ALERTER

Supreme Court rejects ICSID State Immunity arguments

No bar to registration of ICSID arbitral award

Patrick Green KC
Kate Gardiner

The Supreme Court has unanimously ruled that foreign States cannot rely upon state immunity to set aside the registration in England of an ICSID international investment treaty arbitration award, under the Arbitration (Investment Disputes) Act 1966.

The decision in ***Infrastructure Services Luxembourg & Anor v The Kingdom of Spain; Border Timbers Limited & Anor v Republic of Zimbabwe*** [2026] UKSC 9 (available here), reinforces the pro-arbitration stance of the English courts and accords with the UK's international obligations, applying its previous decision in ***Micula & Ors v Romania***.

Patrick Green KC was instructed by Kobre & Kim and leading Andrew Stafford KC and Richard Clarke of Kobre & Kim as well as Professor Philippa Webb (of Twenty Essex), appeared on behalf of the successful respondent, Infrastructure Services Luxembourg S.a.r.l..

Kate Gardiner assisted in the Court of Appeal below.

Key Point Summary

Under Section 2(2) of the State Immunity Act 1978, Spain had agreed to submit to the jurisdiction of the English courts via a prior written agreement, by its agreement to the obligations in the ICSID Convention. So had Zimbabwe. Considering Section 9 of the 1978 Act was unnecessary.

Introduction

On 4 March 2026, the Supreme Court handed down judgment in *Infrastructure Services Luxembourg & Anor v The Kingdom of Spain; Border Timbers Limited & Anor v Republic of Zimbabwe* [2026] UKSC 9. The Court unanimously held that foreign States cannot rely upon the principle of state immunity to set aside the registration in England of an international investment arbitration award under the Arbitration (Investment Disputes) Act 1966 (the "**1966 Act**").

The relevant provisions in the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "**Convention**") were clear and, properly interpreted under the principles in articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969 (the "**Vienna Convention**") amounted to a waiver of immunity under Section 2(2) of the State Immunity Act 1978 ("**SIA**"), which did not require the use of explicit words such as "waiver" or "submission".

In short, the decision is major win for holders of awards issued by the International Centre for Settlement of Investment Disputes ("**ICSID**") generally. The Supreme Court essentially upheld the original decision of Fraser J (as he then was) on this point – also upheld by the Court of Appeal.

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Factual Background

In 2018, Infrastructure Services Luxembourg S.a.r.l and Energie Thermosolar B.V (together, the "**ISL claimants**") obtained an arbitral award worth €101 million (the "**ISL Award**") against Spain under the Energy Charter Treaty, in relation to changes to Spain's tariff advantage scheme for solar energy. The ISL Award was issued by an ICSID arbitral tribunal pursuant to the Convention, as a result of an offer of arbitration in Article 26 of the Energy Charter Treaty, accepted by the ISL parties.

In June 2021, the High Court granted the ISL claimants' application for registration of the ISL Award under the 1966 Act. Spain subsequently applied to set aside the registration order on the grounds of state immunity under section 1 of the SIA. In May 2023, Fraser J dismissed Spain's application, holding that Spain was not entitled to claim state immunity under the 1966 Act, under both s.2(2) and s.9 of the SIA.

In *Border Timbers Limited & Anor v Republic of Zimbabwe*, the underlying treaty was a bilateral investment treaty. However, Dias J reached a similar conclusion, dismissing Zimbabwe's application to set aside the registration of an ICSID award on the grounds of state immunity, albeit for very different reasons from those of Fraser J, namely that registration was not an exercise of adjudicative jurisdiction (a proposition which neither party before her supported).

Both sovereign States subsequently appealed to the Court of Appeal, and on 22 October 2024, the Court of Appeal handed down judgment in those appeals which were heard together ([2024] EWCA Civ 1257), unanimously ruling that foreign States cannot rely upon state immunity to set aside the registration in England of an ICSID international investment treaty arbitration award, under the Arbitration (Investment Disputes) Act 1966 because they had submitted to the jurisdiction for the purposes of s.2(2) SIA.

After permission to appeal was granted to the sovereign States by the Supreme Court, the appeal was heard from 1 to 3 December 2025.

Legal Framework

The Convention is an important international treaty, with 158 Contracting States, governing the resolution of certain investment disputes which conventionally involve a foreign investor bringing an arbitral claim against its host state for alleged breaches of investor protections contained in bi-lateral or multi-lateral international investment treaties. A key point is that ICSID arbitral awards can be registered in Contracting States and are then to be given effect as final judgments under the domestic law of each State, but the Convention preserves any state immunity arguments on enforcement. By Article 69 of the Convention, all Contracting States agreed to give those provisions effect in their respective domestic law.

In accordance with the obligations to do so, the United Kingdom gave effect to the Convention in domestic law by the 1966 Act, and whilst the 1966 Act does not give the Convention direct application in the United Kingdom, the Supreme Court had previously held, in *Micula v Romania*, that the 1966 Act should be read consistently with the Convention and so as to give effect to the Convention.

In *ISL v Spain*, the underlying treaty was the Energy Charter Treaty ("**ECT**") which is a multi-lateral treaty, containing investor protection provisions and, at Article 26, provision for arbitration, which (on the facts) meant that the parties agreed to submit to ICSID under the framework of the Convention (although Spain disputed the effect of this clause, by reason of the *"intra-EU objection"* of the CJEU to arbitration of investor state disputes).

CONVENTION PROVISIONS IN ISSUE

Article 53 provides that ICSID awards shall be binding and complied with and shall not be subject to any appeal or other remedy outside the Convention. Article 54 of the Convention provides that each contracting state shall recognise an ICSID award as

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binding and enforceable as if it were a final judgment of its domestic courts.

Finally, Article 55 of the Convention expressly provides that Article 54 does not derogate from a contracting state's domestic law on state immunity on enforcement – the provisions, read together, making a sharp distinction between registration and enforcement.

SIA PROVISIONS IN ISSUE

The SIA gives foreign States immunity from the jurisdiction of courts of the United Kingdom, except as provided for in sections 2 to 11 of the SIA 1978. The key relevant sections in issue in these appeals were:

i. Section 2(2), which provides that a state may submit to the jurisdiction of the English courts via a prior written agreement; and
ii. Section 9(1), which provides that a state is not immune if it has agreed in writing to submit a dispute to arbitration, as respects proceedings which relate to an arbitration.

The Court of Appeal below held that:

i. Article 54(1) of the ICSID Convention constitutes a prior written agreement by which the contracting States to the ICSID Convention had submitted to the jurisdiction of the courts of other contracting States, meaning that the exception in Section 2(2) SIA was engaged; and
ii. It was therefore not necessary to decide whether Section 9 of the SIA applied, but it was difficult to interpret that section as other than imposing a duty on the English court to satisfy itself that the state in question had in fact agreed in writing to submit the dispute in question to arbitration.

The sovereign States then appealed in relation to both Section 2(2) and Section 9 SIA.

Section 2(2) SIA is satisfied by the sovereign States becoming signatories to article 54(1) of the ICSID Convention, meaning that the sovereign States thereby waived immunity

The first issue before the Supreme Court was whether the States' agreement to be bound by article 54(1) of the ICSID Convention constituted a prior written agreement to submit to the jurisdiction under Section 2(2) SIA such that the States had waived their right to sovereign immunity.

The Court held that in order to waive immunity by treaty, there must be a '*clear and unequivocal expression of the state's consent to the exercise of jurisdiction*'; the test is '*whether the words used necessarily lead to the conclusion that the state has submitted to the jurisdiction*' [69].

The Court found support for this conclusion from:

i. *Ex parte Pinochet Ugarte (No 3)* [1999] UKHL 17, where a majority concluded that the express terms of the Convention against Torture could convey an unequivocal agreement that immunity *ratione materiae* should not apply to acts of official torture – and that it was a necessary consequence of the express provisions of the Convention against Torture that there was no immunity in respect of the conduct concerned [70] and [109];
ii. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 43, where the ICJ derived from the express obligations of the Convention on the Prevention and Punishment of the Crime of Genocide a duty not to commit genocide, despite the literal wording of the article only requiring contracting parties to prevent and punish the crime of genocide [71].

In order to determine whether the sovereign States had in fact waived immunity, the Court had to consider the proper interpretation of articles 53 to 55 of the ICSID Convention, interpreted in accordance with customary international law principles on treat

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interpretation as codified in the Vienna Convention on the Law of Treaties.

Article 54(1) ICSID provides that '*each contracting state shall*' recognise an award as binding and enforce the award within its territories as if it were a final judgment of a court in that state. The Supreme Court concluded that the ordinary meaning of that wording was that each contracting state consents to awards to which it is a party being recognised and enforced in other contracting States, which, on its face, is inconsistent with the preservation of adjudicative immunity [82].

The Supreme Court further noted that there was no express preservation of adjudicative immunity [88] and that the obligations to recognise and enforce undertaken by States under ICSID were '*undertaken on a mutual and reciprocal basis*' [89], concluding that those obligations are '*inconsistent with the maintenance of immunity*' [92].

The Supreme Court found support for this conclusion in the treaty context, as previously considered in the Supreme Court's decision in *Micula v Romania* [2020] UKSC 5, [2020] WLR 1033 ([97]-[105]) and the object and purpose of the ICSID Convention ([106]-[118]). Further, the *travaux préparatoires* of the ICSID Convention confirmed the meaning of Article 54(1) ([119]-[134]):

i. There was a clear intention that state immunity from execution be preserved, which was addressed by the introduction of Article 55;
ii. By contrast there was nothing in the *travaux préparatoires* which suggested that state immunity would preclude the registration of an award before domestic courts; and
iii. It was contemplated throughout negotiations that Article 54 would apply to the enforcement of awards against investors by States, as well as against States by investors.

The Supreme Court was reinforced in its decision by consideration of the principle of consistent interpretation of international instruments and the intention that the text of international treaties should be interpreted by the courts of all the States parties as having the same meaning [134]. The Supreme Court referred to the decisions of the courts of Australia, New Zealand, Malaysia, and the United States, which had all interpreted Article 54(1) as a waiver of adjudicative immunity and (where applicable) a submission to jurisdiction. A decision to the contrary in *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan BVIHC* (Com) 2020/0196, 25 May 2021, a ruling of the High Court of the British Virgin Islands which held that the ICSID Convention had not constituted a waiver by Pakistan of immunity, was a mere '*outlier*' upon which little weight could be placed [135], as it had not properly taken Article 53 into account.

Section 9 SIA not considered

Having dismissed the appeals on the first ground, the Supreme Court concluded that it was unnecessary to determine the remaining ground on Section 9 SIA, as to whether there was an agreement to arbitrate (and in any event, it was not addressed upon those arguments) [145].

The Court noted that it was not commenting either way as to the correctness of the decisions below on that point and remitted the Zimbabwe appeal to the High Court for that point to be determined in that case.

This leaves the much vexed question of the EU's objection to ICSID arbitration under Article 26 of the Energy Charter Treaty to be decided on another occasion – subject always to the underlying decision of Fraser J (as he then was) on that point, in favour of the ISL parties, which remains undisturbed on appeal (although obliquely doubted in the Court of Appeal).

Conclusion

The Court's unanimous dismissal of the appeals confirms, finally, that state immunity is no bar to registration of an ICSID award in the United Kingdom and sets an authoritative international precedent, consistent with the other international decisions referred to above, to that effect.

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The ruling is an entirely uncontroversial application of the normal principles of treaty interpretation in the Vienna Convention and is entirely consistent with the well-established pro-arbitration stance of the English courts, as well as the UK's international law obligations under the Convention, as previously considered by the Supreme Court in *Micula v Romania*.

It will be welcome news to ICSID award-holders around the world.

ABOUT THE AUTHORS

Patrick Green KC ✉

Patrick Green KC is a highly regarded appellate and trial advocate. He won the coveted The Lawyer's Barrister of the Year award in 2020, after securing victory for 555 Sub-postmasters in the landmark Post Office Group Litigation.

He is known for his creative approach to difficult cases and regularly appears in the Supreme Court, Court of Appeal and the High Court, with his varied practice spanning commercial law and civil fraud, EU, investment treaty arbitration, judicial review, defamation, employee patent compensation, planning and employment law.

View Patrick's profile here.

Kate Gardiner ✉

Kate practises across all of Chambers' main areas, with a particular focus on commercial litigation, group actions, and environmental disputes. Kate has appeared as junior counsel in the Supreme Court and the Court of Appeal, and has significant experience as sole counsel both the High Court and the County Courts, including successfully appearing unled in a heavy application in the Chancery Division.

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