loosely’ to extend to *execution*.¹³⁷ After a lengthy comparative analysis of other judgments and writings of Mr Broches, the HCA came to the conclusion that there is no real discrepancy between the English, French, and Spanish versions of the ICSID Convention:

¹²⁹ *Border Timbers*, High Court (n 75) para 35.

¹³⁰ *Ibid*, para 36.

¹³¹ *Ibid*, para 41.

¹³² *Ibid*.

¹³³ *Ibid*.

¹³⁴ *Micula and others v Romania* [2020] UKSC 5.

¹³⁵ *Border Timbers*, High Court (n 75) para 47.

¹³⁶ *Spain v Infrastructure Servs*, HCA (n 105).

¹³⁷ *Ibid*, para 42.

The French and Spanish texts are [...] to be understood against the background of the civilian process of *exequatur*, which encompasses both recognition and the step by which a court grants an arbitral award the force of (that is, the same status as) a judgment of the domestic court. The function of the *exequatur* is thus both to recognise the arbitral award and to render the award enforceable in the territory of the issuing State.¹³⁸

From the above, we can conclude that domestic recognition, enforcement, and execution proceedings will normally entail two or three different steps, depending on the jurisdiction (see Table 1). Step 1 (in case of two steps) or Steps 1 and 2 (in case of three steps) will entail the ‘conversion’ of the international arbitral award into a binding and enforceable local judgment or order, an *exequatur* or a *titre exécutoire*. This (combined) step can be named ‘recognition and enforcement’, ‘confirmation’, ‘registration and enforcement’,¹³⁹ etc. This is when the State can invoke immunity from jurisdiction, and the investor will invoke one of the exceptions to it. Under the UK SIA, the domestic courts ‘shall give effect to [jurisdictional immunity] even though the State does not appear in the proceedings in question’.¹⁴⁰ Only once the award is ‘converted’ into an enforceable judgment, order, or title that is not shielded by immunity from jurisdiction, can the attachment of assets (execution) follow, during which immunity from execution will play a role with its own exceptions.

3.4 Which exceptions to jurisdictional immunity should investors invoke? The waiver vs the arbitration exception

The two most common exceptions to jurisdictional immunity in ISDS recognition and enforcement cases are the ‘waiver’ and the ‘arbitration’ exceptions. It is in the investor/award creditor’s interest to invoke both exceptions, in case one of them might be unsuccessful. The conditions that need to be fulfilled for their successful invocation differ in the selected jurisdictions. Even so, some convergence through persuasive, cross-border precedent exists.

3.4.1 The waiver exception

In the USA, a waiver of jurisdictional immunity can be made explicitly or by implication.¹⁴¹ The UK SIA holds that a State can submit to the jurisdiction of UK courts either after the dispute has arisen (either by instituting proceedings or when intervening/taking steps in the proceedings, subject to limitation) or by a ‘prior written agreement’.¹⁴² In case of the latter, the ‘State binds itself in advance to accept the jurisdiction of the court’.¹⁴³ Under the Australian FSIA, a foreign State may submit to the jurisdiction of Australian courts ‘by agreement or otherwise’.¹⁴⁴

In the *NextEra* appeal before the DC Circuit, one of the questions was whether the ratification of the ICSID and the NY Conventions constituted an ‘implicit’ waiver of immunity from jurisdiction, as argued by the investors. The DC Circuit looked at the settled case law of the Second Circuit—according to which the ratification of the NY and ICSID Conventions are waivers of immunity from jurisdiction under the FSIA¹⁴⁵—and a similar conclusion of the HCA in *Spain v Infrastructure Services*.¹⁴⁶ However, it then held that the ‘waiver’ issue remained unsettled in the DC Circuit Court and there was no need for further

¹³⁸ Ibid, para 62

¹³⁹ UK Code of Civil Procedure, Rules 62.17 to 62.21.

¹⁴⁰ UK SIA 1978, sec 1(2).

¹⁴¹ FSIA 1976, sec 1605(a)(1).

¹⁴² UK SIA 1978, sec 2(2).

¹⁴³ Fox and Web (n 2) at 185.

¹⁴⁴ Australian FSIA 1985, sec 10.

¹⁴⁵ DC Circuit, *NextEra v Spain* (n 16) 19.

¹⁴⁶ *Spain v Infrastructure Servs*, HCA (n 105) para 79.

Table 1 The various steps in domestic recognition, enforcement, and execution proceedings.

What happens?	Terms used in 2 steps	Terms used in 3 steps	State immunity
‘Conversion’ of the award into a binding and enforceable judgment, title, order, writ	Confirmation, <i>exequatur</i> , <i>titre exécutoire</i>	Recognition, Registration Enforcement	Immunity from jurisdiction
‘Attachment’ of assets	Execution, attachment, enforcement, <i>exécution forcée</i>	Execution, taking measures against property, attachment	Immunity from execution

clarification since the district courts had jurisdiction under the ‘arbitration’ exception.¹⁴⁷ In other words, whilst the waiver exception is settled before the Second Circuit (New York), it remains to be settled in the DC Circuit. Some quick comments are warranted. Firstly, for investors wishing to rely on the FSIA’s waiver exception, the fact that the Second Circuit considers the ratification of both conventions an implicit waiver provides much-needed clarity. Secondly, while the DC Circuit refused to clarify the issue, the signs are somewhat positive that in the future it might agree with the Second Circuit. Thirdly, whilst there were hopes that the US Supreme Court would clarify in *Amaplat Mauritius Ltd. v Zimbabwe Mining Development Corp* whether the NY Convention constitutes a waiver to adjudicative immunity,¹⁴⁸ on 27 April 2026 the Supreme Court denied the petition.¹⁴⁹

As discussed in Section 3.1, the waiver exception also needed to be clarified by the UKSC, which held that sec 2(2) of the SIA does not require express language that would include terms such as waiver or submission.¹⁵⁰ Furthermore, under Article 54(1) of the ICSID Convention, the waiver followed ‘from the fact that each contracting state has agreed that all other contracting states are obliged to [...] recognise and enforce ICSID awards’.¹⁵¹

The HCA in *Spain v. Infrastructure Services* also came to the conclusion that the ‘express terms of Art 54(1) [ICSID Convention] involve a waiver of immunity from jurisdiction in relation to recognition and enforcement’.¹⁵² In late 2025, Judge Stewart J from the FCA recognized the ICSID awards in *RREEF Infrastructure v Spain*, *9REN v Spain*, *Watkins v Spain*, and *NextEra v Spain* as binding on the respondent State and entered judgment in favour of the investors/award creditors.¹⁵³

Nonetheless, there are differences between US court practice, on the one hand, and UK and Australian practice, on the other. Firstly, in the USA the court—at least the Second Circuit—considers the ratification of the ICSID and New York Conventions as *implicit* waivers, while both the UKSC and the HCA considered the ratification of the ICSID Convention to be a

¹⁴⁷ DC Circuit, *NextEra v Spain* (n 16) 20.
¹⁴⁸ Petition for a Writ of Certiorari, *Amaplat Mauritius Ltd v. Zimbabwe Mining Development Corp*.
¹⁴⁹ *Amaplat Mauritius Ltd., and others, Petitioners v. Zimbabwe Mining Development Corporation, and others*, No. 25-699 <<https://www.supremecourt.gov/docket/docketfiles/html/public/25-699.html>> accessed 29 April 2026.
¹⁵⁰ UKSC [2026] (n 93) para 69.
¹⁵¹ *Ibid*, para 89.
¹⁵² *Spain v Infrastructure Servs*, HCA (n 105) para 75.
¹⁵³ FCA, *Blasket Renewable Investments LLC v Kingdom of Spain (relief)* [2025] FCA 1469, Orders of 26 November 2025 <https://jsumundi.com/en/document/decision/en-9ren-holding-s-a-r-l-v-kingdom-of-spain-judgment-of-the-federal-court-of-australia-2025-fca-1469-wednesday-26th-november-2025#decision_85764> accessed 29 April 2026.

written agreement to waive immunity from jurisdiction. Secondly, the Second Circuit referred to both conventions, while the UK and Australian courts referred only to the ICSID Convention.

However, what about the NY Convention as a potential waiver of jurisdictional immunity in British and Australian courts? In this case, the situation is a bit trickier. For example, the UK Court of Appeal in the *Border Timbers* appeal held that ‘it is by no means clear that interpreting article 54 [of the ICSID Convention] as a submission to the jurisdiction for the purposes of section 2(2) of the SIA would necessarily result in article III [of the NY Convention] also being so interpreted’.¹⁵⁴ The High Court was then called upon to decide on this exact issue in *Devas v India* and referenced the aforementioned statement of the Court of Appeal in *Border Timbers*. It also recalled previous case law that waiver of state immunity by treaty must always be express and concluded that under English law, ‘the ratification of Art III of the NYC is not, on its own, a waiver of state immunity’.¹⁵⁵ It remains to be seen what the Court of Appeal will decide on this matter.¹⁵⁶

The FCA, sitting as the Full Court in the *India v CCDM Holdings (Devas)* appeal of the judgment of the Primary Judge of the FCA, reversed the lower judgment.¹⁵⁷ The Australian courts had to ascertain whether India’s Commercial Reservation to the NY Convention meant that India’s ratification of the NY Convention (because of this reservation) constituted a waiver of state immunity under the Australian FSIA.¹⁵⁸ Primary Judge Jackman J had concluded that India waived its foreign State immunity by ratifying the NY Convention.¹⁵⁹ However, the FCA in Full Court held that the existence of India’s reservation ‘modifies the provision of the [NY Convention] to the extent of the reservation for each party reciprocally’.¹⁶⁰ Thus, India had made a sufficiently (un)equivocal expression of its intention not to waive foreign state immunity in proceedings enforcing the Convention in respect of non-commercial disputes.¹⁶¹

Then, very recently, on 8 April 2026 the HCA handed down a unanimous decision in *CCDM Holdings v India (Devas)* holding that India’s ratification of the NY Convention *did not* constitute a waiver of adjudicative immunity under the Australian FSIA.¹⁶² The HCA concluded that the NY Convention ‘displays neither a clear nor an unequivocal intention that entry into the Convention involves’ a waiver of adjudicative immunity,¹⁶³ which would be required when a State waives its immunity in an international agreement.¹⁶⁴ Such a waiver ‘must be derived from the express words of the agreement (including necessary implications from those words), express words which are lacking in the text of the NY Convention’.¹⁶⁵ Furthermore, no ‘analogy’ could be drawn with the enforcement of awards under the ICSID Convention.¹⁶⁶ The HCA also referred to the limited ‘state practice’ in the USA, UK, and

¹⁵⁴ *Border Timbers Zimbabwe*, Court of Appeal (n 89) para 102.

¹⁵⁵ *CC/Devas (Mauritius)*, High Court (n 98) para 50 with reference to *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147.

¹⁵⁶ This case is still being heard before the Court of Appeal <<https://www.judiciary.uk/live-hearings/cc-devas-mauritius-ltd-ors-appellants-claimants-v-the-republic-of-india-respondent-defendant/>> accessed 29 April 2026.

¹⁵⁷ See S Khandeir, ‘Australian Federal Court Backs India on Sovereign Immunity: Another Twist in the Devas v. India Saga’ (2025) Conflict of Laws <<https://conflictoflaws.net/2025/australian-federal-court-backs-india-on-sovereign-immunity-another-twist-in-the-devas-v-india-saga>> accessed 29 April 2026.

¹⁵⁸ *Republic of India v CCDM Holdings, LLC* [2025] FCAFC 2.

¹⁵⁹ *CCDM Holdings LLC v Republic of India* [2026] HCA 9, para 4 with reference to *CCDM Holdings LLC v Republic of India* [No 3] [2023] FCA 1266.

¹⁶⁰ *Republic of India v CCDM Holdings, LLC* [2025] FCAFC 2, para 67.

¹⁶¹ *Ibid.*, para 72.

¹⁶² *CCDM Holdings LLC v Republic of India* [2026] HCA 9.

¹⁶³ *Ibid.*, para 6.

¹⁶⁴ *Ibid.*, para 34.

¹⁶⁵ *Ibid.*, paras 34–35.

¹⁶⁶ *Ibid.*, paras 45–46.

Canada. To the extent that ‘any degree of common understanding [could] be discerned’ from the foreign jurisdictions, they pointed in the direction that the ratification of the NY Convention does not constitute a waiver of state immunity.¹⁶⁷

In conclusion, the following can be said. As regards the ICSID Convention, and Article 54 more specifically, the highest/higher courts in the three jurisdictions are willing to treat it as a waiver of immunity from jurisdiction. The effects of the ratification of the NY Convention, more specifically Article III, are less clear. The Second Circuit in the USA will treat it as a waiver of jurisdictional immunity, the decision stands, since SCOTUS denied certiorari on this very issue in *Amplat*. The matter is also not yet settled in the UK as the High Court’s judgment in *CCDM (Devas)* is currently under appeal. In Australia, the very recent HCA judgment in *CCDM (Devas)* clarified the previously conflicting interpretations of the FCA. According to the HCA, ratification of the NY Convention does not constitute a waiver of adjudicative immunity.

3.4.2 The arbitration exception, deference, and even some intra-EU matters

If the waiver exception fails, the investors/award-claimants can also rely on the arbitration exception, recognized by the three jurisdictions, albeit pursuant to different statutes and case law.

In *Stileks I*, the DC Circuit referred to its 2015 judgment in *Chevron v Ecuador*¹⁶⁸ to hold that the arbitration exception under 28 U.S.C. § 1605(a)(6) applies if the following cumulative conditions are met: (i) the existence of an arbitration agreement, (ii) an arbitration award, and (iii) a treaty governing award enforcement. The same test was also reiterated by the DC Circuit in the *NextEra* appeal.¹⁶⁹ In both cases, the issue was the existence of an ‘arbitration agreement’, which puts the domestic courts in a very delicate position, especially in ICSID cases in which domestic courts cannot review the awards. However, the question of the existence of an ‘arbitration agreement’ becomes a jurisdictional issue and not one in which domestic courts are asked to review it on the merits.

In *Stileks I*, Moldova argued that the ECT did not give the arbitral tribunal jurisdiction since no ‘investment’ was made. According to the DC Circuit, Moldova conflated the jurisdictional standard of the FSIA with the standard for review under Article V(1)(c) of the NY Convention.¹⁷⁰ The DC Circuit raised a key question: who decides the issue of arbitrability? Relying on unanimous US Supreme Court precedent,¹⁷¹ the Circuit Court held that once the issue of arbitrability was assigned to an arbitral tribunal, a court ‘possesses no power to decide the arbitrability issue’.¹⁷² In other words, since—through the ECT—Moldova agreed to assign arbitrability to the arbitral tribunal, the US court had to accept the tribunal’s determination.¹⁷³ This deferential attitude is in stark contrast to the CJEU’s judgment in *Komstroy*.¹⁷⁴

The sec 1605(a)(6) exception applies in two cases: either the agreement is made by the foreign State ‘with’ a private party or ‘for the benefit’ of one. In *NextEra*, the DC Circuit held that an arbitration provision in an investment treaty cannot be an agreement ‘with’ a private party, but can constitute an agreement ‘for the benefit’ of a private party or could give rise to a separate agreement ‘with’ a private party.¹⁷⁵ The existence of an arbitration

¹⁶⁷ Ibid, para 42.

¹⁶⁸ *Chevron Corp. v Republic of Ecuador* 795 F.3d 200, 204 (D.C. Cir. 2015).

¹⁶⁹ DC Circuit, *NextEra v Spain* (n 16) 20.

¹⁷⁰ *Stileks v Moldova (I)* (n 123) 9.

¹⁷¹ *Henry Schein, Inc. v Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019).

¹⁷² *Stileks v Moldova (I)* (n 123) 10.

¹⁷³ Ibid, 10–11.

¹⁷⁴ Case C-741/19, *République de Moldavie v Komstroy LLC* (Grand Chamber) ECLI:EU:C:2021:655.

¹⁷⁵ Ibid, 22.

agreement ‘with’ or ‘for the benefit of’ a private party is further complicated when intra-EU arbitrations are involved. After discussing how an arbitration is formed under an investment treaty,¹⁷⁶ the DC Circuit in the *NextEra* appeal held that the ECT contained a standing offer to arbitrate and there was no disconnection clause for intra-EU cases to bar such cases.¹⁷⁷ Furthermore, just like in *Stileks I*, the question of whether the ECT applies in intra-EU cases is an argument ‘regarding the scope of the [ECT], not its existence’; questions of scope are not a jurisdictional question for the purposes of the FSIA.¹⁷⁸ There are only two limits to this holding: when an investment treaty does not supply the requisite State consent to arbitration and when there are issues concerning domestic courts’ jurisdiction to enforce arbitration awards, and not issues of the merits, whether they should do so.¹⁷⁹

The DC Circuit applies a deferential approach to the existence of an arbitration agreement for the purposes of the arbitration exception. Thus, the domestic court’s role is to simply ascertain the existence of the agreement and not to decide on its scope or replace an arbitral tribunal’s conclusions on its own jurisdiction, especially when the disputing parties authorized the arbitral tribunal to decide on the issue of arbitrability.

The arbitration exception in sec 9 of the UK SIA covers both proceedings to enforce an arbitral award and all arbitration proceedings to which a State is a party and establishes the jurisdiction of English courts in relation to the proceedings.¹⁸⁰ The High Court in *Border Timbers* held that the arbitration exception under sec 9 ‘raises two issues: first, whether [it] requires or permits the English court to re-examine the jurisdiction of the tribunal (whether an ICSID tribunal or any other tribunal) and, secondly, whether ICSID awards fall to be treated differently from other awards’.¹⁸¹ Justice Dias then held that the statutory exception applies if a State had agreed in writing to submit a dispute to arbitration and that English courts must be ‘independently satisfied that there was an agreement to arbitrate’.¹⁸² Then, in a couple of oddly reasoned paragraphs, the Justice came to the conclusion that even though ICSID awards fall under a self-contained regime, for the purposes of sec 9 of the SIA, they should not be treated differently from other awards, and the claimants had failed to establish the applicability of the arbitration exception.¹⁸³

Unlike Justice Dias, Justice Fraser in *Infrastructure Services* decided differently and was also met with Spain’s intra-EU arguments under *Achmea* and *Komstroy*.¹⁸⁴ According to him, there was nothing within the ECT itself to conclude that it only included a ‘partial offer of arbitration to some investors, but not others, depending on whether those investors were resident within [EU] Member States or elsewhere’.¹⁸⁵ Furthermore, consistent with the UKSC’s decision in *Micula*, the ICSID Convention satisfied the requirements of sec 9 of the SIA and is an agreement in writing by all its contracting States ‘to submit disputes with investors from other States to international arbitration’.¹⁸⁶

On appeal, Lord Justice Phillips held that even though it was unnecessary in his opinion to delve into the sec 9 question, as the waiver exception was held to apply, ‘it is difficult to interpret section 9 of the SIA other than as imposing a duty on the court to satisfy itself that the State in question has in fact agreed in writing to submit the dispute in question to

¹⁷⁶ DC Circuit, *NextEra v Spain* (n 16) 22–23.

¹⁷⁷ *Ibid.*, 24.

¹⁷⁸ *Ibid.*, 25–27.

¹⁷⁹ *Ibid.*, 28.

¹⁸⁰ Fox and Webb (n 2) 204.

¹⁸¹ *Border Timbers*, High Court (n 75) para 83.

¹⁸² *Ibid.*, para 84–87.

¹⁸³ *Ibid.*, para 90.

¹⁸⁴ *Infrastructure Services*, High Court (n 76) para 101.

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*, para 102.

arbitration’.¹⁸⁷ According to him, the ICSID Convention does not supply the relevant arbitration agreement for the purposes of sec 9 of the SIA, while the validity of the arbitration agreement under Article 26 of the ECT, as a matter of international law, was a complex issue \ which he did ‘not propose to embark upon’.¹⁸⁸

The UKSC in *Infrastructure Services/Border Timbers* was also asked to decide whether the arbitration exception applied under sec 9(1) of the FSIA. However, following its conclusions on the applicability of the waiver exception, the UKSC found it ‘unnecessary to determine the remaining ground’ of appeal.¹⁸⁹ Thus, the application of the arbitration exception in English law is not yet settled. What we can deduce is that—unlike the DC Circuit—UK courts might be less willing to be fully deferential to the findings of an arbitral tribunal concerning the existence of an arbitration agreement, and they might be willing to look at the agreement in more detail.

Turning now to Australia, sec 17(2)(b) of the FSIA provides that a 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 an [arbitration agreement]’. Just as the judgments of the lower FCA did, the HCA’s judgment in *Spain v Infrastructure Services* only refers to the waiver exception but not the arbitration exception. The HCA’s and the full FCA’s judgment in *India v CDM (Devas)* also does not refer to sec 17. Thus, for now, the exact contours of the Australian arbitration exception are not defined.

In conclusion, investors seeking to force compliance by challenging a State’s jurisdictional immunity through the arbitration exception are faced with some uncertainty. Whilst the DC Circuit adopts a much more deferential approach to the existence of an arbitration agreement and will not second guess the conclusions of the arbitral tribunal, the contours of the arbitration exception in the UK and Australia are less defined.

3.5 What about immunity from execution?

In Switzerland the courts tend to view the exceptions to jurisdictional immunity as also applying to execution immunity.¹⁹⁰ However, the International Court of Justice in its 2012 judgment in *Jurisdictional Immunities of the State* held that ‘any waiver by a State of its jurisdictional immunity before a foreign court does not in itself mean that that State has waived its immunity from enforcement as regards property belonging to it situated in foreign territory’.¹⁹¹ As we have seen in Section 3.1, the statutory instruments in the USA, UK, and Australia also differentiate between sovereign immunity from jurisdiction and from execution, and the exceptions that apply to them. This means that investors have a double hurdle. If they are successful in proving that jurisdictional immunity does not apply—most commonly by relying on the waiver and/or arbitration exceptions—they will still need to prove exceptions to execution immunity.

Execution immunity and exceptions to it are quite well covered in the literature. Brenninkmeijer and Gélinas, in their 2022 article, made a compelling argument that the hurdles imposed by immunity from execution in arbitration between States and private parties are misplaced and impose ‘an unjustified limit on the rule of law’.¹⁹² In his 2023 article,

¹⁸⁷ *Border Timbers Zimbabwe*, Court of Appeal (n 89) para 105.

¹⁸⁸ *Ibid*, para 106.

¹⁸⁹ UKSC [2026] (n 93) para 144.

¹⁹⁰ Fox & Webb (n 2) 480, 487.

¹⁹¹ ICJ, *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* [2012] ICJ Rep 99. See also M Wood, ‘Immunity from Jurisdiction and Immunity from Measures of Constraint’ in R O’Keefe and CJ Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (OUP 2013).

¹⁹² Brenninkmeijer and Gélinas (n 2).

Dautaj focused on immunity from execution in the USA, arguing that an arbitral award creditor ‘must demonstrate both that the property is in the US and that the property is being used for a commercial activity in the US [...] The award creditor must then either seek to attach and execute against State assets on the basis of confirming an arbitral award or on the basis of an [explicit or implicit] waiver, if applicable’.¹⁹³ Among the hurdles award creditors face, Dautaj identified the application of the waiver and arbitration exceptions to immunity from execution, the question of what constitutes commercial property, the issue of mixed (sovereign and commercial assets), as well as the property of State ‘instrumentalities’, like State-owned enterprises (SOEs).¹⁹⁴

The interplay between immunity from execution and the property of SOEs/sovereign wealth funds in the USA and the UK was analysed by Argentini, who also focused on pre- and postjudgment attachment.¹⁹⁵ In the UK, the key provision for execution immunity is sec 13(2) SIA pursuant to which the investor must show that the property is ‘for the time being in use or intended for use for commercial purposes’. Prejudgment attachment is allowed ‘only with the written consent of the State, whereas postjudgment execution can be ordered on the basis of the commercial purpose of the assets to be attached’.¹⁹⁶ Looking at Australia, Douglas and Carr in their 2017 article, presented in detail the ‘commercial exception’ to state immunity, which applies to both immunity from jurisdiction and execution. However, the exact contours of this exception are left to the courts to decide.¹⁹⁷

Given the thoroughness of the existing literature on execution immunity in the jurisdictions analysed, this section only focuses on newer, post-2020 developments, which touch upon issues not previously covered in the literature. Most of the cases analysed refer to immunity from jurisdiction, but not execution. For example, in *Stileks I* and *Nextera* the DC Circuit was not faced with execution immunity under the FSIA.

As mentioned above, English High Court Justice Dias embarked on a lengthy analysis of the three different terms (recognition, enforcement, and execution) under Articles 54–55 of the ICSID Convention and held that Article 54(1) of the ICSID Convention was not intended to amount to waiver of state immunity ‘in relation to processes of execution against States’.¹⁹⁸ Furthermore, Zimbabwe could rely on execution immunity to ‘resist any attempts by the Claimant to proceed beyond mere registration towards execution’.¹⁹⁹ In *Infrastructure Services*, High Court Justice Fraser clarified that the application of the claimants did not entail ‘consideration of any execution upon Spain’.²⁰⁰ He also relied on the HCA judgment in *Infrastructure Services* to conclude that Articles 53 to 55 of the ICSID Convention amounted to a waiver of jurisdictional immunity but *not* execution immunity.²⁰¹ Relying on the HCA, the UK Court of Appeal in *Border Timbers* also delved into the distinction between the terms recognition, enforcement, and execution and confirmed that the ICSID Convention, due to the express and clear wording of Article 55, did not amount to a waiver of execution immunity.²⁰²

Also as mentioned above, the UKSC acknowledged in *Infrastructure Services/Border Timbers* that while the terms enforcement and execution were not clearly defined in the ICSID Convention, the Convention drew a sharp distinction between recognition and enforcement,

¹⁹³ Dautaj (n 2) 115.

¹⁹⁴ With reference to *Crystallex Int’l Corp. v Bolivarian Republic of Venez.*, 932 F.3d 126, 139 (3d Cir. 2019).

¹⁹⁵ M Argentini, *Sovereign Wealth Funds and State Immunity* (Brill/Nijhoff 2025) Ch 7.

¹⁹⁶ *Ibid.*, 161.

¹⁹⁷ Douglas and Carr (n 43).

¹⁹⁸ *Border Timbers*, High Court (n 75) para 62

¹⁹⁹ *Ibid.*, para 118.

²⁰⁰ *Infrastructure Services*, High Court (n 76) para 56.

²⁰¹ *Ibid.*, para 115.

²⁰² *Border Timbers Zimbabwe*, Court of Appeal (n 89) paras 74–77.

on the one hand, and execution on the other.²⁰³ Whilst the preceding cases did not reference sec 13(3) of the SIA that governs the exceptions to execution immunity, the UKSC touched upon that provision. It referred to the Court of Appeal case in *General Dynamics v State of Libya*²⁰⁴ (later upheld by the UKSC²⁰⁵) in which Justice Phillips held that Libya had waived its execution immunity under sec 13(3) SIA pursuant to the contract it concluded with the investor, which was governed by Swiss law.²⁰⁶ However, one should not draw the conclusion from this case that the ICSID Convention also amounts to a waiver of execution immunity under sec 13(3) of the SIA, given the express wording of Article 55 of the ICSID Convention.

Sec 13(3) of the SIA also arose in an ancillary manner in the enforcement of the *Devas* award before the High Court. The claimants argued that the use of the term ‘enforce’ under Article III of the NY Convention ‘may well go beyond adjudicative jurisdiction and constitute consent to enforcement under s. 13(3)’.²⁰⁷ In this case, the claimants equated enforcement with execution. Sir William Blair held that even though ‘this is not a question arising for decision’, it ‘raises some considerable questions, given the clear distinction between adjudication and enforcement, and possible unintended consequences’, giving the example of the protected assets of foreign central banks, an issue on which he ‘did not express a view’.²⁰⁸ As a preliminary conclusion, UK courts seem not to be inclined to view Article 55 of the ICSID as a waiver of execution immunity,²⁰⁹ while the question of whether Article III of the NY Convention constitutes such a waiver remains to be decided. There is a possibility that this will not be the case, since Sir William concluded that it did not amount to a waiver of immunity from jurisdiction.

The HCA case in *Infrastructure Services* is also worth mentioning, as both the UK and US courts referred to it. In the first instance case of *Eiser Infrastructure v Spain* before the FCA, the primary judge held that Articles 53–55 of the ICSID constituted a waiver from immunity from recognition and enforcement, but not from execution. Still, the FCA ordered Spain to pay the damages. The Full Court of the FCA upheld the conclusions concerning the ICSID Convention and execution immunity, but partially reversed this decision, since the primary judge went too far by ordering Spain ‘to do something’.²¹⁰ One of the issues raised before the HCA on appeal was whether Spain’s ‘amenability to jurisdiction [was] limited to “bare recognition” of the award, or to “recognition” and “enforcement” of the award’.²¹¹ The HCA argued that the FCA Full Court’s judgment properly characterized it as an order of recognition and enforcement; however, this conclusion ‘leaves unaffected any foreign State immunity enjoyed by Spain in relation to execution’, since Articles 53–55 ICSID did not amount to such a waiver.²¹² Moreover, there were no issues in the proceedings that concerned immunity from execution, including any exceptions to it or the relationship between execution immunity and commercial property.²¹³

Later, in *CCDM (Devas)*, the HCA held that Article 55 of the ICSID Convention was inserted to preserve State immunity ‘only’ from execution.²¹⁴ Furthermore, the FCA orders in *RREEF*

²⁰³ UKSC [2026] (n 93) para 87.

²⁰⁴ [2025] EWCA Civ 134.

²⁰⁵ *The State of Libya (Appellant) v General Dynamics United Kingdom Limited (Respondent)* [2025] UKSC/2025/001.

²⁰⁶ [2025] EWCA Civ 134, para 32.

²⁰⁷ *CC/Devas (Mauritius)*, High Court (n 98) para 79.

²⁰⁸ *Ibid.*

²⁰⁹ Reece Thomas and Gültutan argue that Article 55 ICSID ‘would need to be amended to allow the enforcers entry into the protected realm of state assets except, for instance, assets that are regarded as commercial assets’. See Reece Thomas and Gültutan (n 89) 25.

²¹⁰ *Kingdom of Spain v Infrastructure Services Luxembourg Sarl* (2021) 284 FCR 319 at 336 [65].

²¹¹ *Spain v Infrastructure Servs*, HCA (n 105) para 7.

²¹² *Ibid.*, para 9.

²¹³ *Ibid.*

²¹⁴ *CCDM Holdings LLC v Republic of India* [2026] HCA 9, para 47.

Infrastructure v Spain, *9REN v Spain*, *Watkins v Spain*, and *NextEra v Spain*, while entering the judgment in favour of the investors/award creditors and mentioning the actual sums and penalizing interest of the pecuniary obligations, also clearly state that nothing in the orders ‘shall be construed as derogating from the effect of any law relating to immunity of the respondent from execution’.²¹⁵ In other words, execution immunity must still be defeated by the claimants. What we can conclude is that UK and Australian courts will not consider Articles 53–55 of the ICSID as waivers of execution immunity. Thus, investors/award creditors will need to find another mechanism through which to have execution immunity waived. Whether or not Article III NY Convention amounts to such a waiver is still undecided, but signs from the UK High Court indicate that this might not be so.

3.6 The burden of proof

Since all three jurisdictions distinguish between the two types of state immunity and the applicable exceptions, the burden of proof needs to be satisfied twice. It is also logical that the investors bear the burden of proof, since they are the ones invoking an exception to state immunity. However, the DC Circuit in *Nextera* held that in assessing whether the three-legged *Chevron* test is satisfied for the application of the arbitration exception, a ‘burden-shifting framework’ must be used for such ‘jurisdictional facts’. According to the DC Circuit:²¹⁶

The plaintiff must initially satisfy a *burden of production* as to these facts, which when met requires the foreign sovereign to “establish the absence of the factual basis by a *preponderance of the evidence*.”²¹⁷

In its *amicus* brief, the USA objected to the *Chevron* burden-shifting framework, arguing that the plaintiff, ‘as the party invoking the federal courts’ jurisdiction, must satisfy *both* the burden of production and persuasion’ (emphasis added).²¹⁸ The DC Circuit wished not to revisit this framework since it was bound by it and the plaintiff companies had satisfied the burden of persuasion.

In the original *Chevron v Ecuador* judgment,²¹⁹ the DC Circuit’s burden-shifting framework is discussed in more detail. Thus, the claimant ‘bears the initial burden of supporting its claim that the FSIA exception applies’, which only entails a burden of production. For the arbitration exception, this burden of production is met when the claimant investor produces the underlying BIT, its notice of arbitration against the State, and the arbitral award. At this point, the burden shifts, and the State now has the burden of persuasion, ‘which must establish the absence of the factual basis by a preponderance of the evidence’.²²⁰ In other words, the investor/claimant must *prima facie* show that an arbitration agreement exists at which point the burden shifts to the State to demonstrate ‘by a preponderance of evidence’ that no valid arbitration exists.²²¹

This approach of the DC Circuit seems reasonable as it strikes a balance between investors and host States. It is important to recall that when faced with exceptions to state immunity, courts are primarily dealing with jurisdictional issues and not standards of review of the awards or issues of arbitrability. Thus, for the FSIA’s arbitration exception to apply (a

²¹⁵ See n 153.

²¹⁶ DC Circuit, *NextEra v Spain* (n 16) 21.

²¹⁷ *Ibid* (emphasis added).

²¹⁸ *Ibid*.

²¹⁹ *Chevron Corp. v Ecuador*, 795 F.3d 200, 205 & n.3 (D.C. Cir. 2015). Ecuador later also submitted a petition to the Supreme Court for a writ of certiorari.

²²⁰ DC Circuit, *NextEra v Spain* (n 16) 7.

²²¹ *Ibid*, 7–8.

jurisdictional matter), an investor should not also need to prove why the underlying arbitration agreement is valid. The existence of the underlying BIT which contained the standing offer to arbitrate, the investor's notice of arbitration, but most importantly, the existence of an actual arbitration award should be ample *prima facie* evidence that such an award could not have been rendered without a valid arbitration agreement. It is only at this point that the State must then persuade the court why it considers that an arbitration agreement did not exist.

Looking at UK statutory law, sec 1 of the 1966 Arbitration Act, implementing the ICSID Convention, provides that registration of an ICSID award at the High Court for the purposes of recognition or enforcement is 'subject to proof', and the High Court can prescribe the matters to be proved and the manner to prove them, in particular by furnishing a copy of the award. Sec 2 (waiver exception) and 9 (arbitration exception) of the SIA are silent on the burden and standard of proof. The UK judgments analysed mention the burden of proof in passing or not at all. For example, the High Court in *Border Timbers*, relying on precedent,²²² held that the 'applicant bears the burden of proving the application of an exception on the balance of probabilities'.²²³ This standard of proof applies in civil and commercial cases, and—unlike the 'beyond reasonable doubt' standard used in certain criminal cases—requires only the slightest tip of the balance to decide who wins the case.²²⁴ In the *Devas* enforcement case before the High Court, the claimant investors and the respondent State disagreed on whether the burden of proof for the application of the waiver exception had been adequately discharged by India, since it alleged that investment treaty arbitration was a commercial matter under its reservation to the NY Convention.²²⁵ The claimants requested that English law apply and its presumption of similarity of foreign law.²²⁶ Sir William did not wish to delve further on this matter as the presumption of similarity of foreign laws is fact-specific and there are 'no hard and fast rules as to when it may be properly employed'.²²⁷ The burden of proof was not specifically handled by the Australian judgments analysed.

Before moving on to Section 4, some comments are warranted. Firstly, the foreign State has a different obligation under US and UK law when it comes to proving state immunity. In the USA, the foreign State has the burden to produce evidence in support of a claim of immunity. Thus, once the foreign State presents *prima facie* evidence that it is protected by state immunity, the burden shifts to the award creditor to show that one of the FSIA exceptions applies.²²⁸ This is different from the UK statutory requirement that UK courts shall give effect (*proprio motu*) to state immunity 'even though the State does not appear in the proceedings in question'.²²⁹

Secondly, investors or award creditors first need to defeat immunity from jurisdiction. Proving the exceptions that apply to jurisdictional immunity will require satisfying separate conditions for the waiver and the arbitration exceptions, thus necessitating two separate burdens of proof if both exceptions are invoked. At this stage of the proceedings, the DC Circuit Court's approach to the proof of the exceptions seems reasonable. The invocation of

²²² *Al Masarir v Saudi Arabia* [2022] EWHC 2199 (QB).

²²³ *Border Timbers*, High Court (n 75) para 10; see also Webb and Fox (n 2) 232.

²²⁴ Oxford Reference, 'Balance of Probabilities'.

²²⁵ *CC/Devas (Mauritius)*, High Court (n 98) para 96.

²²⁶ 'The "presumption of similarity", which applies when a foreign law is relied on but is for some reason not proved by the evidence before the Court. There is (or may be) then a rebuttable presumption that the foreign law is the same as English law. The presumption can be used to fill gaps in expert evidence, as well as when there was no evidence of foreign law at all.' See G Wheeler KC, 'Proof of Foreign Law after *Brownlie*' (2022) Fountain Court.

²²⁷ *CC/Devas (Mauritius)*, High Court (n 98) para 97.

²²⁸ Fox and Webb (n 2) Ch 8.

²²⁹ SIA 1978, sec 1(2).

exceptions to jurisdictional immunity in recognition and enforcement cases is a jurisdictional question and should not be confused with a review of the award and issues concerning arbitrability (which is not even allowed under the ICSID Convention). Thus, once the award creditor/investor makes a *prima facie* case for the application of the exceptions, the burden should then shift to the State to prove why they do not apply. When proving the existence of an arbitration agreement, the arbitral award should be sufficient *prima facie* proof that there was a valid arbitration agreement, as arbitral tribunals are competent to decide on their own jurisdiction.

Thirdly, the last hurdle for the claimants is to defeat immunity from execution. The burden rests on the claimants to prove the exceptions to execution immunity and that the property is used as or intended to be used as commercial property.²³⁰ As Dautaj notes, here the approach tends to be more State friendly, and investors will struggle to prove that there are State assets that can be attached and that they are for a commercial purpose.²³¹

4. State immunity and compliance

Until more recent studies²³² have shed light on compliance with ISDS awards, one of the long-held assumptions was that States comply with adverse awards. Why would they not? They had willingly taken on international commitments that they should honour. Furthermore, not complying would carry reputational costs, which would deter future investments. However, we now have a better understanding of the postaward phase and the issues that arise.

Firstly, there is often a *lack of transparency and knowledge* as to whether compliance had occurred. As recent studies have shown, for almost half of ISDS awards issued against the host State, there are no data on compliance, and even for the ones for which data exist, gathering it becomes a tedious task.²³³

Secondly, there are now well-known cases of *non-compliance*,²³⁴ especially among EU Member States following the CJEU's *Achmea* and *Komstroy* judgments that made intra-EU BIT and ECT awards unenforceable in EU Member States. The DC Circuit in *Nextera* mentioned that according to the *amicus brief* of several investment law scholars, Spain 'now leads the world in noncompliance with investor-State awards', owing more than USD 1.3 billion for 16 unpaid investor-State awards.²³⁵

Thirdly, there is a high level of *complexity* in the postaward phase, several sides of which have only recently been clarified. We have known about domestic set-aside proceedings for non-ICSID cases and ICSID annulments, but there is also the issue of postaward settlements (which are not public)²³⁶ as well as the effects of non-compliance, which result in complex domestic recognition and enforcement cases that mushroom in different jurisdictions.²³⁷ For example, as discussed, the enforcement of the *Devas*, *Eiser (Infrastructure Services)*, and the *NextEra* awards is being pursued, simultaneously, in multiple jurisdictions, and the two types of sovereign immunity become real obstacles to enforcement and execution, leading to even lengthier and more numerous domestic proceedings.

²³⁰ Fox and Webb (n 2) at 506.

²³¹ See the discussion on the 'nature' and 'purpose' of the act when it comes to a 'commercial activity'. Dautaj (n 2) 106–107.

²³² See (n 1) and (n 3).

²³³ Strain and others (n 1).

²³⁴ Lavranos (n 3).

²³⁵ 'Amicus Brief of International Scholars in Support of Appellee and Affirmance' in the *NextEra* appeal, 30.

²³⁶ St John and others (n 1); Chernykh and Sattorova (n 1).

²³⁷ Gáspár-Szilágyi (n 13).

Considering this broader context, outlined above, the issue of state immunity and how it applies to the enforcement of ISDS awards becomes important for several reasons.

Firstly, the *effectiveness* of a dispute settlement system can also be measured by how widespread compliance is.²³⁸ If losing parties choose not to comply voluntarily with an adverse judicial decision, in most domestic systems, various mechanisms exist to force compliance through an enforceable judgment/order that can result in the attachment of assets if compensation is involved. However, for ISDS awards, the international award first needs to be recognized/confirmed as a binding, local judgment/decision, which then must be given an enforceable quality, after which State property might be attached. However, because the losing party is a State, the two types of state immunity, conflicting domestic judgments, ill-defined judicial concepts, and a mix of international, statutory, and case law turn this endeavour into a lengthy and often gargantuan task undermining the effectiveness of investment treaty arbitration. By way of example, the *Infrastructure Services* and *Border Timbers* ICSID awards were registered by the High Court of England and Wales in 2021, and their recognition and enforcement were challenged before the High Court, Court of Appeal, and the UKSC, adding 5 more years of litigation after the handing down of the award. However, those extra years of litigation have only clarified the waiver of adjudicative immunity but have yet to clarify the potential lifting of execution immunity. One should recall that 13 years have already passed since the constitution of the *Infrastructure Services* tribunal and 15 years since that of the *Border Timbers* tribunal. In other words, we should reassess long-held views that investment treaty arbitration, unlike other methods of international dispute settlement, somehow creates a system which ensures quick and effective dispute settlement through which investors' claims are easily satisfied.

Secondly, complex domestic recognition and enforcement cases involving yet-to-be-settled and diverse domestic rules are likely to change *investors' prelitigation* and *postaward behaviour*. For the prearbitration phase, the more these domestic recognition and enforcement cases drag on, the more the message will be that investors should think twice before pursuing investment treaty arbitration against certain non-complying States; in the case of non-voluntary compliance, forcing the State to comply will lead to increased costs, and the different State immunity rules might not guarantee a positive outcome. Investors might also be keener to conclude contracts with the State when making the investment, providing for contract-based arbitration, which would at least more easily satisfy some of the exceptions to state immunity (see the UK enforcement of the aforementioned *General Dynamics v. Libya* contractual arbitration award). In the postarbitration phase, knowing the complexities that follow from voluntary non-compliance, investors might sell their awards at a discount to others, who will then pursue enforcement (see Blasket's takeover of the enforcement of multiple arbitration awards). Or they might use the award as a bargaining tool for a mutually agreeable (but non-transparent) settlement.²³⁹ For the State as well, being dragged into multiple foreign jurisdictions to have an award enforced against them will be onerous.

Thirdly, state immunity rules will also indirectly affect how compliance is measured. Recent empirical studies that seek to measure compliance with adverse ISDS awards need to answer two important questions: what is meant by compliance and how does one measure it? Even if we use a more restrictive and legal definition of compliance²⁴⁰ that neglects, for example, postaward bargaining and settlements, one is still faced with the issue of *voluntary*

²³⁸ See Ø Stiansen, 'Directing Compliance? Remedial Approach and Compliance with European Court of Human Rights Judgments' (2021) 51 *British J of Pol Science* 899.

²³⁹ St John and others (n 1); Chernykh & Sattorova (n 1).

²⁴⁰ Gáspár-Szilágyi (n 15) 133–137.

and *forced* compliance. If a State voluntarily complies with an adverse award, the conclusion is simple. Compliance has occurred. However, what if the State eventually complies, but only after several dozen cases in half-a-dozen, different jurisdictions, where every small issue and exception concerning state immunity is appealed, then remanded to a lower court, then appealed again? In such a case, did compliance occur? And if so, how many years does one have to wait to be able to measure it? Or do we just say that only voluntary compliance counts as compliance? This is not just an academic question, as investors (and more specifically their legal representatives) and third-party funders will not only look at the chances of success of an arbitration, but also the ability to recover the damages in case the State does not voluntarily comply.²⁴¹

Brenninkmeijer and Gélina made a compelling argument that an agreement to arbitrate ‘should ultimately have the presumptive effect of waiving immunity from execution’.²⁴² It has been argued in the literature that the absolute understanding of state immunity slowly gave way to a more restrictive understanding, since the functions of the State had changed and expanded.²⁴³ However, even this restrictive understanding is subject to two different types of state immunity that in the USA, UK, and Australia oblige investors to separately prove exceptions to them. And, as we have seen, tackling the ‘easier’ issue of jurisdictional immunity is sometimes unsuccessful and results in protracted domestic litigation. Domestic courts are put in a difficult position since they have to, on the one hand, balance their obligations arising under the ICSID and NY Conventions against their domestic rules on state immunity, and on the other, accept the possibility that an enforceable decision might not always lead to a remedy or satisfaction.

5. Conclusions

To conclude, sovereign immunity in both its forms is here to stay in all three jurisdictions. However, due to some host States’ choice not to comply with adverse ISDS awards, it is very likely that we will see even more US, UK, and Australian domestic cases in which the relationship between state immunity and the recognition, enforcement, and execution of ISDS awards will need further clarification. There are positive signs that between the three common law jurisdictions, there is and will be some level of convergence, primarily due to cross-border ‘persuasive precedent’, judicial dialogue, and investors trying to enforce the same awards in all three jurisdictions. Some issues, such as whether Articles 53–55 of the ICSID Convention represent exceptions to jurisdictional immunity, have mostly been settled in all three countries in the affirmative, even though the Australian and UK courts consider the ratification of the ICSID Convention as satisfying the requirements of their domestic ‘waiver’ exception, while US courts prefer to treat it as satisfying their ‘arbitration’ exception to jurisdictional immunity.

Still, investors are faced with several challenges. The same issue is often interpreted completely differently by judges of the same domestic courts, issues which then have to be clarified on appeal, and often, even following a second appeal. Furthermore, in federal countries like the USA, some issues—such as whether Article III NY Convention constitutes an exception to jurisdictional immunity—have been clarified by one Circuit Court, but not others. This issue is also not fully clarified in UK and Australian jurisprudence, but so far the cases

²⁴¹ Insights on third-party funding shared by Ayse Yasir during her presentation at the 2025 Academic Forum on ISDS conference, EUI and University of Oslo (April 2025).

²⁴² Brenninkmeijer and Gélina (n 2).

²⁴³ *Ibid.*, 550–551.

show that these courts are not willing to treat the ratification of the NY Convention as a waiver of jurisdictional immunity.

Then there is also divergence between the jurisdictions when it comes to the conditions for the application of the waiver and arbitration exceptions, and—depending on the jurisdiction—there is more clarity on the application of one exception compared to the other. The ongoing difficulty for investors to defeat execution immunity is another hurdle, but there are some positive developments at the DC Circuit when it comes to the burden of proof for the application of the arbitration exception to jurisdictional immunity.

The ongoing cases and discussions are of course not just important for academic purposes and how we view the postaward phase and how compliance with ISDS awards is measured, but overly onerous state immunity rules will make it difficult for investors to force non-willing losing States to comply with ISDS awards. This in turn can undermine the effectiveness of ISDS and change investors' prearbitration and postaward behaviour.

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