Neutral Citation Number: [2026] EWCA Civ 1392

Case No: CA-2025-002964

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
HIS HONOUR JUDGE PELLING KC
CL-2021-000481

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/11/2026

Before :

LORD JUSTICE LEWISON
LORD JUSTICE MALES
and
LORD JUSTICE FOXTON

- -

Between :

(1) OPERAFUND ECO-INVEST SICAV PLC **(2) SCHWAB HOLDING AG**	**Claimants**
(3) BLASKET RENEWABLE INVESTMENTS LLC	**Appellant/ Applicant**
- and -	
THE KINGDOM OF SPAIN	**Defendant/ Respondent**

- -
- -

Laurence Rabinowitz KC, Christopher Harris KC (of Gibson Dunn LLP) and **Mark Wassouf** (instructed by **Debevoise & Plimpton LLP**) for the **Appellant**
Sean Aughey, **Cameron Miles** and **Raphaël Tulkens** (instructed by **Simmons & Simmons LLP**) for the **Respondent**

Hearing dates : 6 and 7 October 2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on 02 November 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Foxton:

1. This appeal concerns the assignability by the successful party of rights arising from an award made under the Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965 ("the ICSID Convention").

2. As developed on the appeal, the issues which arise for determination are as follows:

   i) whether the successful party in the arbitration ("the original award creditor") can assign the benefit of the award ("Ground 1A");

   ii) whether Article 15 of the Energy Charter Treaty of 1994 ("the ECT") precludes an assignment of an award in respect of substantive rights arising under that treaty ("Ground 1B");

   iii) whether Article 54(2) of the ICSID Convention allows anyone other than the original award creditor to seek recognition or enforcement of an ICSID award ("Ground 1C");

   iv) whether it is sufficient for Article 54(2) that the original award creditor initiates the recognition and enforcement process before the national court ("Ground 1D"); and

   v) whether the original award creditor can assign the right to enforce such an award under s.2 of the Arbitration (International Investment Disputes) Act 1966 ("the 1966 Act") ("Ground 2")?

3. In a judgment produced with his customary expedition and reported at [2025] EWHC 2874 (Comm) ("the Judgment"), His Honour Judge Pelling KC ("the Judge") held that there was no relevant right of assignment in this case. For the reasons set out below, I have concluded that the Judge was right on both grounds, and that the appeal should be dismissed, substantially for the reasons the Judge gave. However, the arguments advanced on appeal involved a number of refinements to those advanced before the Judge, and as a result the reasons for my conclusions differ in some respects from those of the Judge.

The factual background and procedural history

The background to the underlying claims

4. During the period from 1997 onwards, Spain put in place a legislative regime which offered significant incentives for the production of energy from renewable sources, and in particular solar energy. That legislation was substantially amended – it is alleged to the detriment of those who had invested in the production of renewable energy in Spain – by further legislation passed between November 2010 and June 2014.

5. Whatever success the original legislation may have had in incentivising the production of energy from renewable sources, the subsequent modifications to the tariff regime have proved highly effective in incentivising investment treaty litigation. There are 51 known arbitrations commenced against Spain under the ECT in respect to the modifications to the renewables tariffs, and litigation arising from those awards has

reached the courts of eight countries, including the apex courts of the United States, Australia and the United Kingdom.

The procedural history

6. The claimants in these proceedings ("the Investors") are companies incorporated in Malta and Switzerland respectively (both contracting states to the ECT and the ICSID Convention). They commenced arbitration against Spain under the ECT on 31 July 2015. As I explain below, Article 26 of the ECT offers an investor seeking to bring a claim under its provisions a number of dispute resolution options. The Investors selected the option of bringing their claims under the rules of the ICSID Convention. They obtained an award in their favour on 6 September 2019 in the sum of €29.3m, which was rectified and assumed its final form on 28 October 2019 ("the Award").

7. On 9 August 2021, the Investors applied without notice under s.2(1) of the 1966 Act for an order registering the Award in England and Wales, which would give the Award "the same force and effect for the purposes of execution as if it had been a judgment of the High Court given when the award was rendered pursuant to the Convention". That order was granted by Cockerill J on 14 September 2021 ("the Cockerill Order"). On 6 January 2023, Spain applied to set the Cockerill Order aside on various grounds, including that Spain was immune from the adjudicative jurisdiction of the courts of England and Wales by reason of s.1(1) of the State Immunity Act 1978 ("the State Immunity Challenge").

8. An application made by Spain on 25 February 2020 for annulment of the Award under Article 52 of the ICSID Convention was rejected by a decision of an ICSID Ad Hoc committee on 2 March 2023 (this being the only means of challenging an ICSID award permitted by the ICSID Convention).

9. Enforcement proceedings in respect of another ECT award against Spain arising from amendments to the renewables tariffs regime, and which had also been the subject of a registration application under the 1966 Act, came before Mr Justice Fraser in *Infrastructure Services Luxembourg SARL v Kingdom of Spain* [2023] EWHC 1226 (Comm); [2024] 2 Lloyd's Rep 299 ("*Infrastructure Services"*). Spain advanced the State Immunity Challenge in those proceedings. In his judgment, Fraser J rejected the State Immunity Challenge. An appeal against that decision was pending when Spain's application to set aside the Cockerill Order came before the now Lord Justice Fraser in December 2023. In a judgment handed down on 25 January 2024 ([2024] EWHC 82 (Comm)) and given effect by an order dated 13 February 2024, he dismissed Spain's challenge to the Cockerill Order based on an alleged failure by the Investors to make full and frank disclosure on the without notice registration application, but adjourned the State Immunity Challenge pending the Court of Appeal's decision in *Infrastructure Services*.

10. On 31 January 2024, the Investors entered into an agreement with the applicant ("Blasket") which purported to assign "all rights, interests and benefits of the Assignors under or in respect of the Award" ("the Assignment Agreement") to Blasket. The Assignment Agreement is governed by Swiss law.

11. On 25 July 2024, Blasket filed and served an application for an order that it be substituted for the Investors in the ongoing set-aside application under CPR 17.1(3) and

19.2(4) ("the Substitution Application"). Under CPR 19.2(4)(a), the court may order substitution "if the existing party's interest or liability has passed to a new party". It was common ground before the Judge and on the appeal that this required Blasket to satisfy the court on the balance of probabilities that there had been a valid assignment (Judgment, [12]).

12. On 22 October 2024, the Court of Appeal handed down judgment dismissing Spain's appeal on the State Immunity Challenge in *Infrastructure Services* ([2024] EWCA Civ 1257; [2025] KB 611: "*Infrastructure Services (CA)*"). On 30 January 2025, the Supreme Court granted permission to appeal against that decision, and that appeal was pending when the Substitution Application came before the Judge.

13. The Judge dismissed the Substitution Application:

    i) In relation to Ground 1 (which was advanced before the Judge as a single compendious ground), he held that on the proper construction of Article 54(2) of the ICSID Convention, only a party to the arbitration which culminated in the award could seek registration and enforcement of the award, and that, in particular having regard to Article 15 of the ECT, rights arising under the ECT and arbitration awards giving effect to such rights were not assignable without the state's consent.

    ii) In relation to Ground 2, he held that s.2 of the 1966 Act did not create any new substantive rights, and that if the Award could not be assigned as a matter of international law, that state of affairs could not be changed by registration.

14. The Judge gave Blasket permission to appeal on Ground 1, and Blasket was given permission to appeal on Ground 2 by this court.

15. On 4 March 2026, the Supreme Court handed down judgment dismissing Spain's appeal on the State Immunity Challenge in the *Infrastructure Services* case ([2026] UKSC 9, [2026] 2 WLR 581: *Infrastructure Services (SC)*).

The commercial context

16. One reason why the issue of the assignability of arbitration awards in general, and of investment treaty and ICSID awards in particular, has only recently received close scrutiny is the development of a market in which award creditors can sell their rights under an award to third parties incorporated for the purpose of acquiring and exploiting such awards. Blasket, a company incorporated under the laws of Delaware, was incorporated for the purposes of acquiring and exploiting investment treaty awards. The United States, Blasket's "home" state, is a party to the ICSID Convention but not the ECT.

17. We were referred to a paper published by ICSID in June 2024 entitled "Compliance with and Enforcement of ICSID Awards" ("the ICSID Compliance Paper") which describes this market at [98]:

> "Some award creditors have monetized their award by selling or assigning their rights to third parties. The underlying rationale as observed by commentators is to reduce risks and burden involved in seeking enforcement. Some of these

> transactions have been made public in press reports, in corporate filings, in a procedural order, or during proceedings before domestic courts. The issue of whether an assignee can seek enforcement has been examined by domestic courts in enforcement proceedings."

(the last sentence referring to the decision of the United States District Court for the Southern District of New York in *Blue Ridge Investments, LLC v Argentine Republic* Memorandum Opinion & Order, 10 Civ 153 (PGG), 902 F Supp 2d 367 ("*Blue Ridge*") which featured extensively in the appeal and which I consider below).

The legal context

The ECT

18. The ECT is a treaty between signatory states governed by international law and which is intended to provide a multilateral framework for energy co-operation. The ECT was concluded in 1994. It was signed or acceded to by over 50 countries and regional organisations, including Spain which ratified the ECT in 1997 (although Spain withdrew from the ECT with effect from 17 April 2025).

19. The ECT functions, inter alia, as a multilateral investment treaty, with signatory states undertaking obligations to each other in relation to qualifying investments made by nationals of other signatories within their territory, which obligations are capable of being enforced by those qualifying nationals in accordance with Article 26 of the ECT. This provides:

> "(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.
>
> (2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:
>
> (a) to the courts or administrative tribunals of the Contracting Party party to the dispute;
>
> (b) in accordance with any applicable, previously agreed dispute settlement procedure; or
>
> (c) in accordance with the following paragraphs of this Article.
>
> (3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.
>
> …

(4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:

(a) (i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the "ICSID Convention"), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention; or

(ii) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in subparagraph (a)(i), under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (hereinafter referred to as the "Additional Facility Rules"), if the Contracting Party of the Investor or the Contracting Party party to the dispute, but not both, is a party to the ICSID Convention;

(b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter referred to as "UNCITRAL"); or

(c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC").

(5) (a) The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for:

(i) written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention and for purposes of the Additional Facility Rules;

(ii) an "agreement in writing" for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (hereinafter referred to as the "New York Convention"); and

(iii) "the parties to a contract [to] have agreed in writing" for the purposes of article 1 of the UNCITRAL Arbitration Rules.

(b) Any arbitration under this Article shall at the request of any party to the dispute be held in a state that is a party to the New York Convention. Claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of article I of that Convention.

(6) A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law

…

(8) The awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute. An award of arbitration concerning a measure of a sub-national government or authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted. Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards."

20. For present purposes, the following features of the ECT (which are similarly applicable to bilateral investment treaties or "BIT"s) should be noted:

i) First, qualifying investors who bring claims under the various obligations assumed by contracting states in respect of investments in their territory are not parties to the treaty but are able to enforce those protections in proceedings against the state where the investment is made ("the host state") through dispute resolution mechanisms set out in the treaty. This feature of investment treaty arbitration led Professor Jan Paulsson to characterise it as "arbitration without privity". It is now overwhelmingly accepted that the dispute resolution provision for investor claims in an investment treaty is a standing offer to qualifying investors, who can accept that offer (and bring an arbitration agreement into existence) by bringing a claim through one of the methods thus designated (see *Mustill & Boyd: Commercial and Investor State Arbitration* (3rd), (2024), [18.4]: "*M&B (3)*"). These features of investment treaty disputes were first the subject of judicial consideration in this jurisdiction in *Republic of Ecuador v Occidental Exploration and Production Company* [2005] EWHC 774 (Comm), a decision of Aikens J which remains highly influential and which was approved on appeal: [2005] EWCA Civ 1116, [2006] QB 432.

ii) Second, the ECT (like many investment treaties) offers the investor alternative means of pursuing a claim for breach of the treaty's provisions against the host state. As noted in Campbell McLachlan et al, *International Investment Arbitration* (2nd, 2017), [3.70-3.71]:

> "In respect of any of the choices other than ICSID arbitration, the lex arbitri will be selected by application of the methods used in commercial arbitration. The lex arbitri will be a municipal system of law. Arbitration under the ICSID Additional Facility would also be treated in this manner … The lex arbitri of an ICSID arbitration is the ICSID Convention itself. Thus, the rules of law pursuant to which the arbitration is conducted are supplied by the Convention as interpreted under principles of public international law. The laws of the physical place of arbitration have no bearing whatsoever on the arbitration procedure. ICSID arbitration only intersects with domestic law for the purposes of (a) seeking a stay of domestic court proceedings brought in breach of an agreement to arbitrate under ICSID and (b) enforcement".

iii) *M&B(3)*, [18.13] observes that, while the procedural course of ICSID and non-ICSID arbitrations (in the case of the ECT, under the UNCITRAL or SCC rules) is "broadly similar", "in terms of the application of the law of the seat, including with respect to the conduct of proceedings, challenge and enforcement, arbitration under the ICSID Convention is quite different" ([18.13]). In particular, ICSID arbitrations are insulated from the courts of the place where the arbitration takes place (there being no "courts of the seat"), and the ICSID Convention contains its own exclusive code for challenges to the award, and its own enforcement regime.

iv) Third, just as the ECT is itself governed by international law (being an international law treaty between the contracting states), so too the obligations assumed by contracting states in relation to qualifying investments within their territory are obligations arising under and governed by international law (*M&B (3)*, [18.6]). That will frequently also be true of the agreement to arbitrate investment disputes which arises from an investor accepting the standing offer in a treaty, although the position here is more complex, and different jurisdictions have arrived at different answers to aspects of that question (*M&B (3)*, [18.22]-[18.25]).

v) Fourth, while qualifying investors are not parties to the ECT, it has been held in this jurisdiction that the claims an investor asserts under the treaty's dispute resolution provision are its own claims, the treaty giving direct rights to qualifying investors, not those of its state. In the *Occidental* litigation, the Court of Appeal at [20] approved the analysis of Professor Zachary Douglas in *The Hybrid Foundations of Investment Treaty Arbitration* [2003], pp.10-38 that:

> "the functional assumption underlying the investment treaty regime is clearly that the investor is bringing a cause of action based upon the vindication of its own rights rather than those of its national state."

vi) Finally, investors' rights are in the nature of international law rights. The United Kingdom is a dualist legal system, one in which "international law and domestic law operate in independent spheres" (*R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] AC 223, [78]), or, as it is sometimes put, on different planes (*JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 499-500). However, the investment treaty regime engages with the domestic or municipal law sphere in a number of contexts. Many investment treaties permit investors to assert treaty obligations directly before the courts or tribunals of the host state; or to claim in an arbitration which is subject to the national arbitration legislation of the seat, and obtain an award which can be enforced using conventions for the enforcement of domestic law awards. In the case of the ICSID Convention, an award can be enforced in the manner of a judgment of the courts of the contracting state where enforcement is sought. As Chief Justice Menon observed in *Swissbourgh and others v Lesotho* [2018] SGCA 81, [2019] 1 SLR 263, [1]:

> "International investment law is a hybrid legal construct uniquely placed at the crossroads of domestic and international law and of private and public law."

21. The parties relied on a number of provisions in the ECT to which I will return, and which I flag briefly now:

    i) Blasket points to the definition of "investments" in Article 1(6), which included "claims to money and claims to performance pursuant to contract having an economic value and associated with an investment", and the fact that the treaty protection accorded to qualifying investments in Article 10(1) includes an obligation not to impair by unreasonable or discriminatory measures the "disposal" of investments.

    ii) Spain points to Article 15 addressing rights of subrogation of Contracting States who had indemnified an investor of their nationality in respect of their investments in the territory of another contracting state, and the *travaux préparatoires* in relation to that Article.

The ICSID Convention

22. The ICSID Convention was opened for signature on 18 March 1965, and entered into force on 14 October 1966. It is currently in force in 158 contracting states, including Spain. Chapter I of the Convention establishes the structures and organs of the centre, and Chapter II defines its jurisdiction. As with the ECT, only signatory contracting states are parties to the ICSID Convention, and not investors from one contracting state who make a qualifying investment in the territory of another. As Lord Lloyd-Jones explained in *Infrastructure Services* (SC) at [32]:

> "Foreign investors are private persons. They are not and cannot be parties to the ICSID Convention. The ICSID Convention provides a framework for the resolution of such disputes as the parties may agree in writing to submit to ICSID. A separate agreement to arbitrate is therefore required and is commonly formed by the acceptance by an investor of a standing offer to arbitrate in a bilateral investment treaty or other treaty between two or more states. Absent such an agreement, a foreign state, which is a sovereign actor in public international law, cannot be brought into any sort of compulsory international adjudicatory process by a private person."

23. Article 25(1) of the ICSID Convention states:

> "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."

24. Article 27 provides:

> "No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention …".

25. Chapter III addresses conciliation and mediation, and Chapter IV arbitration. Section 5 of Chapter IV provides for limited forms of challenge to an ICSID award, including requests for revision from the tribunal who handed down the award (Article 51) and annulment of the award (Article 52). Applications for annulment are determined by an ad hoc committee appointed by the Chairman of the Centre from ICSID panel arbitrators who did not form part of the tribunal who delivered the challenged award.

26. Section 6 addresses "Recognition and Enforcement of the Award". Article 53 provides:

> "(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.
>
> (2) For the purposes of this Section, 'award' shall include any decision interpreting, revising or annulling such award pursuant to articles 50, 51 or 52."

27. Article 54 provides:

> "(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.
>
> (2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.
>
> (3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought."

28. Finally, Article 55 provides that "[n]othing 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."

29. The ICSID Compliance Paper notes that "some Member States have enacted laws governing the recognition and enforcement of ICSID Awards, which describe the process and the terms used in their jurisdictions" ([43]). In the United Kingdom, the ICSID Convention is given effect by the 1966 Act. Section 1(2) of the 1966 Act provides that "a person seeking recognition or enforcement of such an award [i.e. one rendered pursuant to the ICSID Convention] shall be entitled to have the award

registered in the High Court subject to proof of the prescribed matters and to the other provisions of this Act."

30. Section 2(1) provides:

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

31. Section 3 provides:

> "(1) The Lord Chancellor may by order direct that any of the provisions contained in section 36 and 38 to 44 of the Arbitration Act 1996 (provisions concerning the conduct of arbitral proceedings, etc.) shall apply to such proceedings pursuant to the Convention as are specified in the order with or without any modifications or exceptions specified in the order.
>
> (2) Subject to subsection (1), the Arbitration Act 1996 shall not apply to proceedings pursuant to the Convention, but this subsection shall not be taken as affecting section 9 of that Act (stay of legal proceedings in respect of matter subject to arbitration)."

32. The effect of these provisions is to exclude the application of the enforcement regime under the Arbitration Act 1996 ("the 1996 Act") – s.66 for awards wherever made, and for awards made in a New York Convention state other than the United Kingdom, ss.100-104 – and of s.58(1) of the 1996 Act which provides "unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them."

The applicable principles for the interpretation of the ECT and the ICSID Convention

33. The ECT and the ICSID Convention are to be interpreted in accordance with the provisions of the Vienna Convention on the Law of Treaties 1978 ("VCLT"), which codifies the principles of treaty interpretation under customary international law.

34. Article 31 provides:

> "General rule of interpretation
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose …
>
> 3. There shall be taken into account, together with the context: (a) … (b) any subsequent practice in the application of the treaty which establishes the

> agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties …"

35. Article 32 provides:

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

36. In *Infrastructure Services* (SC), Lord Lloyd-Jones explained the approach to be adopted in applying Articles 31 and 32 at [75]-[77] and [79]:

> "Article 31 thus requires the terms of a treaty to be interpreted in good faith in accordance with their ordinary meaning, in their context, and in the light of the treaty's object and purpose. A holistic approach is required. Context and object and purpose may be found in the treaty's text, in other words its surrounding provisions, and in the treaty as a whole, including its Preamble. The clear focus of article 31 is, accordingly, on seeking to ascertain the ordinary meaning of the relevant terms of the treaty having regard to context, object and purpose of the treaty as a "single combined operation": see *JTI Polska sp z oo v Jakubowski* [2024] AC 621 *(*para 26, per Lord Hamblen JSC); and *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* [2017] ICJ Rep 3, para 64.
>
> Article 32 allows for recourse to supplementary material for limited purposes only, emphasising that the court's task is to interpret the treaty rather than the supplementary material. Where the ordinary meaning of treaty terms can be ascertained by applying the primary rule in article 31 of the Vienna Convention on the Law of Treaties, recourse to supplementary means of interpretation under article 32 is permitted only "in order to confirm" that ordinary meaning. Such confirmation can be drawn from the travaux préparatoires. However, the supplementary means of interpretation in article 32 cannot be used to change or contradict the meaning resulting from the application of article 31.
>
> Where, however, the application of the rule in article 31 produces a meaning that is ambiguous or obscure or leads to a manifestly absurd or unreasonable result, the rule in article 32 permits supplementary means to be used to determine the meaning of treaty terms. But such cases "should be rare, and only where two conditions are fulfilled, first, that the material involved is public and accessible, and secondly, that the travaux préparatoires clearly and indisputably point to a definite legislative intention" (*Fothergill v Monarch Airlines Ltd* [1981] AC 251, 278 b – c per Lord Wilberforce; and also *Effort Shipping Co Ltd v Linden Management SA* [1998] AC 605 , 623e per Lord Steyn).
>
> Finally, it is well-established that the text of an international treaty or convention is intended to be given the same uniform meaning by all the states which become parties to it. This means that so far as possible the text should be interpreted in a

> uniform manner and that regard should be had to how it has been interpreted by the courts of different countries, particularly where there is consensus among national courts in relation to the question of interpretation: see, for example, *Islam v Secretary of State for the Home Department* [1999] 2 AC 629, 657 a – b , per Lord Hope of Craighead."

Customary international law

37. Treaties are not the only source of public international law. The recognised sources of international law are identified in Article 38 of the Statute of the International Court of Justice, and include, in addition to "international conventions":

> "(b) international custom, as evidence of a general practice accepted as law;
>
> (c) the general principles of law recognized by civilized nations;
>
> (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law".

38. It was not argued on the appeal that a right to assign international law obligations arises on the international law plane because this reflects "the general principles of law recognized by civilized nations", nor was the ambit of that particular source of international law explored. While I suspect most municipal systems of law recognise at least some form of right of assignment, no right of assignment is recognised by the common law, nor by Roman law until the introduction of the action utilis.

39. However, reliance was placed on international custom. The court was referred in this regard to *R (Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWCA Civ 1719, [2019] QB 1075, [15], where Arden LJ stated:

> "Customary international law has to satisfy two requirements: there must be evidence of a substantial uniformity of practice by a substantial number of states; and opinio juris, that is, a general recognition by states that the practice is settled enough to amount to a binding obligation in international law. On occasion this recognition can be inferred from actual settled state practice … but this will not always be the case … Customary international law does not have to cover an entire field: it can, as the Divisional Court found in this case, cover certain core matters as a minimum."

40. At [16], Arden LJ quoted from Lord Sumption JSC's judgment in *Benkharbouche v Embassy of the Republic of Sudan (Secretary of State for Foreign and Commonwealth Affairs intervening)* [2017] UKSC 62, [2019] AC 777, [31]:

> "To identify a rule of customary international law, it is necessary to establish that there is a widespread, representative and consistent practice of states on the point in question, which is accepted by them on the footing that it is a legal obligation (opinio juris) … There has never been any clearly defined rule about what degree of consensus is required. The editors of *Brownlie's Principles of Public International Law*, 8th ed (2012), p 24, suggest that 'complete uniformity of

> practice is not required, but substantial uniformity is'. This accords with all the authorities. In the words of the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14, para 186: 'The court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.' What is clear is that substantial differences of practice and opinion within the international community upon a given principle are not consistent with that principle being law: see *Fisheries Case (United Kingdom v Norway)* [1951] ICJ Rep 116, 131."

41. In *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia (Secretary of State for Constitutional Affairs intervening)* [2006] UKHL 26, [2007] 1 AC 270, [63], Lord Hoffmann observed:

> "It is not for a national court to 'develop' international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states."

In the same decision, when referring to the applicant's reliance on the decision of the Italian Court of Cassation in *Ferrini v Federal Republic of Germany* (2005) Cass sez un 5044/04 as evidence of a rule of customary international law, Lord Bingham stated at [22]:

> "One swallow does not make a rule of international law".

The assignability of commercial arbitration awards

42. While there is extensive discussion in arbitration commentaries of the assignability of arbitration agreements, or of rights which are conditioned by an obligation to arbitrate disputes as between the original parties, the assignability of commercial arbitration awards, and the effect of such assignment for enforcement purposes, has received little attention.

43. The United Nations Convention on the Recognition and Enforcement of Arbitral Awards signed at New York on 10 June 1958 ("the New York Convention") uses the phrase "the party" or "the parties" when setting out the obligations which signatory states undertake to each other under that treaty in respect of the enforcement of arbitration agreements and arbitral awards. Article IV(1) provides that "to obtain the recognition and enforcement" by a Contracting State, "the party applying for recognition and enforcement" must supply certain documents.

44. The New York Convention does not expressly address the position of an assignee of the arbitration agreement (for the purposes of Article II) or of an award (for the purposes of Article IV). However, it is clear that proceedings by an assignee of a right which is subject to an arbitration agreement fall within Article II (see for example *ICCA's Guide to the Interpretation of the New York Convention* 2nd (2024), p.69). There appears to be a similar consensus that an assignee of an award can seek enforcement under Article

IV (assuming the award to be assignable under its applicable law), and this position was not challenged on the appeal. In her commentary on Article IV in *Dr R Wolff* (ed), *New York Convention: Article-by-Article Commentary* (2019), Professor Maxi Scherer states at page 220, [14] that "if the applicant was not a party to the arbitration … the applicant can still substantiate its entitlement to the award otherwise" for the purposes of Article IV. Reported case law proceeds on the basis that the language of Article IV does not preclude an assignee of the award from exercising the Convention enforcement right.

45. This was assumed to be the position in *Gater Assets Ltd v Nak Naftogaz Ukrainiy* [2008] EWHC 237 (Comm), [2008] 1 All ER (Comm) 209; [2007] EWCA Civ 988, [2008] 1 All ER (Comm) 209. Assignees of commercial arbitration awards have been able to avail themselves of New York Convention registration and enforcement in the US: e.g. *MGM Productions v Aeroflot Russian Airlines* 573 F. Supp. 2d 772 (SDNY, 2003) and *Global Distressed Alpha Fund I LP v Red Sea Flour Mills Co Ltd* 725 F. Supp. 2d 198 (DDC, 2010). That is also the case in relation to enforcement under national arbitration legislation giving effect to the UNCITRAL Model Law (the enforcement provisions of which replicate the New York Convention) in Singapore (*DKB v DKC* [2025] SGHC(I) 11; [2025] 4 SLR 170) and Ontario (*Gebre LLC v Kyrgyz Republic* 22 ONSC 4137).

Ground 1A: Is the Award Assignable?

Introduction

46. As stated in *Dicey, Morris & Collins on The Conflict of Laws* (16th incorporating the Second Cumulative Supplement, 2024) at Rule 143(1)(b):

> "As a general rule …the law governing the right to which the assignment relates determines its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged".

It is common ground that the assignability of an ICSID award is governed by international law (unless, as Blasket argues, the terms of the ICSID Convention themselves devolve that question to national law in a form of *envoi*).

47. When issues arise as to the assignability of an English law right, the source of the general legal power to effect an assignment is found in s.136 of the Law of Property Act 1925 ("LPA 1925"), various specific statutes and the principles governing equitable assignments (assuming, for present purposes, that the latter properly represent a form of transfer of rights, as opposed to a particular aspect of the law of trusts under which the trustee's right against the other party is itself the subject of the beneficiary's right against the trustee: *Chitty on Contracts* (36th, 2026), [23-006] (Professor B McFarlane)). That general power of statutory assignment cannot be exercised in respect of all rights. We were referred to Lightman J's summary of the applicable English law principles in *Don King Productions Inc v Warren* [2000] Ch 291, 318-319. Rights otherwise capable of falling within s.136 of the LPA 1925 may nonetheless be "unassignable" for a number of reasons, most obviously because the obligor and obligee have agreed that they cannot be assigned; or because the right is "personal" (that is to say the identity of the obligee is material to the obligor) or for reasons of public policy (the law relating to champerty and maintenance).

48. I address case law from other jurisdictions referring to the assignment of ICSID awards below. As will be apparent, it is largely focussed on the issue of whether the terms of the ICSID Convention preclude assignment. Mr Aughey and Mr Miles, counsel for Spain, argue that the terms of the ECT preclude assignment of awards. However, their submissions before this court placed considerable emphasis on the anterior question of what the source of the legal power of assignment was said to be, in circumstances in which it is common ground that neither the ECT nor the ICSID Convention confer such a right.

49. Logically that is the first question which arises in the determination of Ground 1 of the appeal: both because, if the power to assign cannot be found in the treaties, it must be derived from or supported by some source of public international law, and because the existence and extent of any power of assignment of treaty awards under international law is of obvious relevance when construing the ECT and the ICSID Convention.

50. The issues which arise under this heading are as follows:

    i) Does customary international law recognise a legal power on the part of the beneficiary of a right arising under a treaty to assign that right? Spain argues that there is no such right, and Blasket argues that such a right does now form part of customary international law where the beneficiary of the treaty right is a non-state actor.

    ii) If customary international law is silent on the existence of such a right, and does not positively prohibit such assignments, is the effect of the principle reflected in *SS Lotus (France v Turkey)* (1927) PCIJ Series A, No 10, p.4 that the beneficiary of a treaty obligation is permitted to assign it as a matter of international law?

    iii) Is Blasket seeking to assert "treaty rights"?

    iv) Does the ICSID Convention devolve the issue of assignability to national law?

Does customary international law recognise a general power on the part of an obligee of a treaty right to assign that right without the obligor's consent?

51. There is no international convention addressing the assignability of international law treaty rights generally: it is not, for example, a topic addressed in the VCLT "meta-treaty". The issue of whether international law recognises such a right, or prohibits such assignment, requires an analysis of customary international law.

52. In support of its contention that there is no general power to assign treaty rights (i.e. no power arising independently of the specific grant of such a right in a treaty), Spain placed considerable reliance upon a passage from Lord McNair's *The Law of Treaties* (1961), pp340-341. Lord McNair was a former President of the International Court of Justice and the European Court of Human Rights, and Whewell Professor of International Law at Cambridge University. He was an international law jurist of the highest renown.

53. Given the importance of the passage relied upon, I have set it out at length:

> "Can a State party to a treaty change the scope of its operation by assigning the treaty or its rights or obligations thereunder to a third State? (by assignment we mean transfer without the consent of the other party; if the other party consents, the transaction becomes tripartite and resembles the novation of private law). Certainly a State cannot assign 'the treaty'; certainly, apart from express agreement, it cannot assign its obligations thereunder. Can it assign its rights? Suppose that State A has promised by treaty to pay to State B a sum of money found to be due by a Claims Commission or fixed by agreement between them as reparation for war damage, has State B a right to direct State A to pay the debt to State C upon the understanding that its receipt by State C will give State A a good discharge from the debt? Dr Mann says about all that can be said on the matter in the *British Year Book* … He mentions an agreement by a debtor State to make certain payments to a creditor State 'or order', but there the debtor State has assented in advance to a transfer of the debt by the creditor State. We are not aware of any existing rule of international law permitting a State to assign to C rights which it holds under a treaty made with B, and can find no basis in principle for the validity of such an assignment. States differ so much in the manner in which they conduct their external relations and enforce their rights that in our view a debtor State (using the words debtor and creditor in the wider sense of debitor and creditor of Roman law) is entitled to refuse to recognize a change of creditor to which it has not assented: *non haec in foedera veni*. The analogy of the assignments permitted by English law is attractive but in our submission does not apply …
>
> We are not aware of any express authority to the effect that rights under a treaty are assignable unilaterally and without a novation, except in the case of the automatic transfer of certain kinds of local rights affecting territory passing upon a cession or a State succession".

54. Clearly there is a broad spectrum of treaty rights which, from a municipal law perspective, might fall to be treated differently when determining whether they are assignable. At the one end there is the executory promise as to the future conduct of a State, where a general power of assignment to someone other than the beneficiary of that promise appears highly improbable. An assignment of an existing claim for breach of the treaty would be a less ambitious contention, albeit one which would involve the purported obligor in a dispute with the assignee as to existence and extent of any such right, and the relief which it might support. The right to assign a financial obligation arising from a final adjudication of the State's liability by a competent authority might be thought to lie at the other end of the spectrum, the existence and content of the right and relief having been finally determined, and the obligor state's interaction with the assignee being limited to the simple act of payment. And yet it is noteworthy that Lord McNair includes an obligation of this latter kind (a determination of a Claims Commission resulting in a debt due from one State to another State) within the category of non-assignable treaty rights.

55. Lord McNair's analysis of the assignability of treaty obligations *owed by one state to another* derives support from the Report of the International Law Commission to the UN General Assembly on a draft of the Vienna Convention on Succession of States in Respect of Treaties, reported in Yearbook of the International Law Commission, 1974, Vol II Part One. The commentary on draft Article 8 at paragraph (6) (p.184), when

discussing the effect of an agreement between a predecessor state and a successor state in respect of treaties entered into by the former, expresses the following view:

> "A devolution agreement has then to be viewed, in conformity with the apparent intention of its parties, as a purported assignment by the predecessor to the successor State of the former's obligations and rights under treaties previously having application to the territory. It is, however, extremely doubtful whether such a purported assignment *by itself* changes the legal position of any of the interested States. The Vienna Convention contains no provisions regarding the assignment either of treaty rights or treaty obligations. The reason is that the institution of 'assignment' found in some national systems of law by which, under certain conditions, contract rights may be transferred without the consent of the other party to the contract does not appear to be an institution recognized in international law. In international law the rule seems clear that an agreement by a party to a treaty to assign either its obligations or rights under a treaty cannot bind any other party to the treaty without the latter's consent."

56. Mr Aughey referred to passages from the UN Conference on Succession of States in Respect of Treaties at its First Session, Vienna 4 April-6 May 1977 (Official Records at p.91 ([23]), p.95 ([58]) and 97 [(1)])) in which various state representatives expressed their agreement with this statement of international law, apparently without demur. Mr Aughey also relied on passages from the International Law Commission Report to the General Assembly on the same draft Convention in its 33rd session (Yearbook of the International Commission, 1981 Vol II Part Two, (9)-(10) of the commentary on Article 34 at pp.83). However, the particular focus of those paragraphs is the transfer by a debtor state of some or all of the debts it owed to another state to a successor state (i.e. transfer of obligations rather than rights), and the impact of such transfers on creditors. I have not found them of assistance.

57. Finally, Mr Aughey pointed to Article 36(1) of the VCLT which provides:

> "A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides."

58. While Article 36 is concerned with the creation of third party rights in favour of non-signatory states, it is in my view significant that the creation of such a right requires the consent of both state signatories.

59. On the basis of this material, I accept that on the current state of customary international law, treaty rights as between states are not assignable without the consent of the obligor state, either given in advance in the treaty or subsequently. Indeed, I did not understand Blasket to challenge that position, so far as it goes. Blasket understandably made the point that these materials are concerned with treaty obligations owed between states, rather than rights afforded by treaties to nationals of other signatory states and directly enforceable by them.

60. However, an investor's rights against a host state are also international law rights which derive from a treaty, and those rights are only granted to investors who meet a number

of qualifying criteria, including the making of an investment in the host state and the holding of the nationality of another signatory state. It might be thought somewhat surprising if rights created by an agreement between two or more states could not be assigned by any state right-holder, but could be assigned by non-parties to the treaty on whom direct rights were conferred. Absent a development in customary international law which treats that particular category of treaty rights as a distinct category, and differently from, for example, debt obligations as between States, I see real force in Spain's submission that the position set out by Lord McNair and the International Law Commission is equally applicable to the rights afforded by an international law treaty to non-state actors. Further, it is noteworthy that while the English courts have adopted the view that an investor exercises its own rights rather than its state's rights when bringing a claim under a treaty (see [20(v)] above), that remains a topic of controversy (see, for example, the discussion by Eric De Brabandere in "The Legal Character of the Direct Access of Foreign Investors to Investment Treaty Arbitration" in *Investment Treaty Arbitration as Public International Law* (2014)). The development of customary international law so as to permit the assignment by investors of treaty rights while the treaty rights of states were not assignable would need to engage with the "direct rights model" / "derivative rights model" debate in investment treaty law.

61. We were referred by both parties to material said to support both the proposition that customary international law recognised that investor treaty rights were assignable under international law, and that it did not. In my view, the overall effect of that material does not meet the high bar (as set out at [39]-[40] above) for establishing a rule of customary international law on the position of treaty rights accorded to non-state actors (and in particular investment treaty rights accorded to qualifying investors).

62. Spain relied on academic commentary and a number of investment treaty awards in support of its contention that customary international law did not recognise a right on the investor's part to assign its treaty rights:

    i) Spain referred to RSJ Martha, in *The Financial Obligation in International Law* (2015). Dr Martha is a member of the Dutch Advisory Committee on public international law. At p.569, he states that he "is not aware of any decision of an international court or tribunal regarding the question of assignability of award/judgment benefits". Dr Martha's view (at p.570) is:

> "Given that other than by virtue of customary international law, a State or other international person cannot incur obligations towards a party without its consent, it would be difficult to accept the proposition that a creditor under a […] award may assign its judgement/award benefits to a third party who would be able to exercise the same enforcement rights as the assignor. These benefits hail from international law and thus cannot be treated as if they have been emancipated from the very legal order that gives rights to them and that regulates their validity as well as their extinction. Hence, no conclusion can be drawn one way or the other from the fact that under domestic law award/judgment creditors may assign their benefits. Under international law, it remains a truth that no debtor-creditor relations can be imposed on either a State or an international organization unless a governing international legal instrument so permits."

    I accept that Dr Martha's view supports Spain's contention.

ii) Spain also cited a 2014 article by Dr Hanno Wehland, "The Transfer of Investments and Rights Under International Investment Agreements – Some Unresolved Issues" (2014) 30 Arbitration International 565. That article addresses a number of issues which can arise from assignment of investment treaty *claims* (including their potential impact on jurisdictional issues and the concern about "treaty-shopping"). It does not directly address the assignability of investment treaty *awards*. In relation to the assignment of claims, Dr Wehland noted at p.573 that "a review of the relevant decisions of investment treaty tribunals reveals that the issue has so far only sporadically been addressed and that opinions appear to be diverging on this point", with Dr Wehland preferring the view of those tribunals who suggest that investment treaty claims are not assignable (p.574). Dr Wehland's views support the contention that assignment of investment treaty rights (or at least some investment treaty rights) is a matter of controversy, but I do not think it takes matters much further.

iii) Spain referred to a number of investment treaty arbitration awards, essentially concerned with the assignment of claims during the pendency of an arbitration. Assignment in this context obviously raises additional issues to those arising on the assignment of an award (not least how existing relations between the original parties and the tribunal, and questions of arbitrator conflict of interest, will be impacted). Once again, for that reason the awards do not take matters much further than showing that issues of assignment are controversial ones in the investment treaty context. Spain placed most reliance on the ICSID arbitration award in *Neustar Inc v Republic of Colombia*, ICSID Case No ARB/20/7, award of 20 September 2024 (Lew, Hobér, and Derains) which referred to a passage of the then-current edition of *Brownlie's Principles of Public International Law* edited by Professor James Crawford (see now the 9th edition, (2019) p.678) noting that "BIT claims are essentially claims intuitu personae under international law and this imposes limits to their assignability" ([502]) and to a "general practice … that … a respondent state must agree to a different claimant being substituted" ([503]). After noting that they had been referred to case law favouring both parties' arguments, they stated that they were "not persuaded that a claimant can be replaced midway through proceedings without the respondent State's consent to this end, and especially in the circumstances of this case" ([504]). Their award also expresses a more general conclusion that they were "not persuaded that Claimant's transfer of the ICSID claim was valid and effective under international law given the absence of Respondent's consent to that end" ([518]). Other awards to which the court was referred were concerned with the issue of whether an investor who has a completed claim under an investment treaty can still assert that claim if it subsequently disposes of the investment, which raises a different issue.

63. Blasket relies principally on those court authorities which have permitted assignees to enforce investment treaty awards. The first of these chronologically, and the most influential, is *Blue Ridge*, which was handed down on 30 September 2012. Judge Gardephe of the United States District Court for the Southern District of New York dismissed Argentina's contention that the assignee of an ICSID award could not seek recognition and enforcement of that award under Article 54 of the ICSID Convention and US implementing legislation. I return to that decision in more detail below, when addressing Spain's contention that the terms of the ICSID Convention preclude an

assignee from invoking Article 54. For present purposes it is sufficient to note that the case does not address the issue of whether there is a right to assign an investment treaty award under customary international law. Rather it is concerned with the secondary issue of whether any such right (or its exercise) is precluded by the terms of the ICSID Convention. Judge Gardephe's conclusion at page 20 is that "nothing in the ICSID Convention, in Congress's legislation implementing ICSID, or in New York law, prevents an assignee from seeking recognition and enforcement of an ICSID Convention award". The only legal source for the power to assign identified in the judgment is the New York General Obligations Law § 130-103. The issue of whether the ICSID Convention devolves issues of assignment to national legislation is addressed below. But for the purposes of the present enquiry, all that Blasket can take from *Blue Ridge* is that Argentina does not appear to have challenged the existence of a right to assign investment treaty obligations as a matter of customary international law.

64. The second decision is *Balkan Energy Limited v Republic of Ghana* Memorandum Opinion & Order, Case No 17-cv-00584, a decision of Judge Mehta in the United States District Court for the District of Columbia handed down on 22 March 2018. This involved the enforcement of an award delivered on the municipal plane (the seat of the arbitration was the Netherlands) under the New York Convention, the arbitration agreement appearing not in an investment treaty but a commercial contract to which the Republic of Ghana was a party. Judge Mehta rejected an argument that an assignee of the award did not have standing to seek enforcement, an argument which was premised on the alleged invalidity of the assignment, either by reference to the law governing the assignment or a no-assignment clause in the commercial contract. The decision is of no bearing at all on the issues raised on this application.

65. The third decision, *CC/Devas (Mauritius) Ltd v Republic of India (No 2)* [2023] FCA 527 is a decision of Jackman J in the Federal Court of Australia. The court was not taken to this case in the course of oral argument. It concerned the enforcement of an UNCITRAL award, which had its legal seat in the Netherlands and which was rendered pursuant to the Mauritius-India BIT. Significantly, therefore, the award which was sought to be enforced was not an award which existed on the international plane, but an award with a state seat and which could be enforced under the New York Convention. India did not appear at the hearing, and with impressive expedition, judgment was delivered on the day of the hearing. Not surprisingly, the issue of assignment under international law is dealt with briefly in [33]:

> "Under international law, an award to which the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 330 UNTS 3 (entered into force 7 June 1959) (New York Convention) applies, such as the Quantum Award (and the rights thereunder), is assignable. First, there is no prohibition on assignment in the India-Mauritius BIT, in the UNCITRAL Arbitration Rules 1976 or in the Terms of Appointment. Second, there is no international law rule prohibiting the assignment of an award between a private party and a state: *Global Distressed Alpha Fund I LP v Red Sea Flour Mills Co Ltd*, 725 F. Supp. 2d 198 (D.D.C. 2010); *Belize Social Development Ltd v Government of Belize*, 5 F. Supp. 3d 25 (D.D.C. 2013). Third, there are no rules of international law on the assignability or assignment of awards or other choses in action; it is the role of municipal law to fill this gap as a general principal of law widely accepted across different

municipal systems: see *Statute of the International Court of Justice*, Art 38(1)(c). Absent any rule, the Court must apply the law of the forum."

66. Dissecting that paragraph:

i) While we did not hear argument on the point (see [44]-[45] above), I share Jackman J's view that the New York Convention (a treaty which is governed by international law) does not prohibit assignees from enforcing Convention awards. Similarly I accept that the UNCITRAL Rules do not do so.

ii) Jackman J's third sentence posits the issue of whether international law "prohibits the assignment of an award between a private party and a state", which would appear to adopt the "permissive" approach to the analysis of international law which I address below. The two authorities referred to in support of that proposition are *Global Distressed Alpha Fund I LP v Red Sea Flour Mills Co Ltd* 725 F Supp 2d 198 (DDC 2010) and *Belize Social Development Ltd v Government of Belize* 5 F Supp 3d 25 (DDC 2013). Those authorities were not cited to this court. *Global Distressed Fund* involved the enforcement under the New York Convention of a commercial arbitration award. *Belize* similarly involved enforcement of a commercial arbitration award (albeit one obtained against a state) under the New York Convention. For those reasons, I am not persuaded that those authorities assist on the issue of whether treaty rights which exist solely on the international law plane are assignable without the award debtor state's consent.

iii) The statement that there are no rules of international law on the assignability or assignment of awards or other choses in action assumes that the principles governing assignment of treaty rights (to which Jackman J does not appear to have been referred) do not apply. For the reasons I have set out, I have accepted Spain's argument to the contrary effect. Jackman J's application of Australian principles of assignment appears to have involved an application of Article 38(1)(c), namely that the assignability of treaty rights reflects "the general principles of law recognized by civilized nations". As I have stated, no Article 38(1)(c) argument has been advanced in this case.

iv) Finally, it is to be noted that at [34], Jackman J found that the award in that case was assignable under Dutch law (the law of the seat and, therefore, presumptively at least the law governing the award). That conclusion on its own was sufficient to justify the court's order.

67. The fourth decision is that of Stewart J in the Federal Court of Australia in *Blasket Renewable Investments LLC v Kingdom of Spain* [2025] FCA 1028 ("*Blasket FCA*"), a decision in respect of the enforcement of the ICSID Award in this case. We were told by Mr Miles that an appeal against that decision has already been heard by the Full Court, and that judgment is expected in January 2027. Once again, the argument in that case (at least before Stewart J) as to the position under international law was principally analysed by reference to the question of whether Articles 53 and 54 of the ICSID Convention had the effect that the Investors could not assign the Award, and not by reference to the position under customary international law. On that issue, Stewart J referred to and followed the reasoning of Judge Gardephe in *Blue Ridge*. Stewart J did address the position of customary international law at [310]:

> "More generally, there is no public international law rule prohibiting the assignment of an award between a private party and a State, or the assignment of awards more broadly. As Professor Sarooshi addresses in his report, the existence of a rule of customary international law to that effect – as evidenced by both State practice and opinio juris – is doubtful. There is a paucity of authoritative consensus which establishes such a prohibition. In fact, the converse is illustrated by the judicial decisions which have accepted the in-principle assignability of such investor State awards under municipal law: see eg *CC/Devas (Mauritius) Ltd v Republic of India (No 2)* [2023] FCA 527 at [33] per Jackman J (India FCA No 2); *Belize Social Development Pty Ltd v Government of Belize* 5 FSupp 3d 25 (DDC 2013) at fn 12 per Leon J citing *Global Distressed Alpha Fund I LP v Red Sea Flour Mills Co Ltd* 725 FSupp 2d 198 (DDC 2010); *Gebre LLC v Kyrgyz Republic*, 2022 ONSC 4137; *FG Hemisphere Associates c République Démocratique du Congo*, Cour d'appel de Paris [Paris Court of Appeal], No 18-10217, 7 December 2021 (cf *Société CC/Devas c République d'Inde*, Cour d'appel de Paris [Paris Court of Appeal], No 24-00152, 10 September 2024, which may tend to a different view, but cannot be authoritative on its own as to the existence of a customary rule). Relevantly, Professor Sarooshi refers to a practitioner survey in which 32 jurisdictions responded in the affirmative to the question of assignment of award debts as at 1 January 2022. As Jackman J observed in *India FCA No 2* at [33], "it is the role of municipal law to fill this gap as a general principle of law widely accepted across different municipal systems" in the sense set out at Art 38(1)(c) of the Statute of the International Court of Justice (1945). That was clearly the approach taken by Gardephe J in the circumstances of *Blue Ridge*."

68. Once again, this approaches the issue by asking if there is a customary international law rule *prohibiting* assignment (i.e. the "permissive" approach), albeit even then the effect of the expert evidence adduced by Blasket on that issue was that such a prohibition was "doubtful". Moreover, decisions on the assignability of awards under municipal law are of limited assistance on the question of whether awards are assignable under international law. Stewart J relied on Jackman J's decision and the two US authorities he referred to, which I have addressed, and on *FG Hemisphere Associates v Republique du Congo*, a decision of the Paris Cour d'Appel of 7 December 2021. That decision was not cited to the court, but it concerned the enforcement of an ICC award (i.e. one existing on the municipal law plane) which was enforced under the New York Convention (the claim in question arising under a commercial agreement with a state rather than an investment treaty). Stewart J's decision also appears to have rested on "the general principles of law recognized by civilized nations".

69. Blasket relied on the decision of the United States District Court for the District of Columbia in *Titan Consortium 1 LLC v Argentina Republic* Memorandum Opinion, Case No 21-cv-2250 of 10 December 2024. This involved the enforcement of an ICSID award obtained against Argentina. Argentina did not dispute the application to enforce, and the decision does not address any issues raised by the assignment.

70. Next, Blasket relied on a decision of the Rotterdam District Court in *Spain v Blasket Renewable Investments LLC* 21 July 2026, Case No C/10/720308/KG ZA 26-503. That decision appears to have been reached on an interim basis. The relevant passage is as follows:

> "The judge in these interim proceedings answers that question in the affirmative. Contrary to Spain's argument, the ICSID Convention and the ECT do not (expressly) prohibit the assignment of a claim arising from an arbitral award. Article 53(1) of the ICSID Convention provides that the award is binding on 'the parties' and that 'each party' must comply with the award. Article 54(2) of the ICSID Convention stipulates that "a party seeking recognition or enforcement" must submit to the competent court a copy of the award certified by the Secretary-General of the ICSID. It does not, therefore, state that an assignment such as the one at issue here is not possible or permitted. Furthermore, the phrase "a party seeking recognition or enforcement" may also be interpreted to include an assignee. Nor does the ECT preclude such an assignment. The parties agree that Article 15 of the ECT relates to subrogation and that the issue at hand in this case is (the legal validity of) an assignment of a claim arising from an arbitral award. The fact that the assignment is not regulated in the ECT does not justify the conclusion that rights arising from arbitral awards may not be assigned."

71. Once again, the case approaches the issue of assignability exclusively by reference to the effect of Articles 53 and 54 of the ICSID Convention and Article 15 of the ECT, asking whether they "prohibited" assignment, and not by reference to the position as a matter of customary international law. Blasket can legitimately point to the apparent failure of Spain to raise the anterior question of whether there is a power of assignment independently of any issue of its exclusion, but no more.

72. The next decision relied upon is that of the Hague Court of Appeal in *Republic of India v CC/Devas (Mauritius) Ltd* judgment of 15 September 2026 (Case No. 200.259.975). This concerned the enforcement of the same UNCITRAL arbitration decision with which Jackman J was concerned in the Federal Court of Australia. India relied on the Judge's judgment in this case, for reasons which remain unclear because that judgment rested on the terms of the ICSID Convention which were not in issue in the Hague case. At [5.22]-[5.23], the Hague Court of Appeal stated:

> "The Court of Appeal leaves open whether this assertion can be seen as a new ground of appeal. Even if that is not the case, the Court of Appeal does not agree with India in its position that claims under an arbitral award rendered in an investment arbitration are not transferable. The investment treaty between India and Mauritius does not provide for the transferability of (rights arising from) investments, but does not exclude it either. In the opinion of the Court of Appeal, it is not logical to conclude from the absence of a provision on the transfer of these rights that the treaty excludes that possibility, given the purpose of investment treaties. Excluding that possibility would possibly be a brake on investment, while these treaties are concluded precisely to encourage investment. India has referred to Article 10 of the Investment Treaty, which provides for the possibility of subrogation by the home country to an investor's rights, if the home country has provided a guarantee to the investor and the home country has made a payment to that investor on that basis. The latter provision relates to a specific situation in which the home State itself may initiate proceedings against the host State in place of the investor. Partly in view of the aforementioned purpose of investment treaties, the Court of Appeal is of the opinion that it cannot be assumed that the drafters of the treaty intended Article 10 not only to provide for this

> specific form of subrogation, but also to exclude any other form of transfer of rights before and after an arbitral award has been rendered.
>
> India has further highlighted the intuitu personae nature of investment arbitration. According to India, the assignments of claims go against that personal character. It is true that investment treaties impose requirements on an investor who can invoke the protection of his investment under the treaty. The host country's offer under the treaty to submit an investment dispute to arbitration applies to investors who meet those requirements. To that extent, the offer has a personal character. However, that does not preclude the possibility that, once it has been established that an investor has a claim against the host country under the treaty, that claim may be assigned to another person."

73. While it can be said that the sentiments expressed in the judgment, particularly the suggestion that permitting assignment of investment treaty awards would give effect to the object and purpose of investment treaties, are of some assistance to Blasket, the case is concerned with the very different question of whether the assignment of an arbitration award obtained on the municipal law plane through the exercise of the offer to arbitrate contained in an investment treaty governed by international law is, for that reason, incapable of being assigned. I see very considerable force in the Hague Court of Appeal's conclusion that that is not the case, at least where the municipal law governing the award permits assignment (and there was no suggestion that Dutch law, the seat of the *CC/Devas* arbitration, contained such a prohibition). However, that does not assist with the position of an ICSID arbitration award, which is a product of the ICSID Convention and is governed by international law.

74. Finally, there is the decision of the United States District Court for the District of Columbia in *Eurus Energy Holdings Corporation v Spain* delivered on 24 September 2026 (Memorandum Opinion, Civil Action No 25-1842). Judge Moss's decision did concern an ICSID Award, but the argument as to its assignability was conducted exclusively by reference to the allegedly prohibitory effect of Article 54(2), Judge Moss adopting the reasoning in *Blue Ridge*. Spain did not advance an argument by reference to customary international law before Judge Moss.

75. In my judgment, the effect of this material is that customary international law has yet to achieve any substantial uniformity of practice on the assignability of investor rights under investment treaties, still less is there a general recognition by states that the practice is sufficiently settled to have achieved normative status as a matter of customary international law. Rather there remain "substantial differences of practice and opinion within the international community", which as Lord Sumption noted in *Benkharbouche*, is "not consistent with that principle being law". The consideration of this issue in academic commentary and enforcement courts leaves unresolved potential differences between the assignment of investor treaty rights generally, assignment by investors of awards which come into existence on the international law plane and the assignment of investment treaty awards on the municipal law plane. Key issues as to the scope of any right of assignment of investor treaty rights of any kind have not been the subject of consideration, still less any sufficient consensus: for example whether an award could be assigned to a signatory state (bypassing state-state dispute mechanisms in the treaty or provisions restricting a state's power to take actions to support claims by its nationals); or a non-signatory state (with whom the host state might not even have

diplomatic relations); or to non-state actors without qualifying nationality under the treaty; or to non-state actors of the nationality of the host state.

76. It is also noteworthy that, with the exception of *Blue Ridge*, the cases relied upon by Blasket have been delivered in the last three years. The issue of assignability appears to have gained prominence in response to the recent emergence of a market in investment treaty awards. Professor Crawford in *Brownlie's Principles of International Law* (9th, 2019) at p.22 notes that the comparatively recent nature of this material is not without significance:

> "Provided the consistency and generality of a practice are established, the formation of a customary rule requires no particular duration. A long practice is not necessary, an immemorial one even less so: rules relating to airspace and the continental shelf have emerged following a fairly quick maturation period. In *North Sea Continental Shelf* [ICJ Reports 1969, 6, 43-6], the Court said:
>
> > 'Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of the States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.'
>
> This sets a high standard, especially in requiring concordant practice by states 'specially affected'."

77. The recent nature of the decisions relied upon, together with the fact that the decisions are those of "enforcement courts" from three jurisdictions who can scarcely be described as "specially affected" by the issue of assignability of investment treaty awards against states, all tell strongly against the existence of the rule of customary international law for which Blasket contends.

78. In short, I am satisfied that Blasket is really asking this court to develop international law by adopting a version of it that "however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states" to the requisite degree.

79. Finally, I should deal at this point with Blasket's suggestion that Article 1 Protocol 1 to the European Convention on Human Rights (a treaty to which Spain, Malta and Switzerland as the domiciles of the Investors, and the United Kingdom are parties) protects the right to assign protected property rights, and either evidences a state practice to that effect, or should influence the United Kingdom's interpretation of what customary international law requires. That argument was developed briefly by Blasket in writing. Blasket did not explain how a rule of customary international law which provided that treaty rights could not be assigned amounts to deprivation of possessions otherwise than "subject to the conditions provided by law and by the general principles of international law" for A1P1 purposes. There is the further difficulty that if it is a legal incident or feature of the award acquired by the investor that it cannot be assigned, the existence of that feature does not give rise to an A1P1 complaint: *Sims v Dacorum*

BC [2014] UKSC 63, [2015] AC 1336, [15]. For those reasons, I am not persuaded that the terms of A1P1 are of any assistance in resolving the issues which are before the court.

If customary international law does not positively prohibit assignment, is the effect of that "silence" that treaty rights are assignable unless the treaty provides otherwise?

80. Blasket argued that "the structure of international law is permissive, such that if a lacuna exists, then it ought not to be interpreted as a prohibition" or, as it was also put, "in the absence of provisions in the ICSID Convention and in the ECT regulating assignment, it cannot follow that assignment is prohibited".

81. On the basis of my conclusion that there is a rule of customary international law which prevents treaty rights being assigned without the state obligor's consent, and that treaty rights accorded to non-state actors are not a recognised exception to that principle, there is no "lacuna".

82. However, Blasket's argument from silence fails for a further reason. In support of the argument that what is not prohibited by international law is permitted, Blasket referred to the decision of the Permanent Court of International Justice in *The Case of the SS* "*Lotus*" 1927 PCIJ (Ser A) No 10, 7 September 1927. The decision arose from a collision between two steamships on the high seas, and raised the issue of whether Turkey had acted contrary to international law in asserting criminal jurisdiction over officers of the French vessel. France alleged that its courts had exclusive jurisdiction, that Turkey had been "wrong" in its actions, and that France was entitled to an indemnity from Turkey.

83. At p.15, the Permanent Court identified the issue for determination as "whether or not the principles of international law prevent Turkey from instituting criminal proceedings." Having identified the question, the Court then sought to identify the principles of international law which the prosecution was said to contravene or "violate". At pp.18-19, the Court stated:

> "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.
>
> Now the first and foremost restriction imposed by international upon a State is that - failing the existence of a permissive rule to the contrary - it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention. It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property

> and acts 'outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable. This discretion left to States by international law explains the great variety of rules which they have been able to adopt without objections or complaints on the part of other States
>
> …. In these circumstances, al1 that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction ; within these limits, its title to exercise jurisdiction rests in its sovereignty."

84. It will be apparent that the *SS Lotus* is concerned with an alleged limitation on the power of states to act in a certain way, and that the court rejected the contention that state conduct which does not contravene an established principle of international law will be prohibited unless the state can point to some rule of international law which expressly permits such conduct. That finding led to the rejection of France's assertion that Turkey had breached an international law obligation owed to France for which it should be required to pay compensation. It did not entail that France was obliged as a matter of international law to accept the jurisdiction which Turkey had asserted.

85. The issue of whether the principle recognised in *The SS Lotus* is available, at least in some circumstances, to a non-state actor was addressed by the ICJ in its advisory opinion of 22 July 2010 in *Accordance with International Law of the Declaration of Independence in Respect of Kosovo* ICJ Reports 2010, p.403. The non-state actor in that case was the Provisional Institutions of Self-Government of Kosovo, which lacked international legal personality, and had unilaterally declared Kosovo's independence from Serbia. The question on which the General Assembly of the United States sought the advisory opinion was "is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law"? At [59] and [51], the ICJ stated:

> "In the present case, the question posed by the General Assembly is clearly formulated. The question is narrow and specific; it asks for the Court's opinion on whether or not the declaration of independence is in accordance with international law. It does not ask about the legal consequences of that declaration. In particular, it does not ask whether or not Kosovo has achieved statehood. Nor does it ask about the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State.
>
> …. Accordingly, the Court does not consider that it is necessary to address such issues as whether or not the declaration has led to the creation of a State or the status of the acts of recognition in order to answer the question put by the General Assembly."

86. At [56] the ICJ stated:

> "[T]he General Assembly has asked whether the declaration of independence was 'in accordance with' international law. The answer to that question turns on whether or not the applicable international law prohibited the declaration of independence. If the Court concludes that it did, then it must answer the question put by saying that the declaration of independence was not in accordance with international law. It follows that the task which the Court is called upon to perform is to determine whether or not the declaration of independence was adopted in violation of international law. The Court is not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, a fortiori, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it. Indeed, it is entirely possible for a particular act — such as a unilateral declaration of independence — not to be in violation of international law without necessarily constituting the exercise of a right conferred by it. The Court has been asked for an opinion on the first point, not the second."

87. At [84], the ICJ answered that carefully defined question by stating that:

> "For the reasons already given, the Court considers that general international law contains no applicable prohibition of declarations of independence. Accordingly, it concludes that the declaration of independence of 17 February 2008 did not violate general international law".

88. We were also referred to an article by Professor Helen Quane, "Silence in International Law" British Yearbook of International Law (2014) Vol 84(1) 240, which closely analyses the ICJ opinion in *Kosovo*, and the submissions made to the ICJ by interested states. It is apparent from Professor Quane's analysis that the significance of silence in international law is a "complex and multifaceted phenomenon" (p.268). In relation, in particular, to the significance of silence so far as non-state actors are concerned, Professor Quane states at p.245:

> "While these entities can have certain rights and obligations under international law, these are not coterminous with those of states. There will be many instances where international law is silent on the conduct of non-state actors, given that it does not regulate their conduct in the same extensive way as it regulates the conduct of states. This dimension to silence has attracted little attention in the literature. This is unfortunate especially when principles that were originally formulated in relation to the conduct of states are extended to the conduct of non-state actors without any consideration of their underlying rationale or potential implications. A case in point is the principle that what is not prohibited is legally permitted. The principle has been invoked in relation to non-state actors, [this being a reference to submissions made by Denmark and Austria in the *Kosovo* case] but it is based on a state-centred and consensual view of international law and is of doubtful relevance to non-state actors."

89. I will assume that there may be circumstances in which the principle of international law recognised in *The SS Lotus* can apply to non-state actors as well as states, including investors, such that conduct of a non-state actor which is not expressly prohibited by international law will not "violate" international law. I would simply note that that is clearly a debateable proposition.

90. However, it is important to note the limits of such a position, assuming it is correct. It would mean that damages or other forms of reparation under international law would not be available against the non-state actor for taking the action in question. It does not entail that states are obliged to recognise that conduct as having particular legal effects under international law, just as the ICJ Advisory Opinion did not entail that states were obliged under international law to recognise the legal efficacy of the Kosovan declaration of independence.

91. When analysing the issues in this case, Blasket needs to establish not simply the absence of a positive prohibition under international law on investors assigning their claims, but that such an assignment is, without the state obligor's consent, legally effective on the international law plane to affect the obligations of the obligor state. Blasket's case entails that silence is the source of, or supports the existence of, a legal power on the part of the treaty right holder to alter the state's obligation, such that an obligation previously owed to the investor (and for which only the investor could give a discharge) is changed into an obligation owed to the third party to whom the investor has assigned its right (or to any assignee of such an assignee), with only the holder of the right from time-to-time able to provide a good discharge. The argument that silence in international law gives the relevant actor a liberty to act in a certain way (in that a state has no positive right that they not do so, and they commit no breach of duty by doing so), is a very different thing from an argument that where international law is silent on the issue, the relevant actor has a power to alter the existing international law obligations of a state in the way described. The material to which the court was taken did not suggest that silence in international law was capable of having such an effect.

Is Blasket seeking to assert "treaty rights"?

92. In his reply submissions, Mr Rabinowitz KC for Blasket submitted that the rights assigned to Blasket were not "treaty rights", and therefore not subject to the principle of international law for which Spain contended, referring to the provisions of the ICSID Convention and the ECT as "treaty obligations on the states party to those treaties". The difficulty with this argument is that if, on their proper characterisation, an entitlement arising under a treaty against a state to enforce a state's obligations under that same treaty has been transferred by the obligee to a third party, that is an assignment of treaty rights.

93. Mr Rabinowitz KC advanced a further argument that what had been assigned in this case was not a right to enforce the treaty, but to enforce an award arising under one of the means of resolving investment disputes offered by host states to qualifying investors under Article 26 of the ECT. This, he said, did not involve the assignment of a treaty right.

94. Mr Aughey accepted that if an investor chose to have the dispute resolved in the courts of the host state (i.e. under Article 26(2)(a) of the ECT), then the entitlement to satisfaction of any resultant judgment would arise by virtue of the municipal law of the host state, and its assignability determined by the law of the state. He accepted that an entitlement to satisfaction of the judgment would not engage the default rule of non-assignability of treaty rights under customary international law. Mr Aughey argued that this would not be the case for awards in arbitrations under the UNCITRAL Rules (under Article 26(4)(b)) or the SCC Rules (Article 26(4)(c)), because he argued that enforcement of those awards was dependent on Article 26(8) of the ECT. This provides:

> "The awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute. An award of arbitration concerning a measure of a sub-national government or authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted. Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards."

95. While it is not necessary to decide the issue, I regard that as a very challenging argument. Where the award in question arises on the municipal plane, and is binding and enforceable on the state as a matter of municipal law, I would tend to the view that enforcement proceedings involve the assertion of a municipal law right, not a treaty right on the international law plane. It is not necessary for the award creditor or their assignee to revert to the ECT to find an obligation on the state's part to comply with the award. Such an obligation appears in the UNCITRAL Rules (Article 34(2)); the SCC Rules (Article 46) and, more importantly, will arise under the national arbitration legislation of the seat (e.g. ss.58 and 66 of the Arbitration Act 1996). I would not regard the language of Article 26(8) of the ECT as being intended to draw the distinction between the effect of determinations under Article 26(2)(a) and the other dispute resolution options for which Article 26 of the ECT provides, but rather as providing express confirmation in the case of arbitral awards what is obvious in the case of a national court determination: that the decision is final and binding (s.58 of the 1996 Act having a similar provision).

96. However, we are not concerned in this case with an attempt to enforce a national court judgment or an arbitration award made on the municipal law plane, but an ICSID award. An ICSID award exists on the international law plane, and, subject to the issues raised by Ground 2, the obligation to comply with it can only arise under the ICSID Convention and as a matter of international law. In particular, in my view the rights an ICSID award creditor is asserting in recognition and enforcement proceedings are the treaty provisions in Article 53(1) providing that the award is "binding on the parties and shall not be subject to any appeal or to any other remedy …." and the obligation of the parties to "abide by and comply with the award", and the obligation of all Contracting States under Article 54(1) to recognise the award as binding and to enforce the pecuniary obligations it imposes. If those rights are not properly characterised as treaty rights, I am unable to identify what the source or characterisation of the rights is.

97. Finally, on this issue, Mr Rabinowitz KC submitted that it would be surprising if the issue of assignability of relief granted to an investor in respect of breaches of the rights afforded to the investor under the ECT depended on which dispute resolution option under Article 26 the investor exercised. However, there are a number of significant differences between the various options. For example, the ICSID Convention involves its own tests of nationality which excludes dual nationals of the host state, and as to what constitutes a qualifying investment which may differ from the treaty relied upon as the source of the substantive rights (the so-called "double keyhole test"). Further, the mechanisms for challenging an award differ fundamentally as between ICSID awards and national court decisions or awards on the municipal plane. The grounds for resisting enforcement before a national court are significantly wider under the New York Convention than under the ICSID Convention, but the differences are not all one way. Thus enforcement courts have a discretion under the New York Convention to enforce

an award even where it has been set aside in its seat, which would not apply to an annulled ICSID award. In my view, there is nothing surprising in the fact that the choice made by the investor as to where to bring its claim may impact on the investor's ability to assign the benefit of any determination in its favour.

Does the ICSID Convention devolve the issue of assignability to national law?

98. The arguments raised by this issue overlap with those raised by Ground 2 and I address them below. For the reasons I set out below, in my view the answer to this question is no.

The effect of my determination of Ground 1A

99. Blasket does not contend that either the ECT or the ICSID Convention positively confer on a qualifying investor a positive right to assign an award giving effect to treaty rights. Blasket describes the treaties as "neutral" on that question. It follows that, on the basis of the conclusion I have reached, on Ground 1A, it is not strictly necessary to determine Grounds 1B to 1D. Nonetheless, these points were fully argued, and they formed the basis of the Judge's determination (Ground 1C in particular). In those circumstances, I set out my conclusions on them below.

Ground 1B: Does Article 15 of the ECT preclude an assignment of an award in respect of substantive rights arising under that treaty?

The arguments

100. This issue arises only if, contrary to my determination on Ground 1A, customary international law does recognise a general power on the part of investors to assign investment treaty rights. In that eventuality, Spain does not suggest that the ECT contains an express prohibition on the right to assign an award giving effect to an investor's ECT rights, but argues that such an exclusion is implicit in Article 15 of the ECT and its express recognition of a limited right of assignment and/or subrogation for contracting states. As I have stated, Mr Aughey did not suggest that, even if this argument was correct, it would prevent an investor assigning an otherwise-assignable judgment of a host state court in its favour if it chose to pursue its claim for a breach of the ECT in that tribunal.

101. Article 15 provides:

> "(1) If a Contracting Party or its designated agency (hereinafter referred to as the 'Indemnifying Party') makes a payment under an indemnity or guarantee given in respect of an Investment of an Investor (hereinafter referred to as the 'Party Indemnified') in the Area of another Contracting Party (hereinafter referred to as the 'Host Party'), the Host Party shall recognise:
>
> (a) the assignment to the Indemnifying Party of all the rights and claims in respect of such Investment; and
>
> (b) the right of the Indemnifying Party to exercise all such rights and enforce such claims by virtue of subrogation.

(2) The Indemnifying Party shall be entitled in all circumstances to:

(a) the same treatment in respect of the rights and claims acquired by it by virtue of the assignment referred to in paragraph (1); and

(b) the same payments due pursuant to those rights and claims,

as the Party Indemnified was entitled to receive by virtue of this Treaty in respect of the Investment concerned.

(3) In any proceeding under Article 26, a Contracting Party shall not assert as a defence, counterclaim, right of set-off or for any other reason, that indemnification or other compensation for all or part of the alleged damages has been received or will be received pursuant to an insurance or guarantee contract."

102. Spain argues unless the ECT otherwise precluded assignments of treaty rights, there would be no need for Article 15. It relies in this regard on the view expressed by Dr Wehland about state subrogation provisions of this kind:

> "IIAs frequently contain subrogation provisions, which stipulate a *cessio legis* of both treaty claims and jurisdiction offers where the investor's home state or its designated agency indemnify the investor for losses suffered with regard to the investment under an indemnity or guarantee agreement. Since the indemnity or guaranty agreement will typically already provide for the transfer of the investor's rights in the event of payment, the function of these clauses can arguably not be seen as limited to the subrogation itself. Rather it would appear that these provisions are really meant to provide for an exception to what is the rule in the mind of the signatories – namely that an investor's claims and other rights under the treaty cannot be assigned without the state's consent".

103. Spain also argues that its interpretation of the ECT is supported by the *travaux préparatoires* of the ECT, and specifically relies on the fact that at one point, a version of what became Article 15 in drafts of the treaty produced on 20 August 1991 (in Article 24) and 26 April 1993 (in Article 17) made similar provision for assignment or subrogation where a "company or enterprise incorporated in a Contracting Party" had indemnified an investor. At a working group meeting on 22 April 1993, it was decided that the scope of the assignment/subrogation provision should be limited to rights of indemnity in respect of political risks, and by 29 April 1993, references to a corporation or enterprise as an indemnifying party to whom the article would apply had been removed.

104. For its part, Blasket argues that the purpose of Article 15 of the ECT is not to permit a narrowly defined class of assignments while implicitly prohibiting any other assignments, but to entrench a treaty right so as to prevent contracting parties from passing legislation which would bar indemnifying states from pursuing treaty claims by way of assignment or subrogation. Blasket relies in this regard on the views expressed by Professor Kaj Hobér, *The Energy Charter Treaty: A Commentary* (2020), p.317:

> "Subrogation is an accepted principle of insurance law. A subrogation clause provides for the assignment of an existing claim from the guaranteed investor to a third party and that the third party as subrogate acquires the same rights as the investor had. This ensures that the insurer/ guarantor has a legal basis for recovering payments made under the insurance policy. Subrogation is thus a central element in most investment guarantee programmes.
>
> For such programmes to work it is also important that the host country in question agrees to recognize subrogation. Otherwise the assignment of the investors rights and claims to the insurer might not be accepted under applicable national law. When such recognition is affected in a treaty—as in the ECT—it also becomes an international obligation on the host State/Contracting Party in question."

105. Blasket points to the rejection of an argument similar to Spain's by (i) the Rotterdam District Court in its judgment of 21 July 2026 (see [70] above) in relation to Article 15 of the ECT, and (ii) the Hague Court of Appeal of 15 September 2026 (see [72] above) in relation to Article 10 of the Mauritius-India BIT, albeit the treatment of the issue in both cases is very brief.

106. Blasket also argues that any award or judgment giving effect to a qualifying investor's ECT rights is itself an asset protected by the ECT, and which benefits from the obligation to avoid unreasonable or discriminatory impairments on the right to dispose of the asset afforded by Article 10 of the ECT. In this regard, Blasket relies on decisions which suggest that there are circumstances in which an arbitration award arising from a qualifying investment can be regarded as a continuation of that investment:

    i) *White Industries Australia Ltd v Republic of India* UNCITRAL Final Award, 30 November 2011 (Brower, Lau, Rowley) in which a commercial contract between the investor and Coal India, a state-owned company, provided for disputes to be resolved by arbitration. White obtained an award against Coal India from an arbitral tribunal seated in Paris, but White was unable to enforce the award in India, due to persistent delays in the Indian court system. It brought a claim under the Australia-India BIT. India objected that White's rights under the commercial agreement did not constitute an "investment", leading White to argue in the alternative that the commercial arbitration award was itself a protected investment. The tribunal accepted that White's contract rights constituted an investment in India, but in the alternative was willing to treat the award as part of the original investment ([7.6.3]), being "a continuation or transformation of the original investment" ([7.6.10]). The tribunal did not need to, and did not, address the issue of whether, if White's rights under the commercial contract did not constitute an investment, the commercial arbitration award could be said to be an investment "in the territory of" India, as the Australia-India BIT required.

    ii) *Swissbourgh Diamond Mines v Lesotho* [2018] SGC 81, [2019] 1 SLR 263, in which the investor acquired mining leases in Lesotho. It alleged that Lesotho had expropriated its leases, and brought a claim in respect of the expropriation before a specialist tribunal formed under an international treaty which established the Southern African Development Community to determine disputes in respect of international investments in SADC territories ("the SADC tribunal"). That claim went nowhere, with the investor alleging that this resulted

from interference by Lesotho. That interference allegation was the subject of a separate claim by the investor under a protocol signed by members of the SADC which only came into force *after* the acts alleged to constitute expropriation of the leases had taken place. An UNCITRAL arbitral tribunal seated in Singapore awarded damages to the investor for the interference with the claim before the SADC tribunal, but that award was set aside by the Singapore Court on the basis of lack of jurisdiction, because the claim before the SADC tribunal was not a qualifying investment. In its judgment on appeal, the Singapore Court of Appeal was willing to accept that the right to claim before the SADC tribunal could constitute an investment either on a standalone basis or as a continuation of the original investment ([163]-[164], [170]). However, the investment did not meet the territorial nexus requirement of being an investment made in the territory of Lesotho ([173]). While municipal law rights arising from disputes relating to an original qualifying investment might satisfy that requirement, on the basis that the claim brought and its determination formed part of the "bundle of rights" constituting the investor's investment, the SADC claim was a claim under international law before an international law tribunal ([173]-[175]).

107. The Judge dealt with this issue briefly, given his conclusion on the effect of Article 54 of the ICSID Convention. He observed that Spain's argument as to the effect of Article 15 had "significant force" (Judgment, [53]), and he accepted Dr Wehland's view that Article 15 reflected a decision to exclude other assignments ([54]).

Analysis

108. If public international law recognised a general power on an investor's part to assign an award in respect of its rights under an investment treaty (the premise, on which this stage of Spain's argument must be approached), I am not persuaded that Article 15 would exclude such a right.

109. First, it is common ground that the ECT does not directly prohibit the assignment by an investor of an award obtained pursuant to one of the dispute resolution methods offered by Article 26. If customary international law did recognise a general power of an investor to assign treaty rights, that failure would be significant, and the ECT would fall to be construed against that background, as part of that context (Article 31(3)(c) of the VCLT).

110. Second, I cannot accept Spain's contention that "the assignment to the Indemnifying Party would be entirely unnecessary if the authors … had intended rights acquired under or by reference to the ECT to be assigned generally" nor Dr Wehland's similar appeal to redundancy, certainly so far as rights arising under awards are concerned. Article 15 has a significantly wider subject-matter than the assignment of awards:

    i) Where it applies, Article 15 allows the assignment of claims, and the right to accept the host state's offer to submit the claim to one of the forms of dispute resolution in Article 26, whether before a court or tribunal of the host state or one of the arbitration options.

    ii) Article 15 also allows one Contracting State to bring claims against another Contracting State through the exercise of the investor's rights, and to do so using the dispute resolution mechanisms made available only to investors. That is so

even though Article 27 contains a separate dispute resolution provision for the "settlement of disputes between Contracting States". The ability of a state to pursue investment rights afforded to qualifying investors in an investor's stead, and to do so through one of the means afforded to qualifying investors by Article 26, might well be thought a matter which merited express confirmation.

iii) In particular, the dispute resolution options afforded to an investor (and, by virtue of Article 15, to an indemnifying state) include arbitration under the ICSID Convention. Article 27(1) of that Convention limits the conduct which a state can take on the part of one of its investors, providing:

> "No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute."

Article 27(1) of the ICSID Convention flags a potential concern about state subrogees which it is understandable that the signatories to the ECT might wish to address, at least for the purpose of non-ICSID forms of treaty dispute resolution.

iv) Article 15 also limits the host state's ability to rely upon the compensation of the investor as a defence (Article 15(3)), and, as Hobér notes, entrenches the protections in the form of treaty rights which would prevent a state from taking steps to prevent claims by an assignee of this specific character under its national law (although the force of that point is somewhat diminished by the fact that it would only appear to be of relevance if a claim was brought in the national court of the host state, and then only by contracting state assignees and subrogees).

111. Third, Article 26 of the ECT expressly provides for the investor to obtain an award under municipal law, which might well involve an award which was assignable under the terms of that municipal law, without suggesting that any judgment or award obtained as a result of the investor accepting the Article 26 offer to arbitrate claims would lack any quality of assignability such an award or judgment might otherwise have had.

112. In these circumstances, I am not persuaded that Article 15 would exclude any right of assignment on the investor's part which otherwise existed under applicable law. Spain's reliance on the fact that, at one stage, a draft of what became Article 15 referred to companies and enterprises, as well as states and state agencies, does not assist, because nothing is known about the reasons for the inclusion or removal of those words: for example whether it was because such a reference was inappropriate in a provision essentially seeking to address state-to-state interaction. The reference to political risks insurance on which Spain relies offers no assistance, because insurance against such risks is available from private enterprises as well as state agencies. The material is incapable of "confirming" any interpretation, still less does it represent a "bull's eye" capable of supporting Spain's interpretation.

113. I have reached this conclusion without needing to address Blasket's assertion that an ICSID award arising from an ECT claim is itself a protected investment under the ECT treaty. That argument goes further than the decisions which have to date recognised judgments or arbitration awards as a continuation of a qualifying investment. Those were all concerned with arbitrations under a different mechanism to the treaty relied upon as a source of the protection. If an investor obtains an ICSID award in respect of its ECT rights, it is difficult to conceive of it then bringing a further claim under the ECT in respect of that award, rather than simply seeking to enforce it. There is also the difficulty, which was central to the outcome in *Swissbourgh*, of whether an award on the international law plane can satisfy the territorial nexus which qualifying investments require, and the question of whether, on its proper construction, the ECT can really have been intended to extend Article 14 protection to ICSID awards obtained by exercising that dispute resolution option under Article 26 if non-assignability is inherent in an ICSID award (particularly when it was open to an investor to choose an alternative form of dispute resolution capable of culminating in an assignable determination). Finally, the effect of such an argument would seem to be that an ICSID award in the investor's favour would be assignable, but one in the state's favour (for costs or a counterclaim) would not. Had Blasket's Article 15 argument otherwise failed, its attempt to rely on the status of the ICSID Award as a protected investment under the ECT would have faced formidable, and in my view insuperable, difficulties. To the extent that Blasket seeks to rely on the protections in Article 10 of the ECT as providing a free-standing source of a right to assign an ICSID award if that means of dispute resolution is chosen by the investor under the ECT, I would reject that argument for the reasons set out in this paragraph.

114. In reaching this conclusion, I have not placed reliance on Blasket's submissions as to the object and purpose of the ECT, which I did not find persuasive. That argument involved the assertion that the ability to assign investment treaty awards, including those giving relief for breaches of the ECT, serves the object and purpose of the ECT because a significant proportion of investment treaty awards go unpaid, and assignment permits investors to monetarise their claims more readily than through enforcement against states. Blasket relied upon a survey of compliance by states with investment treaty awards published by E Gaillard and I M Penushliski, "State Compliance with Investor Awards" 35(3) ICSID Review 540 (2020) (a survey not limited to ICSID Awards). An argument along these lines appealed to Stewart J in *Blasket FCA* at [317], on the basis that assignability would enable award creditors to recover "the value of compensation due to them in circumstances where full recovery from award debtor compliance is not feasible or is expected to be protracted".

115. In response, Spain relied upon a more recent, and, it suggested, more positive assessment of state compliance, N Strain et al, "Compliance Politics and International Investment Disputes: A New Dataset" (2024) 27 Journal of International Economics Law 70, 88. Spain and Blasket both referred to the ICSID Compliance Paper, [181] which states that 66% of damages awards are voluntarily complied with, and 97% of award creditors obtain satisfaction of damages claims (as to the significance of which we received "glass half full" and "glass half empty" submissions).

116. The objects of investment treaties such as the ECT are expressed at a level of generality. The issue of whether, and to what extent, recognition of a right to assign awards is necessary to assist successful investors is itself controversial (e.g. as to whether there

are other legal mechanisms such as a trust over the award or a right to control claims which might also provide award creditors with an ability to monetarise awards prior to debtor state compliance). The Judge made this point at Judgment, [49]:

> "Subject to the outcome of the currently stayed set aside application, the claimants remain entitled as between them and Spain to enforce the Award by registration under the 1966 Act and Blasket can control the process and recover any sums recovered by the claimants by enforcement as is already expressly provided for by clause 7 of the Assignment Agreement."

117. There is also the dispute between the parties as to how extensive state non-compliance is. More fundamentally, however, Blasket's argument was of a largely instrumental kind, rather than one tied into the interpretation of treaty text. As Lord Lloyd-Jones observed in *R v TRA v Redress* [2019] UKSC 51, [2021] AC 349, [26]:

> "It is well established that a treaty should be interpreted in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose (Vienna Convention on the Law of Treaties, article 31(1)). It is necessary, however, to sound a cautionary note at this point. While the object of UNCAT was undoubtedly, in one sense, to end impunity for perpetrators of what might be termed 'official torture' it does not follow that the reading of the Convention which would best avoid impunity must be adopted in all circumstances. It is, rather, necessary to give effect to the words used in the light of the object and purpose of the scheme created by the state parties to the Convention. Similarly, the mere fact that a particular reading may be seen as a desirable development of the law is not of itself a valid reason for adopting it. It is not for national courts engaged in interpreting a treaty to seek to force the pace of the development of international law, however tempting that may be."

Ground 1C: Does Article 54(2) of the ICSID Convention allow anyone other than the original award creditor to seek recognition or enforcement of an ICSID award?

Introduction

118. That brings me to the issue which formed the principal basis of the Judge's conclusion on Ground 1, albeit in the light of my conclusion on Ground 1A, it is no longer determinative in this case: that, properly construed, Article 54(2) of the ICSID Convention only permits a party to the ICSID arbitration award to seek recognition or enforcement in signatory states. The Judge accepted that argument:

    i) He held that the phrase "a party" in Article 54(2) was to be read consistently with the provisions in Article 53(1) that the award "shall be binding on the parties" and "each party shall abide by and comply with the terms of the award", which "plainly refer to the parties or a party to the arbitration in which the award referred to in Article 53(1) has been rendered" (Judgment, [43]).

    ii) He rejected Blasket's contention that the ICSID Convention distinguished between a "party to the dispute" or "parties to the dispute" and the simpler "a party" or "the party", suggesting that the terms were used interchangeably (ibid).

iii) He held that the requirement imposed by Article 54(2) to furnish "a copy of the award certified by the Secretary-General" suggested that it was not contemplated that any party other than a party to the dispute could seek enforcement ([45]).

iv) He relied upon commentary in two textbooks and one article which supported this interpretation.

v) The first, and most authoritative, textbook is Schill et al, *Schreuer's Commentary on the ICSID Convention* (3rd, 2022) ("*Schreuer*"). On p.1511 at [139], *Schreuer* states:

> "Only a party to the original ICSID arbitration proceeding may initiate the procedure under Art. 54(2). This would exclude action by an interested third party. It would, in particular, exclude action by a State purporting to act on behalf of its constituent subdivision or agency ... Action under Art. 54(2) by a State acting in the exercise of diplomatic protection of its national who was a party to an ICSID proceeding (see Art. 27, paras. 47–55) would also be impossible. The requirement that only one of the original parties may initiate a proceeding for the recognition and enforcement of an award may also lead to problems of State succession or corporate succession."

vi) At [140]-[141], *Schreuer* goes on to refer to the decision in *Blue Ridge*, to the contrary effect, without engaging critically with the reasoning in that case.

vii) The article was by Dr Wehland (see [62(ii)] above). While that addresses the assignment of investment treaty claims and of the right to accept the dispute resolution offer, it does not address Article 54(2) (and, in my opinion, does not assist in this appeal).

viii) The second textbook is *The ICSID Convention, Regulations and Rules – A Practical Commentary* (2019), the Judge referring to a passage from the commentary on Article 54 by Salim Moollan KC and Lucas Bastin (now KC). At [4.1363] this states:

> "Recognition and enforcement proceedings can only be initiated by a 'party' to the Award, as the terms of Article 54(2) state. This excludes the ability for third parties to commence such proceedings, which would include the investor's home State acting on a diplomatic protection basis and the State of origin of any constituent subdivision or agency that was the respondent to an Award."

ix) The Judge held that the decision in *Blue Ridge* and of Stewart J in *Blasket FCA* did not assist, the former because it focussed on US law and did not address the requirements of the VCLT ([64]-[68]), and the latter because it relied on *Blue Ridge* ([64]-[70]).

119. In addition to the arguments which persuaded the Judge, Spain relied before this court on the *travaux préparatoires* of the ICSID Convention, and in particular the discussion by delegates of whether the ICSID Convention should include an article permitting states to arbitrate claims when they had indemnified an investor of their nationality for

the consequences of the treaty breach. I have found that material of some assistance, in providing a response to one of Mr Rabinowitz's arguments, but not more generally. By way of a brief summary of its effect:

i) A term which would have permitted claims to be brought by signatory state subrogees featured in an early draft of the convention, as a qualification to what became Article 25(1). That was deleted at a late stage.

ii) Only some of the discussion of subrogation in the *travaux* was placed before the court. Even from that limited body of material, it is apparent that while some delegates were opposed to any form of subrogation, others (perhaps the majority) were concerned with the potential conflict with the provision which became Article 27 of the ICSID Convention, and with the prospect of a state being able to appear before an ICSID arbitration tribunal pursuing a claim against another state in the character of a private individual (see for example the discussion of draft Article 26(2) in the Chairman of the Legal Committee's Report of 23 December 1964 and the Memorandum from the General Counsel dated 19 January 1965 at [32]).

iii) A helpful illustration of the types of issue raised can be seen in a memorandum of a meeting of the committee of 18 February 1965. This records Mr Broches, General Counsel of the World Bank, stating of the proposed article at [39]:

> "Mr. Broches, in reply, pointed out that the question of subrogation was not really involved at all. Article 26(2) had been included not in order to provide for subrogation, but to enable two States to appear before the Centre despite the basic provisions of Article 25 which said that the facilities of the Centre were only available for disputes in which one party was a State and the other was not."

In response at [40], Mr. Gutierrez Cano, the Spanish delegate, said that:

> "considering that the situation described in the Convention is unprecedented, subrogation should be avoided not only of a State but also of any other institution."

iv) None of the material before the court referred to assignment of awards.

v) In these circumstances, while the *travaux* show a deliberate decision not to include a right for signatory states to bring claims in ICSID arbitration when exercising rights of subrogation or assignment, they do not assist in determining whether or not the ICSID Convention excludes a general power on the part of investors to assign ICSID awards (assuming such a right otherwise exists), the *travaux* being equivocal both as to the reasons why a subrogation clause for signatory states was included in drafts of the Convention and as to why it did not find its way into the final version.

120. Blasket relied on the textual arguments which the Judge rejected, and their acceptance by courts in the US, Australia and the Netherlands. I will consider what the authorities say on that particular question at this point.

121. In *Blue Ridge*, Judge Gardephe accepted the argument that the word "party" in the ICSID Convention did not always refer to a party to the arbitration, sometimes referring to a party to the dispute (e.g. Article 64) or a party to the Statutes of the ICJ (Article 67), and that some articles (e.g. Article 25) included language which made it clear that "party" meant "party to the dispute", or this was clear from the context (e.g. Articles 43 and 45). Applying US canons of statutory interpretation which favoured readings of instruments which avoided surplusage, Judge Gardephe held that the use, in a number of Articles, of the qualifier "in dispute" or "to the dispute" would be redundant if the word "a party" always had that meaning. He concluded that the ICSID Convention directed national courts to their own legislation in enforcing ICSID awards, including (implicitly) the issue of whether they could be enforced by assignees. He held that there was no restriction on such enforcement under New York law.

122. Stewart J adopted Judge Gardephe's textual analysis in *Blasket FCA* (see [67] above) at [307]-[309]. Addressing Spain's reliance on the meaning of the word "parties" in Article 53 when interpreting Article 54(2), he held that there was "force in the view" that the word "parties" in Article 53 extended to state signatories as well as the parties to the arbitration, on which basis the phrase did not bear the same meaning in the two articles ([309]). As I have stated, Stewart J characterised the issue of construction as being whether it was possible "to read an implied prohibition to Art 54" ([311]).

123. The Rotterdam court (see [70] above) also approached the issue on that basis ([4.6]), and held that the words a "party" in Article 54(2) could include an assignee.

124. Finally, in *Eurus Energy* (see [74] above) Judge Moss followed Judge Gardephe in *Blue Ridge*, both in his textual analysis of the ICSID Convention, and in finding that the ICSID Convention devolved the issue of enforcement, including assignability, to enforcement courts. Judge Moss held that the award was assignable as a matter of both Federal common law and the law of the District of Columbia.

125. In addition, Blasket supported Stewart J's reasoning in *Blasket FCA* as to the different meanings of the word "party" in Articles 53 and 54 by reference to the judgment of Lords Lloyd-Jones and Sales in *Micula v Romania* [2020] UKSC 5, [2020] 1 WLR 1033 ("*Micula SC"*). An issue arose in that case as to the potential application of Article 351 of the TFEU, which "is intended to establish in accordance with principles of international law that that the application of the EU Treaties does not affect the duty of a member state with respect to the rights of non-member states under a prior agreement …." ([97]). Article 351 had no application "if the only obligations in play are those owed to other member states" (ibid). That in turn raised the issue of whether the obligations under Articles 53, 54 and 69 were, in the context of Romania's challenge to registration of an ICSID award by the United Kingdom, only obligations as between Romania and the UK (which would be "intra-EU" obligations in respect of EU obligations which the UK accrued while still a member of the EU).

126. At [105], Lords Lloyd-Jones and Sales held that the obligations under the relevant provisions of the ICSID Convention were not obligations solely as between the UK and Romania, but were owed to all Contracting States:

> "The obligations of contracting states in articles 53, 54 and 69 are expressed in unqualified terms, without limit as to the persons to whom they are owed. Article 64 is expressed in entirely general terms which are apt to include disputes

> regarding the obligations set out in those articles. These features of the Convention regime provide a strong indication that a contracting state which has obligations under the Convention in relation to an award owes those obligations to all other states party to the Convention as well as to any party to the award. Article 27(1) confirms that the obligation on a contracting state against whom an arbitration award is made to comply with the award is not just owed to the other parties to the dispute, since it recognises that any contracting state whose national is involved in the dispute may bring an international claim against the other contracting state if it fails to comply with the award rendered."

127. Blasket also relied in its written submissions on extracts from the *travaux préparatoires* of the ICSID Convention, it being said the *travaux* "contemplate that parties other than the direct parties to the dispute could be involved in enforcing an ICSID award." The passage relied upon is an entry in the Legal Committee meeting of 11 January 1965 discussing a draft Article 57(1) which provided, "each Contracting State shall recognize an award rendered pursuant to this Convention …. as final and binding on the parties." Mrs Villgrattner, the Austrian representative, is recorded as suggesting that "the words 'on the parties' be deleted because third parties could be involved in the enforcement", which led Mr Broches to suggest that the words "on the parties" could be removed. However, it is far from clear that Mrs Villgrattner and Mr Broches had in mind non-parties to the treaty, as opposed to the finality of awards being recognised by other signatories (the point made by Lords Lloyd-Jones and Sales in *Micula (SC)*). In any event, the suggestion was not acted on. In my view, this passage from the *travaux* missed the board, not simply the bull.

Analysis

128. I have not found this issue straightforward, but have ultimately come to the same conclusion as the Judge.

129. Like the Judge, I did not find Blasket's reliance on the use of the word "a party" rather than "a party to the dispute" in Article 54(2) instructive. There is, naturally, a degree of flexibility in the use of the concept of "party" in the Convention, because it is a treaty to which states are signatories (or "parties") but which extends rights to certain non-signatories, who may exercise some treaty rights. It is also a convention in which states play different roles at different times: the investor's state is the source of the investor's qualifying nationality; the host state is the respondent to an investment claim; and other signatory states may be places in which enforcement of an ICSID award is sought. Those features of the ICSID Convention are reflected in the language used:

    i) In certain contexts the phrase "the party in dispute" is used to make it clear that the provisions are concerned with the parties on either side of a particular investment dispute. This is true of Article 25(1), where the phrase "the party in dispute" makes it clear it is the claimant investor and the respondent state to a particular dispute who must consent to submit that dispute to the Centre's jurisdiction; and of Article 64 which permits reference to the ICJ by one of the parties to a dispute arising between contracting states. The need to distinguish between the investor's state or other signatory states and the host state of the investment also explains the other uses of "the party in dispute" in that Article, and in Articles 38 and 39.

ii) There are Articles addressing matters with which only the parties to the dispute will be concerned which, perhaps for that reason, do not add the words "to the dispute": for example Articles 28(1), 29(1) and 30 addressing conciliation; Articles 34 and 45 addressing non-appearance at the arbitration; Article 36(1) addressing the commencement of state-state and investor-state arbitration; Article 42 concerning choice of law; Article 48 concerning the publication of the award; Articles 49(1), 50 and 51 as to additional awards or corrections to the award and Article 52 as to annulment.

iii) However, there are articles where the context makes it clear that it only applies to parties to the conciliation or arbitration process, and yet the words "to the conciliation" or "to the dispute" appear: for example Article 32(2) (a jurisdictional challenge); Article 35 (the non-admissibility in subsequent proceedings of statements made during the conciliation process); Article 41(2) and Article 52(6) (the submission of the dispute to a new tribunal following annulment of the award) and Article 57 ("a party to arbitration proceedings" and "a party" used apparently interchangeably in relation to disqualification of commission or tribunal members).

iv) The expression "a party" is frequently used when one or other of the two parties to the dispute may wish to take the relevant action. That is also true of Article 54(2), where either the investor or the host state may wish to register the award (in the latter case to enforce a costs award or, in exceptional circumstances, an award on a counterclaim under Article 46). Some of these references add the words "to the dispute" (Articles 32(2), 38, 39, 41(2), 49(2) and 52(3)) and some do not (Articles 45(1) and (2), 46, and 54(2)). There are provisions in which the words "either party" are used when the Convention envisages that either the investor or host state may act (e.g. Articles 30, 38 and 50), but I can discern no drafting purpose in the selection of "a party" and "either party" for a particular Article.

v) While I place only limited weight on this, the fact that Article 53 and 54(2) do not include the words "to the dispute" can be explained on the basis they are addressing a stage in the process when the dispute has been resolved.

vi) For these reasons, like the Judge, I have not found the absence of the words "to the dispute" in Article 54(2) of assistance.

130. In contrast, I see real force in Spain's submission that the words "a party" in Article 54(2) would naturally be read as meaning one of "the parties" on whom Article 53(1) provides that the award is "binding" and who have agreed to abide by and comply with its terms. Article 54(1) tracks the different parts of Article 53(1) closely:

i) The provision in Article 53(1) that the award "is binding on the parties" is picked up in the Contracting States' obligation in Article 54(1) to "recognize an award … as binding".

ii) The provision in Article 53(1) that the parties "shall abide by and comply with the terms of the award" is picked up, so far as pecuniary obligations are concerned, in the Contracting States' obligation in Article 54(1) to "enforce the pecuniary obligation imposed by the award."

iii) Article 54(2) provides the means by which "a party" can avail itself of those obligations of recognition and enforcement, and it would be particularly surprising if the scope of the phrase "a party" suddenly embraced parties not referred to in Article 53.

131. Nor was the court pointed to any other provision in ICSID where the expression "party" or "parties" is used to refer to anyone other than a signatory to the ICSID Convention or someone accorded rights under the Convention.

132. Mr Rabinowitz KC suggested that "a party" in Article 54(2) must extend beyond the named parties to the dispute, because a dispute arising under the ECT in respect of a state exercising rights of subrogation or assignment after indemnifying its investor must be capable of being brought under the ICSID Convention. Mr Aughey initially accepted that such a claim was possible, but later confirmed that it was Spain's position that it was necessary to satisfy both the requirements of the ECT and of the ICSID Convention in such a case. The *travaux préparatoires* to which Mr Aughey referred the court, against the background of Article 27, support Mr Aughey's argument that the ICSID Convention was not intended to permit a state to bring a claim in the capacity of an assignee or subrogee of one of its nationals. Not every claim arising under an investment treaty which offers ICSID arbitration as one of its dispute resolution options can be brought in ICSID arbitration (cf. the discussion of the "double keyhole" test at [97] above).

133. For these reasons, I agree with the Judge that, as a matter of textual analysis of the ICSID Convention, the phrase "a party" in Article 54(2) is most obviously read as a reference to one of the parties on whom the award is binding in Article 53 (and indeed one of the parties entitled to seek interpretation, revision and annulment of the award under Articles 50 to 52). In contrast to the Judge, I would not attach weight to the fact that "a party seeking recognition or enforcement" must produce a certified copy of the award. That would be the case whether recognition was sought by one of the parties to the award or someone deriving rights in the award from such a person, and a similar provision in Article IV of the New York Convention does not appear to prevent recognition or enforcement by assignees of awards (see [44] above).

134. What of Blasket's reliance on *Micula SC*, [105] and the suggestion that "parties" in Article 53 and "a party" in Article 54(2) have a different meaning? In my view, this paragraph is of limited assistance to Blasket:

i) Lords Lloyd-Jones' and Sales' reference to Article 53 is focussed not on the words "the award shall be binding on the parties" but the provision that "the award shall not be subject to any appeal or to any other remedy except those provided for in this Convention": see [62] and [84] of *Micula (SC)*. This does not assist Blasket. They were not, on my reading, stating that other contracting states fell within the words "the award shall be binding on the parties". The obligation of other contracting states to recognise that an award is binding *as between the parties to the dispute* appears in Article 54(1).

ii) At [105], Lord Lloyd-Jones and Lord Sales do express the view that the duty imposed by the words "each party shall abide by and comply with the terms of the award" under Article 53(1) "is in fact owed to every other contracting party" (endorsing the view expressed in *Schreuer*). However, that finding does not

involve giving the words "each party" a wider meaning than the parties to the award, because the words "each party" in the second sentence of Article 53(1) only define who owes the obligation, not to whom it is owed.

iii) In any event, even adopting Blasket's reading of [105], it would still not involve the concept of "party" being extended beyond the signatories to the Convention and qualifying investors to whom the Convention affords direct rights.

135. Blasket also argues that interpreting "party" in Article 54(2) as including assignees favours the object and purpose of the ICSID Convention. For the reasons I have set out at [116]-[117] above, I am not persuaded that Blasket's appeals to the object and purpose of the ICSID Convention are of assistance in interpreting Article 54(2), nor that "object and purpose" considerations support interpreting the ICSID Convention in a manner which facilitates the sale of ICSID awards or which makes it easier for an award creditor to "drop out of the picture" once it has done so. It is apparent that the framers of the ICSID Convention expected that state award debtors would voluntarily comply with awards, their principal concern being compliance with awards against disappointed claimants (see for example *Schreuer*, p.1460, [50]). There is no suggestion that a market in ICSID awards was in any signatory's contemplation, and the Convention does not address how efficiently an award might be enforced, leaving signatory enforcement states to apply the same national procedures as for judgments.

136. Blasket suggested that the subsequent developments it relied upon in relation to state compliance and the market for awards justify a wider interpretation of the concept of "a party" in Article 54(2) than may have been appropriate when the ICSID Convention was finalised, relying on observations of the Supreme Court in *Basfar v Wong* [2022] UKSC 20, [2023] AC 33, [64]-[67] that treaty language may need to be given "an 'evolutionary' interpretation which takes account of circumstances as they are now" rather than "a 'static' interpretation which takes account only of circumstances which existed at the time" the treaty was concluded. However, the issue which arises in this case is not the interpretation of words which are "general or vague and refer to concepts that are fluid and may naturally be expected to alter over time" (as were in issue in *Basfar*). The issue of whether someone other than a party to the award can avail themselves of the Article 54(2) enforcement right is a hard-edged binary question, and I struggle to see how it was susceptible to different "right" answers in 1966 and 2026.

137. Having regard to all these matters, I have concluded that the Judge was correct in his conclusion that only a party to an ICSID award can seek recognition and enforcement before a signatory court under Article 54(2). There are four matters which I have taken into account in the course of reaching my conclusion which I should briefly mention:

i) First, this conclusion departs from the considered views on this question reached in *Blue Ridge* and *Eurus* in the United States District Court, the Rotterdam court and in the Federal Court of Australia. However, the scope of the argument presented in those cases is not clear. I agree with Blasket that it is highly unfortunate that, at least as matters stand and subject to the decisions of higher courts in any of the four jurisdictions, divergent decisions have been reached in national courts on the meaning and effect of the same international treaty. The undesirability of such "international chaos" (as Lord Lloyd-Jones and Lady Simler put it in *Infrastructure Services (SC)*, [134]) is obvious. However, as

Lord Steyn noted in *R (Adan) v Secretary of State for the Home Department* [2001] 2 AC 477, 518:

> "Unanimity on all perplexing problems created by multilateral treaties is unachievable. National courts can only do their best to minimise the disagreements. But ultimately they have no choice but to apply what they consider to be the autonomous meaning".

ii) Second, there are certain forms of rights-transfer which are not voluntary in nature (e.g. the vesting of an individual bankrupt's rights in their trustee in bankruptcy or "forced heirship" on death in some civil law systems) or where a voluntary act leads to the original rights-holder ceasing to exist (e.g. corporate succession as discussed in *Schreuer* p.1511, [139]). Mr Aughey was offered the opportunity to explain how, on Spain's interpretation, Article 54(2) would operate in such cases but declined to do so. However, this case is concerned with a voluntary transfer by an original right-holder who remains in existence. The application of Article 54(2) in other situations is best left to a case in which the point arises, and in which the court receives argument on the point.

iii) Third, Mr Aughey accepted that, as a matter of international law, a state can consent to the assignment by the beneficiary of a treaty right by the right-holder to a third party. That might raise the issue of whether a consensual assignee of an ICSID award fell within Article 54(2) and, if so, what implications that had for the scope of the words "a party". It is not necessary to decide the effect of such a consensual assignment in this case. In resolving that issue, it would be necessary to have regard to the fact that Article 54 creates obligations not simply for the state award debtor, but also for all enforcement states. It is also possible that there may be a difference between the consensual assignment of an award and the consensual assignment of a treaty *claim* (a matter in which only the host state would appear to have an interest), because if the assigned claim succeeded, the assignee would be a party to the dispute and award for the purposes of Articles 53 and 54.

iv) Fourth, as I noted at [43]-[45] above, language in Article IV of the New York Convention which is not wholly dissimilar to Article 54(2) is generally regarded as permitting assignees of a qualifying award to avail themselves of its recognition and enforcement provisions. The New York Convention had been concluded 8 years before the ICSID Convention, and was clearly in the contemplation of the delegates when the latter was negotiated (see e.g. Moollan and Bastin, ([118(viii)] above, [4.1363]). It was not suggested to the court that the meaning and effect of the New York Convention was relevant to the interpretation of Article 54(2) and I can well understand why. It is very different in its scope, structure and conception, and there is nothing to suggest that the status of assignees of awards under the New York Convention had been settled when the ICSID Convention was concluded. Nonetheless, it is noteworthy that, on the basis of the conclusions I have reached, the phrase "the party applying for recognition" in one treaty includes an assignee of an arbitration award, but the phrase "a party seeking recognition or enforcement" in another does not.

Ground 1D: is it sufficient for Article 54(2) that the original award creditor initiates the recognition and enforcement process before the national court?

138. I can deal with this argument by Blasket shortly. This interpretation of Article 54(2) is hopeless as a matter of language. A party "seeking" recognition and enforcement of an ICSID award before a signatory enforcement court does so not simply when they issue the application, but at all times thereafter until recognition and enforcement (respectively) are achieved, or the attempt to obtain recognition and enforcement is abandoned or refused. The suggestion that the purpose of Blasket's intervention is not to seek recognition and enforcement of the ICSID Award is patently hopeless.

139. That means that it is not necessary to address a further complication arising from this argument. While the Investors issued the application for recognition and enforcement in this jurisdiction before the assignment in this case, it is unclear where this argument would leave Blasket so far as any subsequent applications for recognition and enforcement in other jurisdictions are concerned (which, on this hypothesis, would still require applications by the Investors to enforce the Award, made *after* they had transferred their rights under the award to Blasket).

The position if customary international law does recognise a right on the part of an investor to assign treaty rights

140. For the purposes of this appeal, Spain did not develop the argument that, if customary international law did recognise a general power on the part of investors to assign treaty rights, the ICSID Convention would exclude that power in respect of ICSID awards, and it is not, therefore, necessary to address that issue and its implications.

Ground 2: can the original award creditor assign the right to enforce an ICSID award under s.2 of the 1966 Act?

Introduction

141. The relationship between the ICSID Convention and the recognition and enforcement mechanism provided by s.2 of the 1966 Act has been considered by both the Court of Appeal and Supreme Court in the *Micula* litigation and both parties relied on those decisions in their submissions on Ground 2.

142. *Micula* was, for present purposes, concerned with the issue of whether Article 54 and s.2 of the 1966 Act had the effect that a registered ICSID award was to be treated in the same way as an English court judgment for the purposes of determining whether enforcement should be stayed pending a ruling by the CJEU as to whether enforcement contravened EU law. This was referred to as the "equivalence" argument. In the Court of Appeal (*Micula* [2018] EWCA Civ 1801, [2019] Bus LR 1394), Arden LJ and Leggatt LJ (who delivered a separate judgment) held that this was not the case. Hamblen LJ, dissenting on this issue, accepted the equivalence argument.

143. Turning to the judgment of the majority:

i) At [113], Arden LJ noted that the purpose of s.2(1) was "to implement, no more and no less, the obligations of the UK under the ICSID Convention". She observed that "Parliament is surely unlikely to have intended section 2(1) to have the effect that registered ICSID awards should be brought within the scope

of later international treaty …. by *the mere procedural* step of registering the award …" ([116] – emphasis added). At [117], she stated that s.2(1) could not "logically be elevated into a provision which overrides the ICSID Convention" and that it did not "make any change *of substantive law*" ([117] –emphasis added). Arden LJ characterised s.2(1) as a "deeming provision" ([118]), and noted that such provisions "require a disciplined approach by the court because the court must not go beyond answering the question which Parliament has required to be answered" ([119]).

ii) Leggatt LJ at [257] held that s.2(1) had "so far as possible to be interpreted in a manner which is consistent with the ICSID Convention". He cautioned against interpreting the words in Article 54(1) "as if it were a final judgment of a court in that state" in "too mechanistic a way", stating at [258] that:

> "the purpose of equating an award with a final judgment of a court in the state where enforcement is sought is to give legal force to an award for the purpose of executing it and to provide machinery for that purpose. It is not to determine *whether* an award is to be enforced".

iii) Reading s.2(1) to give effect to the ICSID Convention, Leggatt LJ stated that "the analogy with a judgment of the High Court is limited to defining the force and effect of a registered award for the purpose of execution" ([259]).

iv) *Micula SC* does not criticise this aspect of the reasoning in *Micula CA*. At [68], Lords Lloyd-Jones and Sales stated that "the provisions of the 1966 Act must be interpreted in the context of the ICSID Convention".

Does the ICSID Convention devolve the issue of assignability to national law?

Introduction

144. Blasket argues that "matters related to the enforcement of ICSID awards (*including, by necessary implication, questions of assignability*) are devolved to domestic jurisdictions by Articles 54(2) and 54(3)" (emphasis added). In support of that contention, Blasket relies on *Blue Ridge*, in which Judge Gardephe stated that the Convention "directs courts in Contracting States to apply their own laws in enforcing ICSID awards" and *Eurus* in which Judge Moss stated "the Convention defers to the domestic law of Contracting States as to who may enforce an ICSID award", a conclusion said to flow "from the structure of the Convention which … leaves the details of enforcement and execution up to Contracting States".

145. Spain's response to that contention is that it is only "execution" and "not enforcement" which is devolved to the municipal law of the enforcement state (by virtue of Article 54(3)). It relies in this regard on the following:

i) The decision of the High Court of Australia ("HCA") in *Kingdom of Spain v Infrastructure Services Luxembourg SARL* [2023] HCA 11, (2023) 275 CLR 292, which, in a judgment in which all of the Justices joined, stated at [43]-[45]

> "Within the structure of Arts 53-55 of the ICSID Convention, in contrast, the words 'recognition', 'enforcement', and 'execution' can be seen to be

used separately and with different meanings. The distinction between 'recognition' and 'enforcement' is apparent in the two distinct obligations that are imposed on a Contracting State by the first sentence of Art 54(1). The subject matter of each obligation is different and the extent of each obligation is identified separately with precision. The obligation to 'recognize' is expressed to apply to the entirety of 'an award rendered pursuant to this Convention' and to be no more than an obligation to recognise the award 'as binding'. The obligation to 'enforce' is expressed to apply only to 'the pecuniary obligations imposed by [the] award' and to go no further than to oblige the Contracting State to enforce those pecuniary obligations within its territories 'as if [the award] were a final judgment of a court in that State'. The disjunctive 'or' in Art 54(2) makes plain that those two obligations imposed by Art 54(1) are severable, in that a party to an arbitral award might seek 'recognition' by a competent court of a Contracting State without necessarily also seeking 'enforcement' of the pecuniary obligations imposed by that award.

The further distinction between 'recognition' and 'enforcement', on the one hand, and 'execution, on the other hand, is then drawn out in Arts 53-54 and Art 55. This is seen in the provision by Art 54(3) that execution is a matter to be governed by the domestic law of the Contracting State, and by Art 55 that none of the international obligations imposed by Art 54 extend so far as to derogate from the domestic law of the Contracting State concerning State immunity or foreign State immunity from execution. In particular, Art 55 spells out that the obligation to "enforce" the pecuniary obligations imposed by an award as if the award were a final judgment of a court in the Contracting State stops short of an obligation to ensure their execution. Whether or not enforcement against a State party to an award can lead to execution is left entirely to be determined under the domestic law of the Contracting State concerning State immunity or foreign State immunity from execution. That usage of the words 'recognition', 'enforcement', and 'execution' in the context of Arts 53-55 of the ICSID Convention aligns with the precise definitions adopted in the recently approved version of the proposed Restatement of the Law: The US Law of International Commercial and Investor-State Arbitration, which described 'terminological confusion' that may result when these 'analytically distinct' concepts are not distinguished and 'recognition' is used to mean 'enforcement' or 'enforcement' is used to mean 'execution. Consistently with the usage in the context of Arts 53-55, the proposed Restatement defines 'recognition' as the court's 'determination ... that an international arbitral award is entitled to be treated as binding', involving the court's 'acceptance of the award's binding character and its preclusive effects'. It describes 'enforcement' as 'the legal process by which an international award is reduced to a judgment of a court that enjoys the same status as any judgment of that court'. It defines 'execution' as 'the means by which a judgment enforcing an international arbitral award is given effect' and explains that '[t]he execution process commonly involves measures taken against the property of the judgment debtor by a law-enforcement official … acting pursuant to a writ of execution'."

ii) The approval of those passages by the Court of Appeal in *Infrastructure Services (CA)*, Phillips LJ at [74] endorsing the view of the HCA that "the Convention used the terms 'recognize', 'enforce' and execute' to denote three distinct processes".

Analysis

146. I have not found it necessary to engage with the issue of whether and to what extent enforcement and execution are distinct processes under the ICSID Convention, nor, if so, whether enforcement as well as execution is devolved to the municipal law of each enforcement state. I note that in *Micula SC,* [76], Lady Hale approved a statement in *Schreuer* that "having regard to all the authentic language versions of the Convention, no distinction is to be drawn between enforcement and execution", this being a reference to the fact that in the Spanish ("ejecutar"/ "ejectuará") and French versions ("l'exécution"), the same word is used in place of both "enforcement" and "execution" in the English language version. In *Infrastructure Services (SC)*, Lord Lloyd-Jones and Lady Simler observed at [87] that "the line between enforcement and execution may not be clear cut and neither term is defined", although they did state "the scheme of these articles draws a sharp distinction between recognition and enforcement on the one hand … and execution on the other" so far as sovereign immunity was concerned, the preservation of state immunity being limited to the latter. The ICSID Compliance Paper at [34] notes that "recognition, enforcement and execution of an award are distinct concepts with differing definitions and practices in different jurisdictions."

147. On any view, the question of whether an ICSID award has been validly assigned is not a question of enforcement or execution, but an anterior question of who is legally entitled to payment. It would be perfectly possible, for the "assignee" of an ICSID award to make no attempt to enforce it before a national court (either because the award is paid voluntarily or because it decides it is not worth the attempt). My view in this regard is consistent with that of Stewart J in *Blasket FCA*, [304] who regarded the issue of the assignability of an ICSID award as raising a question of international and not municipal law.

148. Further, Blasket's formulation assumes that the issue of assignability is devolved to each enforcement jurisdiction, by necessary implication solely for the purposes of enforcement in that jurisdiction. I am unable to see how that approach can apply to questions of the assignability of an ICSID *award*. There is a single award, giving rise to a single payment obligation, albeit one capable of simultaneous enforcement efforts in a number of jurisdictions. I am unable to see how an ICSID *award* could be assigned for the purposes of enforcement in some jurisdictions but not others. That suggests that this aspect of Blasket's case is not concerned with assignment of the award, but of national rights of enforcement. I turn to that issue now.

Does registration of an ICSID award create a new, English law, statutory right to enforce which is itself capable of assignment?

Introduction

149. Blasket argues that "registration of an ICSID award creates a new, English law, statutory right to enforce which did not exist prior to registration. That right is itself capable of assignment". Implicit in that submission is the assertion that the statutory

right to enforce is capable of assignment independently of the ICSID award registered. Blasket points to the fact that s.2(1) of the 1966 Act permits "proceedings to be taken on the award" and that the sum for which the award is registered may carry interest.

150. Blasket also relied on:

i) Decisions as to the effect of the registration of foreign judgments under the Foreign Judgments (Reciprocal Enforcement) Act 1933 and the Administration of Justice Act 1920: *Re A Judgment Debtor* [1939] Ch 601 (holding that the non-payment of a registered judgment could provide the basis for a bankruptcy petition) and *Strategic Technologies PTE Ltd v Procurement Bureau of the Republic of China* [2016] EWHC 3776 (QB) (holding that a registered judgment could be enforced under the Judgments Regulation).

ii) Stewart J's decision in *Blasket (FCA)* by reference to s.35(4) of the International Arbitration Act 1974, which gives effect to Article 54 of the ICSID Convention in Australia, and allows an award to be enforced "as if the award were a judgment or order of [the Court]". Stewart J held that "the rights of enforcement which pertain to an arbitral award are choses of action capable of assignment" under Australian law ([322]), and he rejected an argument that the rights were incapable of assignment under Australian law because they were personal ([323]). At [323], he held that the right of enforcement under Article 54 and s.35(4) "in Australian domestic law" could be assigned ([324]).

151. In response, Mr Miles, who advanced Spain's submissions on Ground 2, contended as follows:

i) Section 2(1) only provided the machinery for enforcing an ICSID award in a particular national territory, and did not create substantive rights beyond those arising under the ICSID Convention.

ii) Section 2(1) created a remedy, or a process in the nature of a remedy, which was incapable of assignment independently of the right to which the remedy responded.

Analysis

152. In my view, the Judge was right to conclude that s.2(1) of the 1966 Act does not create a legal right which is capable of assignment as a matter of English law, independently of the ICSID award (which is not assignable).

153. First, as I have already stated, the issue of the assignability of the rights created by the ICSID Convention (including the Article 54 right to which s.2(1) gives effect) is not a question of enforcement or execution, but a substantive issue to be determined as a matter of international law. Article 54 does not devolve that question to the national law of each enforcement state.

154. Blasket's attempt to argue that because a judgment debt is conventionally assignable under English law, so too should be the s.2(1) right is an attempt to advance a more extreme version of the "equivalence" argument rejected in *Micula* (more extreme because the assignability of a statutory right cannot conceivably fall within the s.2(1)

language, "for the purposes of execution", whatever might have been argued to be the position in relation to a stay of execution).

155. Second, applying the guidance given in *Micula*, Mr Rabinowitz KC accepted that s.2 does not allow the English courts to act in a manner inconsistent with the ICSID Convention, and that s.2 does not allow the English courts to treat an ICSID award as a High Court judgment in "a way which would enable things to be done which are inconsistent with the operation of the ICSID Convention". However:

i) If an ICSID award is not itself assignable, and Article 54(2) does not permit an application for registration and enforcement by someone other than a party to the arbitral award, it would in my view be inconsistent with the operation of the ICSID Convention if s.2 permitted the assignment of the national law right of enforcement or execution which gives effect to Article 54.

ii) While Mr Rabinowitz KC accepted that this would be the case if the ICSID Convention positively prohibited assignment, he argued that this would not be the case if the ICSID Convention merely failed to confer a positive right of assignment when no general power of assignment of that kind was recognised by international law. However, the scope and operation of the ICSID Convention includes the fact that, against the background of customary international law, it does not "contract in" a right of assignment. For s.2 of the 1966 Act to create an assignable right would, in my view, be inconsistent with that choice.

iii) Similarly, if (as I have held) Article 54(2) only gives a right to a party to the arbitration to seek recognition and enforcement in signatory states, it would be inconsistent with the operation of the Convention if s.2, when giving effect to Article 54, permitted someone else to do so.

iv) I would also agree with the other way in which Mr Miles put the matter, which is that Article 54 does not contemplate that implementing legislation will bring into existence new substantive rights capable of assignment, or do anything more than make available to award creditors the processes for enforcing monetary judgments of that state. Arden LJ's description of registration as a "mere procedural step" not intended to "make any change of substantive law" in *Micula (CA)*, [116]-[117] is very much in point here.

156. Third, I am not persuaded that s.2 creates a right of a kind which can be assigned independently of the award. When a claim on a chose in action is the subject of an English court judgment, the chose in action will normally merge in the judgment as a "higher right". There is no difficulty in such a scenario in treating the resultant judgment debt as assignable, because there can be no question of the chose in action on which judgment was given remaining in different hands. Enforcement of international arbitration awards is more complex, because it is open to the award creditor to pursue simultaneous enforcement in a number of jurisdictions, and it is generally thought either that the entry of a judgment giving effect to such an award does not lead to merger at all, or only a merger of the specific right to enforce in that jurisdiction (*M&B 3*, [16.105]-[116]; AG Damon in *Marc Rich & Co AG v Societa Italiana Impianit PA* Case C-190/89 [1991] IL Pr 524). However, the risk of merger can be avoided if the party seeking enforcement does not seek a judgment on the award (under s.66(2) of the 1996

Act) but seeks to enforce the award "in the same manner as a judgment or order of the court" (under s.66(1) and s.101(2)).

157. The 1966 Act only provides for the second of these options, and hence the rights under the ICSID award subsist alongside the right to enforce in a particular contracting state after registration. Indeed s.2 is drafted on that basis, s.1(5) providing that registration may only be sought for the outstanding balance of the award at the date of registration. If Mr Rabinowitz KC is right in suggesting that the right to enforce the award in a particular territory is a "chose in action" which can be assigned even when the award cannot, that could lead to the right to enforce the award in different national territories being in different hands, none of whom need be the person to whom the pecuniary obligations arising from the award are due under the ICSID Convention. As the Judge rightly observed at Judgment, [78]:

> "Such an outcome would create an entirely random outcome in which assignability of an award (which I have concluded is not assignable as a matter of its governing law) might become assignable depending on which jurisdiction in the world it might be registered. Further it would give rise to the entirely undesirable possibility that the effect of registration might permit assignment in some jurisdictions but not others. That is not the effect of either the ICSID Convention or s.2(1) of the 1966 Act nor would such an outcome give effect to the purpose of either."

158. I am not persuaded that English law recognises an assignable right of this kind, which involves an attempt to "divide the indivisible". Although better remembered for re-setting the principles of contractual construction, a similar issue arose in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1997] PNLR 166 (CA); [1998] 1 WLR 896 (HL) if the assignment in issue was interpreted in accordance with the principles of contractual construction applied by the Court of Appeal. The Court of Appeal held that an attempt to assign a remedy in respect of a cause of action in circumstances in which a mutually exclusive remedy was left with another party was invalid, because it attempted "to divide the indivisible and assign the unassignable" (Mr Oliver QC's phrase picked up and developed by Leggatt LJ at p.176). Lord Hoffmann held that this was not the effect of the assignment, properly construed. However, he did not disagree with the view expressed in the Court of Appeal as to the position on that court's reading of the assignment. At p.915 he stated:

> "What is assignable is the debt or other personal right of property. It is recoverable by action, but what is assigned is the chose, the thing, the debt or damages to which the assignor is entitled. The existence of a remedy or remedies is an essential condition for the existence of the chose in action but that does not mean that the remedies are property in themselves, capable of assignment separately from the chose. So, for example, there may be joint and several liability; a remedy for the recovery of a debt or damages may be available against more than one person. But this does not mean that there is more than one chose in action. The assignee either acquires the right to the money (or part of the money) or he does not. If he does, he necessarily acquires whatever remedies are available to recover the money or the part which has been assigned to him. So far, therefore, I am in complete agreement with the judge and the Court of Appeal."

159. That reasoning, in my view, is fatal to the suggestion that English law should recognise the right to assign the ability to enforce a debt in this jurisdiction by process of execution independently of the assignment of the debt.

160. I am conscious Stewart J reached a different conclusion in relation to the Australian implementing legislation in *Blasket (FCA)*. The arguments presented to him do not appear to have embraced those made to this court, and in any event we must form our own view on the assignability of an enforcement mechanism created by a United Kingdom statute as a matter of English law.

161. Finally, in my view the decisions on the Foreign Judgments (Reciprocal Enforcement) Act 1933 and the Administration of Justice Act 1920 cited by Blasket do not assist. Neither involved any assignment of the rights arising from registration independently of the pre-registration right. *Re A Judgment Debtor* [1939] Ch 601 held that nothing in the 1933 Act prevented the judgment creditor from relying on the foreign judgment to support a bankruptcy petition. *Strategic Technologies PTE Ltd v Procurement Bureau of the Republic of China* [2016] EWHC 3776 (QB) held that a judgment registered under the 1920 Act could be enforced under the Judgments Regulation (a decision reached without citation of *Owens Bank v Bracco* [1994] QB 509). Neither bears on the issues arising on this appeal.

Conclusion

162. For these reasons, I would dismiss the appeal against the Judgment on both grounds.

Lord Justice Males

163. I can see that it may be desirable as a matter of international law that an ICSID Convention award against a contracting state such as Spain should be assignable. Nevertheless I agree with Lord Justice Foxton that this does not represent the current state of international law and that this appeal must therefore be dismissed for the reasons which he gives.

164. I am conscious that this means that we are differing from the views expressed in first instance decisions in the United States and Australia and (in an interim decision) in the Netherlands. Nevertheless, those decisions cannot necessarily be regarded as the final and settled view even of those jurisdictions on the issue whether an ICSID award against a contracting state is assignable. Nor do they represent a clear international consensus which we should follow regardless of our own analysis. In my view it is our duty to decide the issue for ourselves, after taking careful account of the reasoning in those decisions. Indeed it may be, and is to be hoped, that the reasoning in this present judgment will make some contribution to the eventual achievement of an international consensus. This should not be a field in which the concept of "first seised" carries undue weight.

165. I wish to reserve my opinion on two points. The first is whether an involuntary transfer of rights, for example on insolvency or death or by corporate succession, would enable the transferee to enforce the award, which is discussed by Lord Justice Foxton at para 137(ii) above. That point does not arise in this case and is best left for decision in a case in which it does. However it may be decided, it gives rise to distinct considerations from those arising here.

166. The second is whether, in the event that a state were to consent to the assignment of an award, in effect a novation, the assignee would be able to obtain recognition and enforcement under Article 54(2). This is discussed by Lord Justice Foxton at para 137(iii) above. This point too does not arise in the present case and it is not at first sight easy to imagine a scenario in which it would. A state which has resisted the claim and failed to pay the award seems unlikely to give its consent to an assignment to an assignee who is likely to be more determined in seeking to enforce the award. Again, therefore, I would leave this point for decision in what seem likely to be rather unusual circumstances, in the event that they ever arise.

Lord Justice Lewison

167. This litigation arises out of Spain's regrettable failure to abide by its treaty obligation to comply with an ICSID award. Nevertheless, for the reasons given by Foxton LJ I too would dismiss the appeal.