International Comparative Legal Guides

Investor-State Arbitration 2021

A practical cross-border insight into investor-state arbitration law

Third Edition

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Expert Chapters

1 Collecting Investor-State Awards
Andrew Stafford QC, Kobre & Kim

5 The Impact of EU Law on ISDS
Prof. Dr. Nikos Lavranos, European Federation for Investment Law and Arbitration (EFILA)

9 How to Maximise Investor Protection Post-*Achmea* and Post-Brexit
Ana Stanič, E&A Law Limited

17 State of Play of EU Investment Protection
Prof. Dr. Gerard Meijer, Kirstin Schwedt & Xavier Taton, Linklaters LLP

Q&A Chapters

24 Australia
Corrs Chambers Westgarth: Lee Carroll & Joshua Paffey

30 China
Zhong Lun Law Firm: Huawei Sun

37 France
Le 16 Law: Julie Spinelli & Yann Dehaudt-Delville

46 Germany
Seven Summits Arbitration: Dr. Gebhard Bücheler & Gustav Flecke-Giammarco

52 Hong Kong
Fangda Partners: Olga Boltenko & John Zhou

58 Hungary
DLA Piper Posztl, Nemescsói, Györfi-Tóth and Partners Law Firm: András Nemescsói & David Kohegyi

64 Japan
Mori Hamada & Matsumoto: Yuko Kanamaru & Daniel Allen

69 Portugal
Delaloa: Pacôme Ziegler

75 Russia
Monastyrsky, Zyuba, Stepanov & Partners: Kirill Udovichenko

81 Singapore
Allen & Gledhill LLP: Chua Kee Loon & Nicholas Tan

87 Spain
Íscar Arbitraje: Javier Íscar
Stampa Abogados: Dr. Gonzalo Stampa

93 Sweden
DER Legal: Ylli Dautaj
Magnusson Minds Advokatbyrå AB: Per Magnusson

99 Switzerland
Homburger: Mariella Orelli & Dilber Devitre

104 United Kingdom
Boies Schiller Flexner LLP: Dominic Roughton & Rosalind Axbey

110 USA
Foley Hoag LLP: Tafadzwa Pasipanodya, Rumbidzai Maweni, Iulia Padeanu Mellon & Karim M’ziani

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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 trading partners: 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 free trade agreements (**FTA**) with the following individual countries: Chile; China; Hong Kong; Indonesia; Japan; Korea; Malaysia; Peru; New Zealand; 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) and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**) (with: Brunei Darussalam; Canada; Chile; Japan; Malaysia; Mexico; Peru; New Zealand; Singapore; and Vietnam).

Australia has signed and ratified the Pacific Agreement on Closer Economic Relations Plus (**PACER Plus**). The PACER Plus was signed in Tonga on 14 June 2017 by Australia, New Zealand and eight Pacific Island countries, but some of the Pacific Island countries are still working toward ratification. The agreement will not enter into force until 60 days after the eighth signatory gives notice of ratification.

In addition, the Papua New Guinea–Australia Comprehensive Strategic and Economic Partnership was signed on 5 August 2020. Not a trade agreement, it is a "framework" for deepening bilateral cooperation across various areas including trade and investment, underpinned by a commitment to achieve concrete outcomes by 2030. It contains six pillars. Pillar 3, called Economic Partnership for Prosperity, includes a pledge to review and modernise the Australia–PNG BIT (1990).

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?

Australia has no bilateral or multilateral investment treaties or trade agreements that it has signed pending ratification.

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.

At the time of writing, the Australian Government has announced that it is conducting a review of its older BITs to bring them into line with its more 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 party to both the New York Convention and the Washington Convention.

Australia signed but has yet to ratify the Mauritius Convention on Transparency on 18 July 2017. The Mauritius Convention has yet to be placed before the Joint Standing Committee on Treaties (**JSCOT**), which makes recommendations to Parliament as to the merits of ratifying treaties.

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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 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. We note that although Australia implemented these changes, Australia is not party to any investment treaty that incorporates 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 is comprised of 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).

Like the rest of the 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 investment.

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 of 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.

3 Recent Significant Changes and Discussions

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

In *SZOQQ v. Minister for Immigration and Citizenship* [2012] FCAFC 40, the Full Federal Court considered, among other issues, the connection between Australia's domestic law and the *Convention Relating to the Status of Refugees*. *SZOQQ* demonstrates that the Australian courts' approach to treaty interpretation is, subject to contrary legislation, consistent with the approach in international law reflected by arts 31 and 32 of the *Vienna Convention on the Law of Treaties* (**VCLT**). The VCLT provides that a treaty shall be interpreted in good faith and according to the ordinary meaning of its words in their context and in the light of the treaty's object and purpose. Recourse to explanatory materials (i.e., *travaux preparatoires*) is permitted (*Great China Metal Industries Co Ltd* (1998) 196 CLR 161 at 186).

In *Minister for Home Affairs v. Zentai* (2012) 246 CLR 213, the High Court of Australia 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* (**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 (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.

The Full Federal Court case of *Tech Mahindra Limited v. Commissioner of Taxation* [2015] FCA 1082 provides a comprehensive analysis on the interpretation of treaties in Australia. The case

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concerned the *Indian Double Taxation Agreement* (**Agreement**). The Court noted that India was not a party to the VCLT. However, as the VCLT is reflective of customary international law, the Court held that 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 Parliament intended to fulfil its international obligations. Accordingly, it is appropriate to interpret such legislation in accordance with the VCLT (paragraph [51]).

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 art. 31(3)(b) of the VCLT, the Court relied on inconsistent state practice on the issue in support of its conclusion.

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

The current Australian Government's policy is to consider investor-State dispute settlement (**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 China–Australia FTA, the Australia–Hong Kong FTA, the Indonesia–Australia CEPA and the Peru–Australia FTA (which has yet to enter into force).

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 most favoured nation (**MFN**) clause; and
- protect assets owned or controlled "directly or indirectly" by an investor of a party.

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

No; 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 United Nations Commission on International Trade Law (**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 2018, three arbitrations were registered by investors whose home State is Australia. These arbitrations are brought against Egypt, the Republic of Gambia and Mongolia. Further, in July 2019, an award was rendered in an arbitration brought by an Australian company (Tethyan Copper Company Pty Limited) against Pakistan under the Pakistan–Australia 1998 BIT.

Recently, a Singapore-based company has threatened to sue the Australian Government under the Singapore–Australia FTA in relation to legislation passed by the Western Australian government terminating a legal dispute over an iron ore project.

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 on which to make any relevant observations.

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.*

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Fostif Pty Ltd (2006) 229 CLR 386 held that litigation funding was not contrary to public policy or an abuse of process (at least in the circumstances being considered in that case, namely 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. 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. However, in a related proceeding [2019] QSC 228, the Supreme Court of Queensland held that whilst Queensland has not abolished the torts of maintenance and champerty, s 103K(2)(b) of the *Civil Proceedings Act* 2011 (Qld), together with the balance of Part 13A of that Act, "authorizes commercial litigation funding agreements in respect of 'class actions' in Queensland". It should be noted that an appeal of *Murphy Operator* is currently pending in the Queensland Court of Appeal.

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

In Australia, 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?

It has been reported that third-party litigation funders operating in Australia capture approximately 15% of Australia's A$21 billion litigation market (Jason Geisker and Dirk Luff, *The Third Party Litigation Funding Law Review*, The Law Reviews, 3rd edition, 2020). A significant proportion of litigation funding relates to insolvency disputes and class actions for tort claims, investor claims, product liability claims and environmental claims.

By contrast, it is understood that few arbitral matters in Australia are funded.

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?

In contrast with the Model Law, arbitrations under the Washington Convention are "self-contained"; that is, all procedural issues are to be resolved by the International Centre for Settlement of Investment Disputes (**ICSID**) and the arbitral tribunal 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 make 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).

The self-contained nature of ICSID arbitrations is consistent with the *International Arbitration Act* 1974 (Cth) (**IAA**), which is silent on the Australian courts' role (or lack thereof) concerning procedural issues. 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?

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 (Washington Convention, art. 39).

Further, 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*" (Washington Convention, arts 14(1) and 40(2)).

These articles above have the force of law in Australia under s 32 of the IAA.

Parties should also be aware of any contractually imposed limits.

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

Yes, 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 (see art. 37(2)(b)) or where the tribunal has not been constituted within time (see 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).

The case of *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 (which concerned the enforcement of an ICSID award), 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 ICSID Convention. More recently, in *Eiser Infrastructure Ltd v.Kingdom of Spain* [2020] FCA 157, Stewart J found that Spain had submitted to the arbitrations under the Washington Convention which produced the awards and which were being enforced. There was no inconsistency between the Washington Convention and the FSIA. Spain has appealed the decision to the Full Court of the Federal Court of Australia. Judgment currently is reserved.

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 (see 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 Act (discussed in question 7.3 above) applies.

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