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Contributing Editor:
Tafadzwa Pasipanodya
Foley Hoag LLP

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EFILA European Federation for Investment Law and Arbitration
ICLG.com

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Australia

Nastasja Suhadolnik

Joshua Paffey

Corrs Chambers Westgarth

1 Treaties: Current Status and Future Developments

1.1 What bilateral and multilateral treaties and trade agreements has your jurisdiction ratified?

Currently, Australia has 15 bilateral investment treaties (**BITs**) in force with the following countries: Argentina; China; the Czech Republic; Egypt; Hungary; Laos; Lithuania; Pakistan; Papua New Guinea; the Philippines; Poland; Romania; Sri Lanka; Turkey; and Uruguay.

Australia has entered into bilateral free trade agreements (**FTAs**) with the following countries: Chile; China; Hong Kong; Indonesia; Japan; Korea; Malaysia; New Zealand; Peru; Singapore; Thailand; and the USA.

It is also party to the ASEAN–Australia–New Zealand Free Trade Agreement (**AANZFTA**) (with: Brunei; Burma; Cambodia; Indonesia; Laos; Malaysia; New Zealand; the Philippines; Singapore; Thailand; and Vietnam), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**) (with: Brunei Darussalam; Canada; Chile; Japan; Malaysia; Mexico; Peru; New Zealand; Singapore; and Vietnam), and the Pacific Agreement on Closer Economic Relations Plus (**PACER Plus**) (with: Cook Islands; Kiribati; New Zealand; Niue; Samoa; Solomon Islands; and Tonga – Nauru, Tuvalu and Vanuatu have signed the agreement, but have not yet ratified it).

1.2 What bilateral and multilateral treaties and trade agreements has your jurisdiction signed and not yet ratified? Why have they not yet been ratified?

On 15 November 2020, Australia and 14 Indo-Pacific countries signed the Regional Comprehensive Economic Partnership (**RCEP**) Agreement, a comprehensive FTA covering a range of matters including trade, investment and competition. Ratification by Australia is expected to occur in late 2021 after legislation was introduced into Parliament on 1 September 2021. The RCEP will enter into force 60 days after six ASEAN Member States and three non-ASEAN Member States have ratified the Agreement. The RCEP Investment Chapter contains many of the usual substantive provisions but does not provide for an investor-State dispute settlement (**ISDS**) mechanism, which will be the subject of future negotiations.

1.3 Are your BITs based on a model BIT? What are the key provisions of that model BIT?

There is an Australian model Investment Promotion and Protection Agreement (**IPPA**) text. It provides a clear set of obligations relating to the promotion and protection of investments and takes full account of each party's laws and investment policies. The model IPPA text can be seen, for example, in the Australia–Egypt IPPA, the Australia–Uruguay IPPA and the Australia–Lithuania IPPA.

The Australian Government is conducting a review of its older BITs to align them with its modern treaties. The Government is considering a range of options in respect of each of its existing treaties including a full renegotiation, an amendment, the issue of unilateral or joint interpretative notes, and the replacement of the BIT with an FTA chapter. A new model BIT may also be considered.

1.4 Does your jurisdiction publish diplomatic notes exchanged with other states concerning its treaties, including new or succeeding states?

We are not aware of diplomatic notes with other States being published.

1.5 Are there official commentaries published by the Government concerning the intended meaning of treaty or trade agreement clauses?

We are not aware of official commentaries concerning the intended meaning of treaty clauses being published.

2 Legal Frameworks

2.1 Is your jurisdiction a party to (1) the New York Convention, (2) the Washington Convention, and/or (3) the Mauritius Convention?

Australia is a party to the New York Convention, the Washington Convention, and the Mauritius Convention.

Australia ratified the Mauritius Convention on 17 September 2020 and it came into force on 17 March 2021.

In October 2018, the *International Arbitration Act 1974* (Cth) was amended by the *Civil Law and Justice Legislation Amendment Act 2018* (Cth) to implement aspects of the Mauritius Convention. Specifically, s. 22(3) of the Act carves out prohibitions on the disclosure of confidential information where the *United Nations Commission on International Trade Law* (**UNCITRAL**) *Rules on Transparency in Treaty-based Investor-State Arbitration* (**Transparency Rules**) apply to an arbitration. The parties to arbitral proceedings and the arbitral tribunal itself are no longer precluded from disclosing confidential information in relation to an arbitration subject to the Transparency Rules.

2.2 Does your jurisdiction also have an investment law? If so, what are its key substantive and dispute resolution provisions?

The foreign investment legislative framework in Australia comprises the *Foreign Acquisitions and Takeovers Act 1975* (**FATA**), the *Foreign Acquisitions Takeovers Fees Impositions Act 2015* and their regulations. This legislative framework is supplemented by Australia's Foreign Investment Policy (**Policy**) and guidance notes. The substantive provisions of FATA and the Policy address the formal admission of foreign investment (discussed in question 2.3 below).

Effective on 1 January 2021, Australia's foreign investment regime was amended by the *Foreign Investment Reform (Protecting Australia's National Security) Act 2020* (Cth) and *Foreign Acquisitions and Takeovers Fees Imposition Amendment Act 2020* (Cth). The changes affect companies seeking foreign investment approval, including for investments in a "national security business" (such as a business involved in or connected with a "critical infrastructure asset").

Consistent with the balance of the investment market in Australia, foreign investors are regulated by the Australian Securities and Investments Commission (**ASIC**). ASIC is an independent Commonwealth Government body responsible for (among other things) registering and ensuring companies, schemes and various individuals and entities meet their obligations under the *Corporations Act 2001*. Additionally, all dealings must be conducted in accordance with the *Corporations Act 2001* with regard to: insider trading; market manipulation; disclosure of shareholdings; takeovers; acquisitions; and capital raisings.

FATA (and its associated regulations) does not contain dispute resolution provisions.

2.3 Does your jurisdiction require formal admission of a foreign investment? If so, what are the relevant requirements and where are they contained?

Under FATA, foreign investment must receive approval from the Commonwealth Government's Treasurer in certain circumstances that involve a "foreign person" as defined by s. 4 of FATA.

A foreign person includes:

- a natural person who is not ordinarily a resident in Australia;
- a corporation in which one foreign person (or two or more foreign persons together) or a foreign government holds a substantial interest; or
- the trustee of a trust estate in which one foreign person or corporation (or two or more foreign persons or corporations together) holds a substantial interest.

Whether a proposed foreign investment requires approval will depend upon the type of investor, the type of investment, the industry sector and also the value of the proposed investment. For example, there is greater scrutiny on investments by "foreign government investors" (as compared to foreign individuals or entities). Typical types of transactions requiring approval include real estate, agricultural, banking, or business investments, and now investments impacting upon Australia's national security.

In deciding whether to approve a proposed foreign investment, the Treasurer is advised by the Foreign Investment Review Board (**FIRB**). FATA itself does not prescribe criteria for approving foreign investment proposals. Rather, FATA empowers the Treasurer to veto foreign investment proposals that are contrary to the national interest (FATA, s. 67). The Policy is instructive as regards what is relevant to the national interest. The Treasurer and FIRB start from the general presumption that foreign investment is beneficial (Policy, p. 8). Matters that are relevant to the national interest include, for example, competition, impact on the economy, the investor's character and national security.

FATA also requires compulsory notification of certain business activities which are considered to be significant (or notifiable) actions. One of the tests used is a monetary screening threshold test (indexed annually). The threshold is met when either:

- the amount paid for an interest; or
- the value of the entity or the asset,

exceeds the threshold amount (depending on the type of transaction).

Other business activities are considered voluntary notice activities (i.e. the foreign person can choose to notify but does not have to). The benefit of giving voluntary notice is that if the Treasurer issues a notice of "no objection", the Treasurer can no longer make orders in relation to the proposal.

Certain persons and proposals are exempt from the notification requirements; however, as strict penalties apply for breaches of FATA, foreign investors in doubt should seek legal advice.

As of January 2021, notification and review is mandatory regarding certain investments that may concern national security.

3 Recent Significant Changes and Discussions

3.1 What have been the key cases in recent years relating to treaty interpretation within your jurisdiction?

The approach of Australia's courts to treaty interpretation is, subject to contrary legislation, generally consistent with the approach in international law reflected by arts 31, 32 and 33 of the *Vienna Convention on the Law of Treaties* (**VCLT**).

In *Macoun v. Commissioner of Taxation* (2015) 257 CLR 519, the High Court of Australia determined that the *Convention on the Privileges and Immunities of the Specialized Agencies* did not require Australia to refrain from taxing the pension entitlements of former employees of certain specialised international agencies. Consistent with the VCLT, the Court first examined the ordinary meaning of the relevant words, then considered the *travaux préparatoires*, and finally considered the practice of parties to the Convention as reflected in international jurisprudence (paragraphs [76]–[82]). The Court's review of state practices was a significant factor in its decision. In this way, the High Court proved to be more receptive to extrinsic materials in aid of treaty interpretation than it had been previously, when it had found that subsequent materials (although relevant under the VCLT) cannot alter the meaning ascertained under the ordinary principles of Australian statutory interpretation (*Maloney v R* (2013) 252 CLR 168, 198–9 (Hayne J)).

Further notable cases include:

- *Tech Mahindra Limited v. Commissioner of Taxation* [2015] FCA 1082: when interpreting the *Indian Double Taxation Agreement*, the Full Federal Court noted that India was not a party to the VCLT, but held that, as the VCLT is reflective of customary international law, the rules of interpretation codified by arts 31 and 32 of the VCLT applied to the construction of the Agreement (paragraph [53]). Further, the Court emphasised that where Parliament had adopted the exact text of a treaty into domestic legislation, it can be assumed that Parliament intended to fulfil its international obligations. Accordingly, it is appropriate to interpret such legislation in accordance with the VCLT (paragraph [51]).
- *Maloney v R* (2013) 252 CLR 168: the High Court of Australia interpreted a provision in the *Racial Discrimination Act 1975*

(Cth) and the *International Convention on the Elimination of All Forms of Racial Discrimination* (to which the Act gives effect), which excludes "special measures" from the definition of "racial discrimination". In determining what constitutes a "special measure", the High Court adopted a strict textual interpretation. Despite the operation of art. 31(3) of the VCLT, extrinsic materials (such as the recommendations of the Committee on the Elimination of Racial Discrimination or the provisions of the UN Declaration on the Rights of Indigenous Peoples) were not to be elevated over the text of the Convention.

- *Minister for Home Affairs v. Zentai* (2012) 246 CLR 213: the High Court considered Hungary's request for the extradition of the respondent to face questioning for an alleged war crime in 1944. The issue before the High Court was the interpretation of the *Australia-Hungary Extradition Treaty*, which had been incorporated into domestic law. Having ascertained the object and purpose of the treaty, the majority of the Court found in favour of a strict textual interpretation. The Chief Justice remarked that the VCLT rules of interpretation were "generally consistent" with Australian common law principles on treaty interpretation, which require treaties to be construed "unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation" (paragraph [19]). Ultimately, as the crime with which the respondent was charged did not exist at the time of the alleged offence, the Court denied the request for extradition.
- *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 280 ALR 18: a majority of the High Court confirmed the relevance of customary international law in treaty interpretation (paragraphs [91]–[93]).

3.2 Has your jurisdiction indicated its policy with regard to investor-state arbitration?

The current Australian Government's policy is to consider ISDS provisions on a case-by-case basis. Recent trade deals reflect a policy position in favour of such a mechanism as ISDS provisions were included in the Australia–Hong Kong FTA, the Indonesia–Australia CEPA and the Peru–Australia FTA.

3.3 How are issues such as corruption, transparency, MFN, indirect investment, climate change, etc., addressed or intended to be addressed in your jurisdiction's treaties?

None of Australia's current treaties contain anti-corruption provisions save for the CPTPP, which contains provisions that permit a State taking measures necessary to eliminate bribery and corruption in international trade.

Australia's more recent FTAs:

- recognise a State's right to adopt measures necessary to protect the environment or conserve natural resources;
- expressly exclude procedures for the resolution of disputes provided for in other investment agreements from the ambit of the MFN clause;
- protect assets owned or controlled "directly or indirectly" by an investor of a party; and
- provide for minimum standards of transparency requiring prompt publication of laws, regulations, procedures and rulings relating to matters covered by the treaty.

3.4 Has your jurisdiction given notice to terminate any BITs or similar agreements? Which? Why?

No (other than where replaced by new treaties); however, India unilaterally terminated its BIT with Australia on 23 March 2017.

4 Case Trends

4.1 What investor-state cases, if any, has your jurisdiction been involved in?

Australia has only been a party to one reported investor-State case. A second case against Australia was not pursued.

In 2012, Philip Morris commenced UNCITRAL arbitral proceedings against Australia under the Hong Kong–Australia BIT. The dispute arose out of Australia's implementation of tobacco plain-packaging laws. Philip Morris alleged, among other things, that Australia had not afforded Philip Morris fair and equitable treatment and that Australia had indirectly expropriated its assets. Ultimately, the tribunal dismissed Philip Morris' claims for jurisdictional reasons.

In November 2016, an American power generation company, APR Energy, commenced UNCITRAL arbitral proceedings against Australia under the Australia–United States FTA (**AUSFTA**). Broadly, the dispute related to the seizure of the claimant investor's power turbines by one of Australia's major private banks. Australia responded to the Notice of Dispute stating that APR Energy could not bring a dispute under the AUSFTA because, *inter alia*, the treaty does not provide for investor-State arbitration. APR Energy has not progressed the claim. Around the same time, NuCoal asserted a claim under the AUSFTA in relation to cancellation of a licence arising from corruption allegations. For the same reason (the treaty does not provide for investor-State arbitration), it seems that the matter is being continued by diplomatic negotiations.

In terms of Australian claimants, since 2010, a number of arbitrations were registered by investors whose home country is Australia. Known arbitrations were brought against the Dominican Republic, Egypt, Georgia, India, Indonesia, Mongolia, Pakistan, Poland, and Thailand. Several proceedings remain pending. Two disputes have been decided in favour of the investor and one in favour of the host State.

4.2 What attitude has your jurisdiction taken towards enforcement of awards made against it?

There have been no awards made against Australia.

4.3 In relation to ICSID cases, has your jurisdiction sought annulment proceedings? If so, on what grounds?

Australia has not had cause to bring any annulment proceedings.

4.4 Has there been any satellite litigation arising whether in relation to the substantive claims or upon enforcement?

There has been no relevant satellite litigation.

4.5 Are there any common trends or themes identifiable from the cases that have been brought, whether in terms of underlying claims, enforcement or annulment?

There is a lack of case law involving Australia on which to make any relevant observations. However, recent case law in Australia has clarified principles relevant to the recognition, enforcement and execution of awards against States. This is discussed in question 7.3 below.

5 Funding

5.1 Does your jurisdiction allow for the funding of investor-state claims?

In Victoria, New South Wales, South Australia and the Australian Capital Territory, third-party funding has been legalised. The High Court of Australia in *Campbells Cash and Carry Pty Ltd v. Fostif Pty Ltd* (2006) 229 CLR 386 held that litigation funding was not contrary to public policy or an abuse of process (at least where maintenance and champerty had been abolished by statute). This decision is applicable to third-party funding of other dispute resolution proceedings, including arbitral proceedings.

The position in Queensland, Western Australia, Northern Territory and Tasmania is not as clear as maintenance and champerty have not been abolished in these states. However, the Queensland Court of Appeal's recent decision in *Murphy Operator Pty Ltd & Ors v. Gladstone Ports Corporation Ltd* (2020) 384 ALR 725 provides some guidance as to how these jurisdictions might consider the torts. At first instance, in *Murphy Operator Pty Ltd & Ors v. Gladstone Ports Corporation Ltd* [2019] 3 Qd R 255, the Supreme Court of Queensland held that in order for a third-party funding agreement to be champertous, it must not only provide for a percentage interest in the proceeds of the litigation as a condition on the provision of funds, but also an entitlement of the funder to control the litigation by selecting and appointing counsel. Having regard to the historical evolution of the tort of maintenance, the Court of Appeal held that unless an aspect of public policy renders the third-party funding improper, the law of maintaining has now been subsumed in the law of abuse of process (paragraph [82]). The Court observed that a degree of control maintained by litigation funders in expensive and complex litigation is inevitable, and found that as long as the solicitor/client relationship is preserved and the funding is not contrary to public policy, the funding will be allowed.

5.2 What recent case law, if any, has there been on this issue in your jurisdiction?

There is no case law directly relating to the funding of investor-State claims.

5.3 Is there much litigation/arbitration funding within your jurisdiction?

The Australian litigation funding market, measured by revenue, was $141.2 million in 2020, compared to Australia's $23 billion legal services market (Jason Geisker and Dirk Luff, *The Third Party Litigation Funding Law Review*, The Law Reviews, 4th edition, 2021). A significant proportion of litigation funding relates to insolvency disputes and class actions for tort claims, investor claims, product liability claims and environmental claims. Funding claims referred to arbitration in Australia is occurring more frequently, albeit still less often than litigation funding.

6 The Relationship Between International Tribunals and Domestic Courts

6.1 Can tribunals review criminal investigations and judgments of the domestic courts?

In other countries, claims have been initiated against host States for allegedly targeting officers and directors of foreign investors through unlawful criminal proceedings. In these instances, claimants have relied on standard treaty provisions such as "National Treatment" and "Minimum Standard of Treatment" which exist in many of Australia's FTAs. For example, in the Singapore–Australia FTA, the minimum standard of treatment includes an express "obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings". Therefore, although the provisions have not been tested in the context of Australian treaties in this way, it is conceivable that similar provisions could be invoked to call into question a criminal investigation or domestic judgment.

6.2 Do the national courts have the jurisdiction to deal with procedural issues arising out of an arbitration?

International arbitrations in Australia are governed by the *International Arbitration Act 1974* (Cth) (**IAA**), which gives effect to the UNCITRAL Model Law on International Commercial Arbitration. Where the Model Law applies, national court intervention is limited to matters permitted by the Model Law (art 5). Permissible court interventions include the usual matters such as assistance with the appointment of an arbitral tribunal, providing parties with interim measures of protection, assistance in the taking of evidence, and determining whether an award can be set aside, recognised and enforced.

In contrast with the Model Law, arbitrations under the Washington Convention are self-contained; that is, all procedural issues are resolved by the International Centre for Settlement of Investment Disputes (**ICSID**) and the arbitral tribunals themselves. For example:

- the Chairman of ICSID's Administrative Council is responsible for appointing arbitrators where the parties cannot agree (Washington Convention, art. 38; Rules of Procedure, art. 4);
- the tribunal can order provisional measures if necessary (Washington Convention, art. 47, Rules of Procedure, art. 39); and
- ICSID, the tribunal, and *ad hoc* committees can (upon a party's application) interpret, revise, stay or annul awards (Washington Convention, arts 50–52, Rules of Procedure, arts 50–55).

Accordingly, the Australian courts' role in relation to ICSID arbitrations is limited to recognising and enforcing awards (Washington Convention, art. 54; IAA, s. 35).

6.3 What legislation governs the enforcement of arbitration proceedings?

The IAA governs the recognition and enforcement of arbitral awards. It gives the Washington Convention the force of law in Australia (s. 32). Part IV of the IAA provides for the recognition and enforcement of ICSID awards. Arbitral awards made under the UNCITRAL Model Law are enforced under Part II of the IAA.

6.4 To what extent are there laws providing for arbitrator immunity?

S. 28 of the IAA provides arbitrators with immunity for anything done or omitted to be done in good faith in his or her capacity as arbitrator.

6.5 Are there any limits to the parties' autonomy to select arbitrators?

Under the UNCITRAL Model Law, the principle of party autonomy enables the parties to select party-appointed arbitrators and determine how a tribunal is to be constituted (subject to the requirements of impartiality and independence). No requirement of nationality applies (art. 11(1)).

In respect of ICSID arbitrations, the requirements of the Washington Convention apply:

- arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute, unless the sole arbitrator or each individual member of the tribunal is appointed by party agreement (art. 39); and
- if a party appoints an arbitrator from outside the Panel of Arbitrators, the arbitrator must be "of high moral character and recognised competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment" (arts 14(1) and 40(2)).

Parties should also be aware of any limits imposed by the relevant agreement.

6.6 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Yes.

Under the IAA, failing agreement, the number of arbitrators shall be three (Model Law, art. 10(2)); each party appoints one arbitrator, and the two thus appointed shall appoint the third (Model Law, art. 11(3)), with courts having the power to assist in the appointment.

In respect of ICSID arbitrations, the default procedure in the Washington Convention has the force of law in Australia. If the parties fail to agree on the number of arbitrators, the default number is three (Washington Convention, art. 37(2)(b)). If the parties fail to agree upon a procedure for the appointment of arbitrators in a three-member tribunal, each party shall appoint one arbitrator and the two arbitrators appointed shall appoint the third, who shall be the president of the tribunal (Washington Convention, art. 37(2)(b)).

6.7 Can a domestic court intervene in the selection of arbitrators?

Generally, a domestic court will only intervene where the parties are unable to agree on the arbitrator or the method of appointment fails. However, arbitrations conducted under the Washington Convention are effectively insulated from the interference of domestic courts. The Washington Convention provides a mechanism for tribunal constitution where the parties are unable to agree on the number of arbitrators or the method of appointment (art. 37(2)(b)), or where the tribunal has not been constituted within time (art. 38). Similarly, the Washington Convention provides a mechanism in respect of the proposed disqualification of an arbitrator.

7 Recognition and Enforcement

7.1 What are the legal requirements of an award for enforcement purposes?

Art. 48 of the Washington Convention requires the award to be in writing and signed by the arbitrators. The award shall also state the reasons upon which it is based.

7.2 On what bases may a party resist recognition and enforcement of an award?

An ICSID award is binding and not subject to any appeal or any other remedy otherwise than in accordance with the Washington Convention.

Under art. 54 of the Washington Convention, a State must enforce an ICSID award as if it were the final judgment of a court in that State. The Federal Court of Australia and the Supreme Courts of the States and Territories are designated for the purposes of art. 54. A party cannot resist, and a court cannot deny, enforcement on grounds of public policy.

The grounds for resisting enforcement of an award under the New York Convention do not apply to an ICSID award (IAA, s. 34).

There are limited grounds on which a party may request annulment of an award in art. 52 of the Washington Convention.

7.3 What position have your domestic courts adopted in respect of sovereign immunity and recovery against state assets?

Sovereign immunity from jurisdiction and execution is provided for under the *Foreign States Immunities Act 1985* (Cth) (**FSIA**). It provides for limited State immunity. A foreign State is generally immune from the jurisdiction of Australian courts unless it has submitted to the jurisdiction (s. 10) or the proceedings concern the State's commercial activities (s. 11).

The property of a foreign State will generally not be subject to any order of the Australian courts for the enforcement of an arbitral award unless the foreign State has waived immunity (s. 31) or the property is commercial (s. 32).

Firebird Global Master Fund II Ltd v. Republic of Nauru (2015) 258 CLR 31 considered these provisions. A private fund, Firebird, held bonds issued through the Nauru Finance Corporation (**NFC**) and guaranteed by the Republic of Nauru. NFC defaulted and Nauru refused to guarantee the debt owing. Firebird obtained judgment against Nauru in a Tokyo District Court. Firebird then sought to register that judgment in Australia and to freeze Nauru's Australian bank accounts. The High Court of Australia held that Nauru was immune to any freezing order over its Australian bank accounts because Nauru used those accounts for non-commercial purposes. Although registered, the judgment against Nauru was practically toothless.

In *Lahoud v. The Democratic Republic of Congo* [2017] FCA 982, the Federal Court of Australia held that the Democratic Republic of Congo was not immune because it had submitted to the jurisdiction of the ICSID tribunal by ratifying the Washington Convention.

More recently, in *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* (2021) 387 ALR 22, the Full Court of the Federal Court of Australia found that Spain and other Contracting States to the Washington Convention cannot resist "recognition" of awards by pleading foreign State immunity. However, the Full Court did not decide whether foreign States are immune from

the subsequent steps of "enforcement" and/or "execution" under art. 55, and its orders (unlike those at first instance) do not grant leave for the applicant to enforce the award. Contracting States may be entitled to rely on foreign State immunity at the steps of enforcement and execution.

7.4 What case law has considered the corporate veil issue in relation to sovereign assets?

The FSIA expressly provides that separate entities (which are defined to include a body corporate that is an agency or instrumentality of the foreign State) are covered by the immunity from jurisdiction provided under s. 9 and execution of an arbitration award against State property under s. 30 (ss 22 and 35, respectively).

The Full Court of the Federal Court of Australia considered the definition of separate entity in *PT Garuda Indonesia v. ACCC* [2011] FCAFC 52. It held that an instrumentality is a body created by the State for the purpose of performing a function for the State.

Therefore, a separate entity will be covered by sovereign immunity unless one of the exceptions under the FSIA (discussed in question 7.3 above) applies.

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Nastasja Suhadolnik is a Partner at Corrs Chambers Westgarth. She is qualified in New York and Australia and specialises in domestic and international commercial arbitration, investor-State and inter-State dispute resolution. Her experience includes advising and representing private and sovereign entities in dispute resolution proceedings conducted under various arbitration rules, primarily across the construction, renewable energy and natural resources sectors. Nastasja also has specific expertise in public international law and responsible business practices advisory work. She regularly advises States, inter-governmental and non-governmental organisations and corporate entities on the interpretation of, and compliance with, obligations arising under international law instruments and customary international law. Nastasja holds two Master of Laws degrees (from the London School of Economics and the NYU School of Law), and has previously practised at leading international arbitration firms in Paris and at the United Nations Office of Legal Affairs in New York.

Corrs Chambers Westgarth
Level 25, 567 Collins Street
Melbourne, Victoria, 3000
Australia

Tel: +61 3 9672 3176 / +61 405 141 942
Email: nastasja.suhadolnik@corrs.com.au
URL: www.corrs.com.au

Joshua Paffey is the Head of Arbitration at Corrs Chambers Westgarth. He represents clients in domestic and international arbitrations including cross-border investment disputes, and investor/State and bilateral investment treaty disputes. Joshua advises listed companies, governments and government-owned enterprises throughout Asia, Africa, America, the UK and Europe. His clients include energy and resources companies, oil and gas project sponsors and operators, EPC contractors, commodity traders, infrastructure project sponsors and participants. Joshua lectures in international commercial arbitration to university law students, is a director of the Australian Centre for International Commercial Arbitration (ACICA) and Chair of the ACICA Queensland State Committee.

Corrs Chambers Westgarth
Level 42, 111 Eagle Street
Brisbane, Queensland, 4000
Australia

Tel: +61 7 3228 9490
Email: joshua.paffey@corrs.com.au
URL: www.corrs.com.au

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