IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT
OF THE REPUBLIC OF SINGAPORE

[2025] SGHC(I) 19

Originating Application No 5 of 2025 (High Court (General Division) Summons No 286 of 2025)

Between

(1) Hulley Enterprises Ltd
(2) Yukos Universal Ltd
(3) Veteran Petroleum Ltd

… *Claimants*

And

The Russian Federation

… *Defendant*

JUDGMENT

[Arbitration — Conduct of arbitration — Estoppel]
[Arbitration — Enforcement — Foreign award]
[International Law — Sovereign immunity — Sections 3(1) and 11(1) State Immunity Act 1979 (2020 Rev Ed)]
[*Res Judicata* — Issue estoppel]

TABLE OF CONTENTS

Hulley Enterprises Ltd and others
v
The Russian Federation

[2025] SGHC(I) 19

Singapore International Commercial Court — Originating Application No 5 of 2025 (High Court (General Division) Summons No 286 of 2025)
Andre Maniam J, James Allsop IJ and Anthony Meagher IJ
25 April 2025

25 July 2025 Judgment reserved.

Anthony Meagher IJ (delivering the joint judgment of Andre Maniam J and himself):

Introduction

1 On 20 May 2024, a judge in the General Division of the High Court made an *ex parte* order pursuant to s 29 of the International Arbitration Act 1994 (2020 Rev Ed) (the "IAA") and O 48 r 6(2) of the Rules of Court 2021 (the "Leave Order"), granting leave to each of the claimants – Hulley Enterprises Ltd ("Hulley"), Yukos Universal Ltd ("Yukos Universal"), and Veteran Petroleum Ltd ("Veteran") (together, the "Claimants") – to enforce a final arbitral award in its favour and against the defendant (the "Russian Federation"). The three final awards (the "Final Awards") had been delivered on 18 July 2014, in arbitrations administered by the Permanent Court of Arbitration and heard together by the same three-member tribunal (the "Tribunal"). The Claimants were awarded significant damages (Hulley was

awarded US$39,971,834,360; Yukos Universal was awarded US$1,846,000,687; and Veteran was awarded US$8,203,032,751) on which compound interest continues to accrue.

2 The Russian Federation presently seeks to set aside the Leave Order on the sole ground that it is immune from the jurisdiction of the Singapore courts pursuant to s 3(1) of the State Immunity Act 1979 (2020 Rev Ed) (the "SIA"). The immunity conferred by s 3(1) is subject to the exceptions from immunity which follow in ss 4–13 of the SIA. The Russian Federation's position is that the "Arbitrations" exception in s 11 of the SIA does not apply as it had not "agreed in writing to submit" the relevant dispute with the Claimants to arbitration. It contends, and has contended from the outset, that the Tribunal lacked jurisdiction to issue the Final Awards. It relies on four arguments made to one or more of the Tribunal and the Dutch Courts (consisting of the District Court of The Hague, The Hague Court of Appeal, and the Supreme Court of the Netherlands), in proceedings to set aside those awards and three interim awards, The Hague being the seat of each arbitration. Those arguments are conveniently referred to as the "Article 45 Argument", the "Investor/Investment Argument", the "Article 21 Purported Jurisdiction Argument" and the "Article 21 Mandate Argument", and are explained in more detail at [37]–[45] below.

3 The underlying arbitration proceedings were commenced in 2004, the Claimants relying upon the provisional application of the arbitration mechanism in Art 26 of the multilateral Energy Charter Treaty (17 December 1994), 2080 UNTS 95 (entered into force 16 April 1998) (the "ECT" or the "Treaty"). The Claimants were, directly or indirectly, the majority shareholders in OAO Yukos Oil Company ("Yukos Oil") from 1999 until its liquidation in 2007. Yukos Oil was a major oil producer in Russia. The Claimants sought compensation from the Russian Federation for breaches of Art 13 of the ECT,

alleging that the Federation had expropriated and failed to protect their investments in Yukos Oil . In three interim awards given on 30 November 2009 (the "Interim Awards"), the Tribunal rejected a number of the Federation's preliminary defences to those claims, including defences relating to the Tribunal's jurisdiction. In its Final Awards, the Tribunal rejected the Russian Federation's remaining jurisdictional and substantive defences and found that the Russian Federation had, as neatly summarised by the Supreme Court of the Netherlands in its decision of 5 November 2021 (at para 3.1):[1]

> … instigated a number of taxation and enforcement measures against Yukos seeking to bring about its bankruptcy with the sole aims of eliminating Mr Khodorkovsky (the Chairman of Yukos Oil and one of its shareholders) as a potential political opponent of President Putin, and of acquiring Yukos's assets.

4 Following the issue of the Final Awards, the Russian Federation sought to set aside the Interim and Final Awards in proceedings commenced on 10 November 2014 in the District Court of The Hague. Accepting the Russian Federation's argument that the arbitration procedures in Art 26 did not apply provisionally under the terms of Art 45 of the ECT because those procedures were inconsistent with Russian law, the District Court set aside the Interim and Final Awards.

5 The Claimants appealed to The Hague Court of Appeal. By its final judgment delivered on 18 February 2020, that court quashed the judgment of The Hague District Court and dismissed the underlying application of the Russian Federation to set aside the awards.

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[1] 2nd Affidavit of Mr Mikhail Vladimirovich Vinogradov filed under the cover of the 1st Affidavit of Mr Axl Rizqy on 4 February 2025 ("MVV-2") at pp 3036–3037.

6 The Russian Federation filed an appeal in cassation to the Supreme Court of the Netherlands; such an appeal is concerned with whether there have been any errors of law by the lower court and whether the decision of the lower court was sufficiently reasoned. By its judgment delivered on 5 November 2021, the Supreme Court of the Netherlands rejected grounds for cassation 2 to 5, which dealt with the four arguments relied on by the Russian Federation in the Dutch Courts below, and in the present application.

7 The Claimants rely on the decisions of The Hague Court of Appeal and Supreme Court of the Netherlands as having finally and conclusively dismissed each of the four arguments of the Russian Federation, and as giving rise under Singapore law to issue estoppels, which preclude the same legal and factual issues from being raised and argued by the Russian Federation before this court in answer to the Claimants' case that the Russian Federation had agreed in writing to submit the dispute which has arisen to arbitration.

The Russian Federation's application

8 The Claimants' proceeding in HC/OA 465/2024 ("OA 465"), seeking the grant of leave to enforce the Final Awards, was commenced in the General Division on 14 May 2024.

9 On 4 February 2025, the Russian Federation filed HC/SUM 286/2025 ("SUM 286") seeking the following substantive relief:

(a) A declaration that Russia is immune from the jurisdiction of the Singapore Courts pursuant to s 3(1) of the SIA;

(b) A consequential order that this court's order dated 20 May 2024 made in OA 465 (the Leave Order) be set aside on the ground that Russia is immune from the jurisdiction of the Singapore courts; and

(c) In the event it is fully and finally determined that Russia is not immune from the jurisdiction of the Singapore courts and that the Singapore courts are seised of jurisdiction over Russia, that directions be issued for Russia to file its challenge against the Leave Order on the merits.

10 On 10 March 2025, OA 465 was transferred from the General Division to the Singapore International Commercial Court ("SICC") and assigned case number SIC/OA 5/2025 ("OA 5"). On 20 March 2025, this court fixed the Russian Federation's SUM 286 for hearing on 25 April 2025, with 26–27 May 2025 to be held in reserve.

11 On 23 April 2025, this court directed in relation to SUM 286 that it would first hear oral argument on the issues described in para (a) below, the parties having "broadly agreed" that the issues arising for determination in SUM 286 are as set out in paras (a) to (c) below:

(a) The "Preliminary Issues": Whether Russia is precluded by operation of transnational issue estoppel and/or the Primacy Principle as defined in *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 ("*Deutsche Telekom (CA)*") from litigating matters concerning the jurisdiction of the Tribunal which Russia had unsuccessfully raised before The Hague Court of Appeal and Supreme Court of the Netherlands (the "Dutch Appellate Courts").

(b) The "Immunity Issues": Whether Russia is immune from the Singapore court's jurisdiction by reason that it had not "agreed in writing to submit a dispute which has arisen, or may arise, to arbitration" under s 11 of the SIA, on the following grounds:

(i) Russia only provisionally applied the ECT; which provisional application never extended to the dispute resolution mechanism pursuant to which the arbitrations were ostensibly commenced;

(ii) Russia never agreed to arbitrate any disputes with the Claimants, who are neither protected "Investors" nor made protected "Investments" within the meaning of the ECT; and/or

(iii) The arbitrations dealt with "Taxation Measures", which are carved out from protection under the ECT, and if it were to be found that the arbitrations dealt with "Taxes", the Tribunal in any event side-stepped the preconditional referral mechanism under the ECT.

(c) The "Postliminary Issue": In the event that Russia does not succeed in the Preliminary Issues or the Immunity Issues, whether it is entitled to directions for the filing of challenges against the enforcement of the Final Awards on the merits.

12 At the conclusion of oral argument on the Preliminary Issues on 25 April 2025, this court reserved its decision on the Preliminary Issues, and vacated the hearing dates reserved in late May.

Our Decision on the Preliminary Issues

13 In relation to the Preliminary Issues, we are satisfied that the Russian Federation is precluded from arguing otherwise than that it agreed in writing to submit its dispute with each of the Claimants to arbitration and that the proceedings brought by the Claimants to enforce the Final Awards against the Russian Federation relate to arbitrations which are the subject of that agreement. That is because the legal and factual issues which are determinative of that question are the subject of final and conclusive decisions on the merits by the Dutch Appellate Courts, and accordingly give rise to issue estoppels under Singapore law which preclude the Russian Federation from contending otherwise before this court. In so holding, we have applied the decision of the Singapore Court of Appeal in *Deutsche Telekom (CA)*, and on the basis that its *ratio decidendi* includes that the doctrine of transnational issue estoppel applies in the circumstances (relevantly described in [4], [96] and [102] of the majority judgment in *Deutsche Telekom (CA)*), and notwithstanding that the question of the Russian Federation's state immunity is determined by the application of that doctrine. Our reasons for so concluding follow.

Background

The State Immunity Act 1979

14 It is convenient to start with a consideration of the SIA. The Russian Federation seeks a declaration that it is immune from the jurisdiction of the Singapore courts pursuant to s 3(1) of the SIA. That section provides:

> **General immunity from jurisdiction**
>
> 3.—(1) A State is immune from the jurisdiction of the courts of Singapore except as provided in the following provisions of this Part.

> (2) A court is to give effect to the immunity conferred by this section even though the State does not file and serve a notice of intention to contest or not contest in the proceedings in question.

15 The "immunity conferred by this section" (s 3(2) of the SIA) is a general immunity subject to the exceptions in ss 4–13 of the SIA. The following exception in s 11 of the SIA is headed "Arbitrations":

> **Arbitrations**
>
> 11.—(1) Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts in Singapore which relate to the arbitration.
>
> (2) This section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between States.

16 The SIA was modelled on the State Immunity Act 1978 (c 33) (UK) (the "State Immunity Act 1978 (UK)" or "the UK Act") and is in substantially the same terms. Section 3 in Part 2 of the SIA corresponds with s 1 in Part 1 of the UK Act. The UK Act in turn was largely modelled on the European Convention on State Immunity (16 May 1972), Eur TS No 74 (entered into force 11 June 1976).

17 The position in the UK before 1978 is summarised by Lord Sumption JSC in a judgment agreed in by the other members of the UK Supreme Court in *Benkharbouche v Embassy of the Republic of Sudan (Secretary of State for Foreign and Commonwealth Affairs and others intervening)* [2019] AC 777 ("*Benkharbouche*") at [8]–[10]:

> 8 Before 1978, state immunity was governed in the United Kingdom by the common law. Properly speaking, it comprised two immunities whose boundaries were not necessarily the same: an immunity from the adjudicative jurisdiction of the courts of the forum, and a distinct immunity from process against its property in the forum state. During the second half

> of the 19th Century, the common law had adopted the doctrine of absolute immunity in relation to both. The classic statement was that of Lord Atkin in *Cia Naviera Vascongada v Steamship Cristina (The Cristina)* [1938] AC 485, 490:
>
> > "The courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages."
>
> By 1978, however, the position at common law had changed as a result of the decisions of the Privy Council in *Philippine Admiral (Owners) v Wallem Shipping (Hong Kong) Ltd (The Philippine Admiral)* [1977] AC 373 and the Court of Appeal in *Trendtex Trading Corpn v Central Bank of Nigeria* [1977] QB 529. These decisions marked the adoption by the common law of the restrictive doctrine of sovereign immunity already accepted by the United States and much of Europe. The restrictive doctrine recognised state immunity only in respect of acts done by a state in the exercise of sovereign authority (jure imperii), as opposed to acts of a private law nature (jure gestionis). Moreover, and importantly, the classification of the relevant act was taken to depend on its juridical character and not on the state's purpose in doing it save in cases where that purpose threw light on its juridical character: *Playa Larga (Owners of Cargo lately laden on board) v I Congreso del Partido* [1983] 1 AC 244.
>
> 9 Before the adoption of the restrictive doctrine at common law, the United Kingdom had signed a number of treaties limiting the scope of state immunity in particular respects [...] These treaties were concerned mainly with acts of a kind which would generally not attract immunity under the restrictive doctrine. But neither of them sought to codify the law of state immunity or to apply the restrictive doctrine generally. ...
>
> 10 [...] The Act therefore dealt more broadly with state immunity, by providing in section 1 for a state to be immune from the jurisdiction of the Courts of the United Kingdom except as provided in the following sections of Part 1. The exceptions relate to a broad range of acts conceived to be of a private law nature, including widely defined categories of "commercial transactions" and commercial activities, as well as contracts of employment and enforcement against state-owned property used or intended for use for commercial purposes. ...

18 In *Playa Larga (Owners Of Cargo lately laden on board) v I Congreso Del Partido (Owners)* [1983] 1 AC 244 ("*I Congreso Del Partido*"),

Lord Wilberforce (at 261–262) described the English common law applying before the commencement of the UK Act as including the "restrictive" doctrine under which "a state has no absolute immunity as regards commercial or trading transactions", with the question "where immunity begins and ends" remaining to be determined. With respect to the limitation which had been engrafted upon the principle of immunity of States, he continued (at 262):

> …[it] arises from the willingness of states to enter into commercial, or other private law, transactions with individuals. It appears to have two main foundations: (a) It is necessary in the interests of justice to individuals having such transactions with states to allow them to bring such transactions before the court. (b) To require a state to answer a claim based upon such transactions does not involve a challenge to or enquiry into any act of sovereignty or governmental act of that state. It is, in accepted phrases, neither a threat to the dignity of that state, nor any interference with its sovereign functions.

19 In *Alcom Ltd v Republic of Colombia* [1984] AC 580 ("*Alcom Ltd*"), Lord Diplock (at 597–598) observed that the provisions of the UK Act:

> … fall to be construed against the background of those principles of public international law as are generally recognised by the family of nations. The principle of international law that is most relevant to the subject matter of the Act is the distinction that has come to be drawn between claims arising out of those activities which a state undertakes jure imperii, i.e., in the exercise of sovereign authority, and those arising out of activities which it undertakes jure gestionis, i.e. transactions of the kind which might appropriately be undertaken by private individuals instead of sovereign states.

20 Section 3(1) of the SIA restates in statutory form the general principle of absolute immunity, but makes that principle subject to wide-ranging exceptions in the subsequent sections of Part 2 of the SIA. Whereas, under the common law, an act was classified as being of a private law nature principally by reference to its juridical character, under the SIA, the exceptions describe with various degrees of specificity the acts which are to be treated as of a private law nature. There is no issue as to the construction of the exception in s 11(1)

of the SIA. The only issue between the parties is whether there was such an agreement by the Russian Federation with respect to the Claimants' disputed claim. That is a mixed question of fact and law. If the exception is satisfied, the immunity does not apply to proceedings which "relate" to any arbitration which is the outcome of such an agreement.

21 In describing the exemption from immunity as being with respect to proceedings in the Singapore courts "which relate to the arbitration", s 11(1) of the SIA is not to be understood as excluding proceedings relating to the enforcement of a foreign arbitral award, and no argument to that effect was made – see *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2)* [2007] QB 886 at [117], [121], [123]; and *General Dynamics United Kingdom v State of Libya* [2022] AC 318 at [183] (Lords Stephens and Briggs JJSC). Thus, the exception in s 11(1) may be engaged in relation to an arbitration where Singapore is the arbitral seat, or in relation to a foreign seated arbitration where the award is sought to be enforced in Singapore, as in *Deutsche Telekom (CA)* and the present case.

22 *In Dallah Real Estate & Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2011] AC 763 ("*Dallah Real Estate*"), Lord Collins uncontroversially observed at [98]:

> …[I]n an international commercial arbitration a party which objects to the jurisdiction of the Tribunal has two options. It can challenge the Tribunal's jurisdiction in the courts of arbitral seat; and it can resist enforcement in the court before which the award is brought for recognition and enforcement. These two options are not mutually exclusive, although in some cases a determination by the court of the seat may give rise to an issue estoppel or other preclusive effect in the court in which enforcement is sought. The fact that jurisdiction can no longer be challenged in the courts of the seat does not preclude consideration of the tribunal's jurisdiction by the enforcing court: see, eg, *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2)* [2007] QB 886, para 104 and

> *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39, 48, per Kaplan J.

23 In proceedings for the enforcement of a foreign award brought in Singapore, a party challenging the tribunal's jurisdiction may seek an order that the enforcement be refused because the arbitral tribunal did not have jurisdiction, there being no valid agreement to submit the relevant dispute to arbitration. That challenge is to be determined by reference to the law chosen by the parties, and in the absence of any such choice, by the law of the country where the award was made: see s 31(2)(*b*) of the IAA and Arts 28 and 36 of the UNCITRAL Model Law on International Commercial Arbitration (found in the First Schedule of the IAA). In that context, a final and conclusive decision of the seat courts as to the tribunal's jurisdiction may be the subject of an issue estoppel under Singapore law, "including its conflict of law rules and how it treats judgments that are relevant and rendered by other jurisdictions": *Deutsche Telekom (CA)* at [97]. However, the Russian Federation contends that under Singapore law, in such proceedings recourse may not be had to any issue estoppel where the question of a party's entitlement to state immunity under ss 3(1) and 11(1) of the SIA arises and also turns on whether there was a valid arbitration agreement. Thus, it is said that a State party, like any other party, could either submit to the Singapore court's jurisdiction in relation to the enforcement of a foreign award and challenge the validity of the arbitration agreement before that court under s 31(2)(*b*) of the IAA or claim immunity from the exercise of that court's enforcement jurisdiction by denying the engagement of the exception in s 11(1) of the SIA, on the basis of the tribunal's lack of jurisdiction. In the former case, under s 31(2)(*b*) of the IAA, the State party would bear the onus, whereas in the latter, the onus of proving the exception from immunity would be upon the party seeking to uphold the tribunal's jurisdiction, and the enforcement court's jurisdiction in the face of the claim to

immunity. On the Russian Federation's case, the doctrine of transnational issue estoppel may be invoked in respect of a seat court determination in proceedings by a State party under s 31(2)(*b*), but not in proceedings in which that State party claims immunity. In *Deutsche Telekom (CA)*, India sought relief on both bases but did not contend that the doctrine of issue estoppel could not apply to the relief sought under s 31 of the IAA. In the present case, the Russian Federation claims a declaration as to immunity and as "consequential" relief, that the Leave Order granting permission to enforce under s 19 of the IAA be set aside.

24 Section 3(2) of the SIA requires the court to give effect to the immunity which it confers. That provision re-enacts the common law duty of a court to determine immunity, if necessary, of its own motion, because if immunity exists, or is conferred, in the absence of an applicable exception, the court has no jurisdiction to proceed with the matter in relation to which it is asked to exercise its adjudicative authority or jurisdiction (see *Mighell v Sultan of Johore* [1894] 1 QB 149 at 162–163 (Kay LJ); and Hazel Fox CMG QC and Philippa Webb, *The Law of State Immunity* (Oxford University Press, 3rd Ed, 2013) at pp 174, 229–230).

25 In *Fang and others v Attorney General* 26 ITELR 273, Lords Hamlin and Stephens and Lady Rose JJSC said (at [170]):

> The obligation on the courts to respect the immunity of sovereign states was described by Aikens LJ in *NML Capital Ltd v Republic of Argentina* [2012] EWCA Civ 41, [2011] QB 8 (para [49]). He said that s1 of the State Immunity Act imposes a duty on all UK courts in imperative terms to give effect to the immunity conferred. An English court is bound to refuse to entertain any proceedings against a state unless it is satisfied that the state concerned is not immune because it falls within one of the exceptions set out in ss 2 to 11 of the Act.

26 In *Zu Sayn-Wittgenstein-Sayn v HM Juan Carlos de Borbón y Borbón* [2023] 1 WLR 1162, Simler LJ (with whom King and Popplewell LJJ agreed) observed with respect to the equivalent UK provisions (at [21]–[22]):

> 21 If state immunity is established, it is for a claimant [being the party invoking the jurisdiction which is challenged] to establish, to the civil standard, an exemption to that immunity (for example, under section 5 of the SIA).
>
> 22 Whenever the question arises under the SIA as to whether a state is immune by virtue of section 1 or not immune by virtue of one of the exceptions, the question must be decided as a preliminary issue in favour of the claimant, in whatever form and by whatever procedure the court may think appropriate, before the substantive action can proceed: *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1989] Ch 72 per Kerr LJ at p 194 and Ralph Gibson LJ at p 252. If there are disputed matters of fact upon which the claim for immunity would depend, then the court can direct the trial of those matters as a preliminary issue […] Before taking that course, the court assumes the facts pleaded in the claimant's statement of case to be true, and determines whether they would give rise to immunity if true: *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2007] 1 AC 270 per Lord Bingham of Cornhill at para 13; *Belhaj v Straw* [2017] AC 964 per Lord Sumption JSC at para 179.

27 Referring to the passage in *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1989] Ch 72 cited above, the English Court of Appeal (Males, Popplewell and Phillips LJJ) in *London Steam-Ship Owners' Mutual Insurance Association Ltd v Kingdom of Spain* [2022] 1 WLR 3434 emphasised (at [54]):

> … It was there decided that where a state makes a claim to immunity, it is necessary for the court to determine, on a final and not merely interlocutory basis, whether the ground for immunity/loss of immunity exists. In that case, the ground on which it was said that the States had lost immunity under section 3 was that they were parties to the tin contracts being sued on. It was only if they were parties that the immunity was lost, because otherwise they had not engaged in any commercial activity, and it was not enough to assert that they were merely alleged to be parties or that there was a good arguable case to that effect. It was necessary to decide that

> question in order to determine whether they had lost immunity by reason of engaging in commercial activity.

28 The equivalent obligation of the Singapore courts to "give effect to the immunity conferred" is not an absolute one, as the English Court of Appeal's decision in *Zhongshan Fucheng Investment Co Ltd v Federal Republic of Nigeria* [2023] EWCA Civ 867 illustrates. In responding to an application under s 66 of the Arbitration Act 1996 (c 23) (UK), the equivalent provisions under the IAA being ss 19 and 29, the primary judge granted leave to enforce the arbitral award *ex parte* and at the same time made provision for Nigeria to make an application to set that order aside on grounds of state immunity. However, Nigeria failed to comply with or disregarded the timetable for that to occur and, in a subsequent application, sought further time in which to make that application. On the appeal from the dismissal of that further application, the court (Sir Julian Flaux C and Underhill LJ) observed as to the court's exercise of its jurisdiction to determine the claim to state immunity:

> 34. That jurisdiction must encompass the imposition of whatever procedural rules are appropriate for that determination. This is clear from what Kerr LJ said in *JH Rayner* where he spoke of the issue of state immunity being determined "in whatever form and by whatever procedure the court may consider appropriate" […] If Nigeria needed more time to make an application, it was incumbent upon it to make an application in time […] If such an application was not made in time (as in the present case) then Nigeria would need to seek relief from sanctions […] and, if it could not satisfy the *Denton* criteria (as the judge found here), then the sanction of not obtaining an extension of time would follow, so that Nigeria could not raise state immunity because it was too late. There is nothing in the CPR or the authorities which suggests that these normal procedural consequences do not follow merely because the defendant is a state.

29 Notwithstanding the form of the declaration sought by the Russian Federation, it is not controversial that the burden is upon the Claimants to persuade this court that on the balance of probabilities, the exception in s 11(1)

is satisfied. That exception describes a private law arrangement to refer to arbitration a dispute arising between two or more parties, one of which is a State. Such an agreement is the source of an arbitral tribunal's authority to decide a dispute within its scope. If the exception is held to be satisfied, the State has no immunity from the jurisdiction of the Singapore courts in proceedings which "relate" to the arbitration. The issue that arises when an arbitral tribunal's jurisdiction is challenged before an enforcement court falls to be resolved in adversarial proceedings to which the State and the entity seeking to uphold and enforce the agreement or foreign arbitral award are parties. From that non-state entity's perspective, the purpose of the exception in s 11(1) is to enable it to enforce a foreign arbitration agreement and any award against the State party in Singapore.

30 To assist an understanding of the respective arguments made by the parties, it is useful first to describe briefly the relevant provisions of the ECT, and then to summarise the arguments made by the Russian Federation before the Tribunal and the Dutch Courts and the outcomes of each of them. These reasons then refer to earlier proceedings before the English Courts in relation to the enforcement of the Final Awards. Having done so, they consider and deal with the arguments made to this court with respect to the determination of the Preliminary Issues. At that point specific attention is directed to the decision in *Deutsche Telekom (CA)* and the extent to which that decision binds this court with respect to the application of the doctrine of transnational issue estoppel in the circumstances of this case.

The Energy Charter Treaty

31 The ECT was opened for signature in December 1994 and entered into force on 16 April 1998. Russia was a signatory, having signed the treaty on 17

December 1994. However, it never ratified the ECT and on 20 August 2009 notified the designated ECT Depositary of its intention not to do so.[2] It followed that Art 45(1) of the ECT applied to the Russian Federation as a "signatory" and required that it:

> …apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.

32 Article 26 is an investor-state dispute settlement provision which allows an investor from one contracting State party to the ECT to bring a claim against another contracting State party in which the investor has made an investment. Such dispute settlement provisions were introduced to reduce the political risks related to rapidly increasing foreign investment by making commitments of host States in investment treaties more easily enforceable. As to the development of multilateral treaties such as the ECT, see Rudolf Dolzer, Ursula Kriebaum & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 3rd Ed, 2022) at pp 18–19.

33 Article 26 of the ECT provides:

> **Article 26: Settlement of Disputes between an Investor and a Contracting Party**
>
> […]
>
> (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

[2] MVV-2 at [26].

> amicable settlement, the Investor party to the dispute may choose to submit it for resolution:
>
> […]
>
> (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.
>
> […]

34 There follow provisions which permit an investor to submit an unresolved dispute to the International Centre for Settlement of Investment Disputes ("ICSID") or a sole arbitrator or to an *ad hoc* arbitration established under the UNCITRAL Arbitration Rules. A State party's consent given in accordance with Art 26(3)(a) of the Treaty, together with the written consent of the relevant investor to one of those particular forms of arbitration, are agreed to satisfy the requirement for an "agreement in writing" between the relevant investor and State for the purposes of Art II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958), 330 UNTS 38 (entered into force 7 June 1959) (the "New York Convention").

35 The provisions of Part III of the ECT include Arts 10 and 13. Article 10(1) provides that Investments of Investors of other contracting States are to enjoy "the most constant protection and security". Article 13 provides that Investments of Investors "shall not be nationalised, expropriated or subjected to a measure or measures having effect equivalent to nationalisation or expropriation", except in particular circumstances. Before the Tribunal, each Claimant alleged conduct, including by the seizure of its shares in Yukos Oil, the making of additional tax assessments over the years 2000–2004, the sale of Yuganskneftegaz (a subsidiary of Yukos Oil) at a sham auction, and the

initiation of Yukos Oil's bankruptcy, which together constituted an expropriation of its investments in breach of Art 13 of the ECT.[3]

The Russian Federation's proceedings before the Dutch seat courts

36 The four arguments summarised below are outlined in both the Russian Federation and the Claimants' written submissions before this court.[4] Each argument is relied upon by the Russian Federation in support of its case that the exception under s 11 of the SIA is not engaged. That exception from immunity is not satisfied unless there is an agreement to submit a dispute to arbitration and the dispute which is said to have arisen is within the scope of that agreement. As to the four arguments made by the Russian Federation, each was said to have the consequence that there was no valid arbitration agreement – the first on the basis that the arbitration clause (Art 26 of the ECT) was not engaged, the second and third on the basis that the dispute pressed by the Claimants was not within the scope of the asserted Art 26 agreement to refer to arbitration, and the fourth on the basis that a condition to the Tribunal's continuing jurisdiction or mandate to hear and determine that dispute was not complied with.

Article 45 Argument

37 Before the Tribunal, the Russian Federation contended: (a) that the "limitation" to provisional application in Art 45 of the ECT had to be considered with respect to the particular provision sought to be applied; and (b) that the limitation applied to Art 26 of the ECT because Russian law does not permit disputes about the exercise of public law powers, such as in the assessment of

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3 MVV-2 at pp 3036–3037 (Decision of the Supreme Court of Netherlands at para 3.1).

4 Defendant's Written Submissions dated 4 April 2025 ("RF's Written Submissions") at para 3; Claimants' Written Submissions dated 11 April 2025 ("Claimants' Written Submissions") at para 31.

taxation, to be arbitrated. The Claimants contended that Art 26 was to be applied provisionally unless the principle of provisional application *per se* was inconsistent with Russian law.

38 The Russian Federation's argument was dismissed by the Tribunal, accepted by The Hague District Court, and rejected by The Hague Court of Appeal. Before The Hague Court of Appeal, the Claimants put an alternative argument that Art 45 obliged a State signatory to apply the treaty provisionally, except insofar as the provisional application of one or more of its articles was inconsistent with Russian law, in the sense that it precluded that provisional application.[5] The Hague Court of Appeal accepted this interpretation and held that the provisional application of Art 26 was not inconsistent with any Russian law; and that The Hague District Court was wrong to decide otherwise.[6] In addition, and assuming the correctness of the interpretation contended for by the Russian Federation, The Hague Court of Appeal also held that Art 26 was not inconsistent with Russian law.[7]

39 The Supreme Court of the Netherlands agreed with The Hague Court of Appeal's interpretation of Art 45.[8] It also rejected aspects of the Russian Federation's interpretation of Art 45.[9]

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5 MVV-2 at pp 3046–3049 (Decision of the Supreme Court of Netherlands at para 5.2.1).

6 MVV-2 at pp 2898, 2904–2905 (Decision of The Hague Court of Appeal (18 February 2020) at paras 4.5.33 and 4.5.48).

7 MVV-2 at pp 2905–2932 (Decision of The Hague Court of Appeal at para 4.7.58; see generally paras 4.7.1–4.7.65).

8 MVV-2 at p 3052 (Decision of the Supreme Court of Netherlands at para 5.2.10).

9 MVV-2 at pp 3053–3054 (Decision of the Supreme Court of Netherlands at paras 5.2.13 and 5.2.16).

Investor/Investment Argument

40 The Russian Federation argued that the Claimants were not genuine foreign "Investors" and had not made genuine foreign "Investments" within the meaning of Arts 1(6) and 1(7) of the ECT, because they were companies owned and controlled by Russian nationals and did not contribute foreign capital into the territory of Russia.

41 The Tribunal rejected this argument, finding that the Claimants qualified as Investors and that they owned an Investment protected by the ECT. This argument was not considered by The Hague District Court. The Hague Court of Appeal affirmed the decision of the Tribunal that these provisions did not "preclude its jurisdiction".[10] The Supreme Court of the Netherlands held that The Hague Court of Appeal was correct in its interpretation of the definitions of Investor and Investment.[11]

Article 21 Purported Jurisdiction Argument

42 The Russian Federation argued that the Tribunal had no jurisdiction with respect to disputes about claims as to taxation measures, pursuant to Art 21(1) of the ECT, and that such claims were not brought back within the scope of the ECT by Art 21(5) of the ECT.[12] The Tribunal held that Art 21(1) did not apply to exclude the dispute as that article only applied to *bona fide* taxation measures

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10 MVV-2 at p 2955 (Decision of The Hague Court of Appeal at para 5.1.12).

11 MVV-2 at p 3060 (Decision of the Supreme Court of Netherlands at paras 5.3.11 and 5.3.14).

12 MVV-2 at pp 2956–2957 (Decision of The Hague Court of Appeal at paras 5.2.3–5.2.4, 5.2.8).

and not to the Russian Federation's tax assessments, which, it held, were designed mainly to impose massive liabilities.[13]

43 This argument was not considered by The Hague District Court. The Hague Court of Appeal affirmed the Tribunal's findings as to the taxation matters not being *bona fide*;[14] and held that Art 21 of the ECT did not affect the Tribunal's jurisdiction.[15] These findings were not challenged by the Russian Federation in its cassation appeal to the Supreme Court of the Netherlands.

Article 21 Mandate Argument

44 This argument was first made in The Hague Court of Appeal. The Russian Federation argued that even if the claims concerning tax and tax measures were within the Tribunal's jurisdiction, Art 21(5) of the ECT obliged the Tribunal to refer "the issue of whether the tax is an appropriation" to the relevant "Competent Tax Authority", and compliance with that obligation was said to be a precondition to the Tribunal's continuing authority to deal with the claim that Art 13 of the ECT had been breached.

45 The Hague Court of Appeal held that the failure of the Tribunal to refer this issue to the Russian tax authorities was not "sufficiently serious to justify setting aside the arbitral award" for reason that it "has not become plausible that the Russian Federation has suffered any disadvantage as a result of this failure".[16] The Supreme Court of the Netherlands held that the Court of Appeal's

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13 MVV-2 at p 2317 (Final Award at para 1444).

14 MVV-2 at pp 2960–2961 (Decision of The Hague Court of Appeal at paras 5.2.16–5.2.17, 5.2.20).

15 MVV-2 at pp 2956–2957 (Decision of The Hague Court of Appeal at paras 5.2.5 and 5.2.8).

16 MVV-2 at p 2964 (Decision of The Hague Court of Appeal at para 6.3.2).

ruling that the failure to refer the dispute to the tax authorities was not sufficiently serious to justify annulment of the Final Awards did not "demonstrate an incorrect interpretation of the law, is not incomprehensible and is not based on insufficient grounds".[17]

The final dismissal of the Russian Federation's four arguments as to jurisdiction

46 The Hague Court of Appeal concluded:[18]

> 10.1 The above leads to the following conclusion. HVY's grounds of appeal succeed at least in part: the Tribunal had jurisdiction over HVY's claims and was competent to decide thereon. The other grounds for setting aside put forward by the Russian Federation cannot lead to the setting aside of the Yukos Awards.
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> […]
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> 10.3 The judgment of the District Court cannot be maintained and will be annulled. Adjudicating the matter anew, the Court of Appeal will reject the Russian Federation's claims.

47 The Supreme Court of the Netherlands held:[19]

> 7.1 In conclusion, grounds for cassation 2 to 7 in the main appeal cannot result in cassation and ground for cassation 8 does not require separate consideration. Ground of appeal 1 is successful. The contested judgments in the Court of Appeal will therefore be quashed.
>
> 7.2 The case will be referred to another court of appeal for further consideration and decision.

48 None of the grounds for cassation directed to the question of whether the Tribunal had jurisdiction over any of the Claimants' claims was upheld. Those were grounds 2 to 5. The only issue on which the Russian Federation was

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17 MVV-2 at pp 3066–3067 (Decision of the Supreme Court of Netherlands at para 5.5.7).

18 MVV-2 at p 3007 (Decision of The Hague Court of Appeal at paras 10.1 and 10.3).

19 MVV-2 at p 3068 (Decision of the Supreme Court of Netherlands at paras 7.1–7.2).

successful in the cassation appeal was that raised by ground 1, which challenged The Hague Court of Appeal's finding that the Russian Federation's allegation on appeal that the Claimants acted fraudulently in the arbitration proceedings could not be raised in the annulment proceedings. The Supreme Court referred that question to the Amsterdam Court of Appeal for consideration and, if necessary, decision. In this context the statement extracted at [47] above (in para 7.1) that the "contested judgments in the Court of Appeal will therefore be quashed" is to be understood as referring only to the decisions of the Court of Appeal which are annulled by the judgment of the Supreme Court, relevantly being the Court of Appeal's decision that was the subject of ground of cassation 1. Otherwise, the judgments of The Hague Court of Appeal, which were not challenged or in respect of which the challenge failed, were upheld. It follows that The Hague Court of Appeal's order annulling The Hague District Court's decision has not been quashed because the cassation challenge to that order was rejected by the Supreme Court. This understanding of the effect of the Supreme Court's orders was the subject of expert evidence (from Professor Jehoram) before Butcher J (see *Hulley Enterprises Ltd and others v Russian Federation* [2022] EWHC 2690 (Comm) at [28]). The contrary was not argued before this court.

49 On 20 February 2024, the Amsterdam Court of Appeal rejected the further ground of appeal on the basis that it involved an "untimely reliance on fraud" and, further, on the basis that if the fraud had been relied upon in time, the awards would not in any event have been set aside. The Russian Federation has filed a further cassation appeal against that decision, and that appeal remains pending. On 11 April 2025, the advisory opinion of the Procurator General at the Supreme Court of the Netherlands was submitted and recommended that this appeal be dismissed. In the usual course, the parties' counsel have or will

have the opportunity to respond in writing to that advisory opinion before that Supreme Court gives its judgment.

Proceedings before the English Courts

50 On 30 January 2015, the Claimants commenced proceedings under ss 66 and 101(2) of the Arbitration Act 1996 (UK), for leave to enforce the three Final Awards. At that time, The Hague District Court had not delivered its judgment quashing the Interim and Final Awards. In September 2015, the Russian Federation filed an application contesting the jurisdiction of the English Courts on the basis that it was immune from jurisdiction in respect of any proceedings which related to the three arbitrations because it had not "agreed in writing to submit" the relevant disputes to arbitration (State Immunity Act 1978 (UK), ss 1 and 9).

51 On 8 June 2016, the Claimants' enforcement proceedings were stayed by consent. Following the decision of the Supreme Court of the Netherlands on 5 November 2021, that stay was lifted to allow the determination of the following questions formulated as arising under Russian Federation's "jurisdiction application":

(a) Issue 1: Whether and to what extent the Russian Federation is, by reason of certain judgments of the Dutch Courts, precluded from re-arguing the question of whether it has agreed in writing to submit to arbitration the disputes that are subject of the Awards.

(b) Issue 2: Whether, if the answer to Issue 1 is that the Russian Federation is so precluded from re-arguing the relevant question, the jurisdiction application ought to be dismissed forthwith.

52 These issues were determined by Mrs Justice Cockerill on 1 November 2023 (*Hulley Enterprises Ltd and others v the Russian Federation* [2024] KB 208 ("*Hulley (EWHC)*"). In answer to Issue 1, she concluded that by reason of the judgments of the Dutch Courts, the Russian Federation was precluded from re-arguing the question of whether it had agreed in writing to submit to arbitration the disputes that are the subject of the relevant awards (*Hulley (EWHC)* at [120]). This answer meant that the Russian Federation did not have immunity because the court was satisfied that the exception from immunity in s 9 of the State Immunity Act 1978 (UK) was made out in the Claimants' favour and applied to the enforcement proceedings. Accordingly, the question posed in Issue 2 was to be answered "Yes": *Hulley (EWHC)* at [121]–[123].

53 On 12 February 2025, the Russian Federation's appeal from Mrs Justice Cockerill's order dismissing its jurisdiction application was dismissed by Lewison, Males and Zacaroli LJJ in *Hulley Enterprises Ltd (a company incorporated in the Isle of Man) and other companies v The Russian Federation* [2025] EWCA Civ 108 ("*Hulley (EWCA)*"). Males LJ, with whom Lewison and Zacaroli LJJ agreed, concluded that the appeal should be dismissed, accepting the Claimants' case (*Hulley (EWCA)* at [3]):

> … that although the State Immunity Act 1978 sets out comprehensively the exceptions of state immunity, it does not prescribe how the court should decide whether any of the exceptions applies in any given case. That question must be decided applying the ordinary principles of English law, both substantive and procedural, and those principles include the principle of issue estoppel.

54 On 10 April 2025, the Russian Federation sought permission from the UK Supreme Court to appeal against the English Court of Appeal's order dismissing its appeal, on the following ground: "That the Court of Appeal erred

in holding that an exception to a foreign state's right to adjudicative immunity under s 1 of the State Immunity Act 1978 can be established by an issue estoppel arising from a decision of a foreign court." On 27 June 2025, the UK Supreme Court dismissed the application for permission to appeal, holding that the Russian Federation had not put forward an arguable point of law.

The Russian Federation's Argument

55 The Russian Federation contends that the question for this court is whether the doctrine of "transnational issue estoppel [should] apply to the question of whether Russia is immune from the jurisdiction of the Singapore courts".[20] The "Arbitration" exception to immunity in s 11(1) of the SIA is engaged if the court is satisfied that the State "has agreed in writing to submit" a relevant dispute to arbitration, which is potentially a mixed question of fact and law. The resolution of this issue does not involve a challenge to or enquiry into any act of sovereignty or governmental act of that State. Rather, it focuses solely upon whether there was such a commercial or private law arrangement.

56 First, it is said that neither of the two Commonwealth decisions in which transnational issue estoppel has been applied to issues of state immunity is binding on this court. Those decisions are *Deutsche Telekom (CA)* and *Hulley (EWCA)*. With respect to *Deutsche Telekom (CA)*, it is said that as the Singapore Court of Appeal did not "expressly" consider whether transnational issue estoppel should apply to the determination of issues of state immunity, that decision does not in that respect, bind this court. As to the decision in *Hulley (EWCA)*, it does not bind this court. Furthermore, it was (at the time of oral argument) under appeal, and the Russian Federation contends that the English

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[20] RF's Written Submissions at para 29.

Court of Appeal did not consider, or did not properly appreciate, the arguments made on its behalf.[21]

57 Secondly, it is submitted that where immunity is claimed by a State, the court determining that claim must consider it *de novo*. Where immunity is claimed in respect of proceedings brought in Singapore to enforce a foreign arbitral award, it is contended this requires that the court undertake a "fresh examination of the matter" "as if the original [hearing] had not taken place" and proceed on the basis that the arbitral tribunal's own view of its jurisdiction "has no legal or evidential value before a court that has to determine that question".[22] These statements are principally from decisions addressing the nature of the "appeal" conducted in an application under s 10 of the IAA, following a ruling on jurisdiction by an arbitral tribunal and in circumstances where the seat of the arbitration is Singapore. It is also submitted that a *de novo* assessment cannot include a determination of a question of immunity from jurisdiction by giving effect to a transnational issue estoppel.

58 Thirdly, it is said that giving effect to a transnational issue estoppel "impermissibly enlarges the statutorily limited jurisdiction of the Singapore courts".[23] In support of this proposition, it is said that an "estoppel cannot be invoked to enlarge or confer upon the Court jurisdiction",[24] and that if the Claimants' reliance on a transnational issue estoppel is upheld "the Singapore

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21 RF's Written Submissions at paras 33–37.

22 RF's Written Submissions at paras 38–52.

23 RF's Written Submissions at para 53.

24 RF's Written Submissions at para 56.

Court's jurisdiction in these proceedings will rest solely on an estoppel against Russia".[25]

59 Fourthly, it is submitted that Singapore and the Singapore courts are "obligated under international law to give effect to state immunity" and that this obligation "trumps the public policy imperative behind transnational issue estoppel"; an unstated premise being that the obligation to "give effect" requires more than the making of findings based upon an issue estoppel arising under Singapore law. It is said that applying the doctrine of transnational issue estoppel to resolve the legal/factual question which arises under s 11(1) of the SIA is to leave that determination "simply to how a foreign court (even if it is the seat court) had decided the question",[26] in circumstances where Singapore "has to independently determine the question of state immunity". It is also said that the "policy imperatives" behind the doctrine of transnational issue estoppel cannot "absolve the Singapore courts of ensuring that its domestic legislation is interpreted/applied in a manner which is consistent with its international law obligations".[27] In this context, reference is made to other types of proceeding where *estoppel per rem judicatam* has a limited or no application. They include childcare and custody proceedings, money lending and usury proceedings and in the context of public law and judicial review.

60 Each of these arguments is made in support of the proposition that "transnational issue estoppel cannot and should not apply to the question of state immunity".[28] The last three proceed on the basis that the *ratio* of *Deutsche*

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25 RF's Written Submissions at para 57.

26 RF's Written Submissions at para 66.

27 RF's Written Submissions at para 70.

28 RF's Written Submissions at para 84.

Telekom (CA) does not include that the doctrine of transnational issue estoppel can apply notwithstanding that a question of state immunity arising under the SIA is or may be determined by its application. As such, those three arguments do not arise for determination if this court is bound by that decision in that respect.

The Claimants' Argument

61 The Claimants refer to and rely on the decisions in *Deutsche Telekom (CA)*, as well as *Hulley (EWCA)*. First, it is submitted that the *ratio decidendi* of *Deutsche Telekom (CA)* includes that the doctrine of transnational issue estoppel can apply to determine a question of state immunity which turns on whether the exception to immunity in s 11(1) of the SIA is engaged. It is submitted that if the requirements for the application of that doctrine, as summarised in *Deutsche Telekom (CA)*, are satisfied and if it is demonstrated that none of the exceptions to the application of that doctrine as recognised in *Merck Sharp & Dohme Corp (formerly known as Merck & Co, Inc) v Merck KGaA (formerly known as E Merck)* [2021] 1 SLR 1102 ("*Merck Sharp*") arise or apply, this court must give effect to the transnational issue estoppels which arise with the result that the Russian Federation's claim to immunity from jurisdiction in respect of proceedings which relate to the arbitrations and Final Awards must be dismissed.[29]

62 Secondly, the following responsive submissions are made to the three further arguments of the Russian Federation: (a) that this court must decide the immunity question for itself does not preclude the application of a transnational issue estoppel; (b) that the application of such an estoppel does not "enlarge the

[29] Claimants' Written Submissions at paras 44–59.

statutory jurisdiction" of the Singapore courts; and (c) that there are no policy considerations which arise against the application of that doctrine and no other qualifications or "special circumstances" which would render that doctrine inapplicable in the present case.[30]

The decision in Deutsche Telekom (CA)

63 The principal and first question for this court in addressing the Preliminary Issues is whether the *ratio* of the Court of Appeal in *Deutsche Telekom (CA)* includes that the doctrine of transnational issue estoppel can apply to the determination of issues of state immunity arising under the SIA. If that is part of the *ratio*, an issue remains as to whether a court in the position of this court may depart from that decision of a higher court in the same judicial hierarchy on the basis that the argument made by the Russian Federation was not made to the Court of Appeal in *Deutsche Telekom (CA)*.

The decision at first instance of the SICC

64 Deutsche Telekom commenced an arbitration against the Republic of India. Geneva was the seat of that arbitration. The tribunal dismissed India's objections to its jurisdiction and found it liable. India made two applications to the Swiss Federal Supreme Court. The first sought to set aside an interim award on the basis that the tribunal lacked jurisdiction. That application was dismissed in December 2018. The second sought to "revise and annul" the interim and final awards, including on the basis that the tribunal lacked jurisdiction. That second application was dismissed in March 2023 (*Deutsche Telekom (CA)* at [16]–[21]).

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30 Claimants' Written Submissions at paras 60–89.

65 In 2021, in an *ex parte* application, Deutsche Telekom obtained permission to enforce the final award in Singapore. India then applied to set aside the order granting that permission. That application was transferred to the SICC for hearing and subsequently dismissed. That court rejected jurisdictional objections to the final award, dealing with each on its merits. The court separately concluded that India was precluded from raising jurisdictional objections that the Swiss Federal Supreme Court had already rejected: *Deutsche Telekom AG v The Republic of India* [2024] 3 SLR 1 ("*Deutsche Telekom (HC)*") at [42], [152]–[153], [172]. It followed, India's jurisdictional objections to the final award having been rejected, that the "exception from state immunity in s 11(1) of the SIA applie[d]" and that the final award was enforceable against India in the Singapore courts (*Deutsche Telekom (HC)* at [172]).

66 At no point in the argument before the SICC, did India contend that the doctrine of transnational issue estoppel could not apply because the legal/factual issue to which it was ultimately directed was whether the exception from immunity in s 11(1) of the SIA was engaged.

The decision on appeal

67 The judgment of the majority, with whom Mance IJ agreed (*Deutsche Telekom (CA)* at [193]–[197]) in relation to the application of the issue estoppel doctrine, formulated the "threshold" question before that court as being whether India was precluded from making arguments that had been made before and determined by the Swiss Federal Supreme Court (as the relevant seat court) (*Deutsche Telekom (CA)* at [58]).

68 Four arguments were made in support of the contention that India had not agreed in writing to submit the dispute concerning Deutsche Telekom's investment in Devas Multimedia Pte Ltd ("Devas") to arbitration. Each was

relied on in support of India's claims to immunity under s 3(1) of the SIA, and for an order that enforcement of the final award be refused pursuant to s 31(2)(*d*) of the IAA, with the result that the order permitting enforcement should also be set aside: *Deutsche Telekom (CA)* at [38]–[39], [53].

69 Deutsche Telekom's primary argument was that the decision of the Swiss Federal Supreme Court gave rise to an enforceable issue estoppel in the subsequent Singapore proceedings in respect of the factual and legal issues to be resolved by the SICC. In the alternative, it relied on the proposition that a decision of the seat court on matters that go to the validity of the award would typically enjoy primacy in the scheme of international commercial arbitration, referring to that proposition as the "Primacy Principle" (*Deutsche Telekom (CA)* at [50]). Having concluded that the requirements for transnational issue estoppel were satisfied, it was unnecessary for the Court of Appeal to decide upon the application of that principle (*Deutsche Telekom (CA)* at [4], [120], [131], [176] and [179]). However, the principle was the subject of discussion in the judgment of the majority (at [103]–[130]), and in the observations of Mance IJ (at [199]–[221]).

70 In response, India accepted that an enforcement court, such as the Singapore court, would be bound by a final and conclusive decision of the Swiss Federal Supreme Court (as seat court) on issues relating to the award's validity, including those as to the Tribunal's jurisdiction, if the elements of transnational issue estoppel were met (*Deutsche Telekom (CA)* at [47]). It submitted that the decisions of the Swiss Courts did not satisfy those requirements because Swiss law did not accord "*res judicata* effect to the relevant factual findings and legal reasons" of the Swiss Federal Supreme Court (at [49]).

71 In addressing the "threshold" question, the court focused on the application of the doctrine of transnational issue estoppel in the context of international commercial arbitration where the issue as to the arbitral tribunal's jurisdiction which had been decided by the seat courts was subsequently raised before an enforcement court. In such a case, the applicable provisions of the IAA include ss 29 and 31.

72 At [4], [96] and [102] of *Deutsche Telekom (CA)*, the majority's conclusion was summarised:

> 4 In our judgment, as a matter of Singapore law, transnational issue estoppel does apply in the context of international commercial arbitration and its effect is to prevent the parties to a prior decision of the seat court, in certain circumstances, from relitigating points that were previously raised and determined.
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> […]
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> 96 […] The doctrine of transnational issue estoppel can and should be applied by a Singapore enforcement court when determining whether preclusive effect should be accorded to a seat court's decision going towards the validity of an arbitral award.
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> […]
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> 102 […] The doctrine of transnational issue estoppel is applicable in the context of international commercial arbitration at least in relation to a prior decision of a seat court regarding the validity of an award.

73 The court dismissed the appeal from the SICC's decision because India was precluded from making the arguments which had been made before and determined by the Swiss Federal Supreme Court. It followed that the question whether the exception in s 11(1) of the SIA was made out was answered in the affirmative and that the order granting leave should not be set aside on either of the grounds relied on by India – the first ground being that India was immune from the jurisdiction of the Singapore courts under s 11(1) of the SIA; and the

second ground being that one or other of the bases for refusal of enforcement pursuant to ss 31(2)(*b*) and 31(2)(*d*) of the IAA was made out. It was a necessary step in the Court of Appeal's reasons for dismissing India's claim to state immunity that the doctrine of transnational issue estoppel could and should be applied to resolve the legal/factual issue which in turn determined the answer to that question.

74 At [155]–[178] of *Deutsche Telekom (CA)*, the court addressed whether the requirements for issue estoppel were met in that case. Those requirements were as formulated in *Merck Sharp* (at [39]–[40]). They are summarised and referred to as involving a "three-step framework" (*Deutsche Telekom (CA*) at [64]):

> 64 […] The test for transnational issue estoppel has been formulated as follows (*Merck Sharp* at [35]–[40]):
>
> (a) The foreign judgment must be capable of being recognised in this jurisdiction, where issue estoppel is being invoked. Under the common law, this means that the foreign judgment must:
>
> (i) be a final and conclusive decision on the merits;
>
> (ii) originate from a court of competent jurisdiction that is transnational jurisdiction over the parties sought to be bound; and
>
> (iii) not be subject to any defences to recognition.
>
> (b) There must be commonality of the parties to the prior proceedings and to the proceedings in which the estoppel is raised.
>
> (c) The subject matter of the estoppel must be the same as what has been decided in the prior judgment.

75 The respects in which these requirements have been applied by the English Courts were considered further in *Deutsche Telekom (CA)* at [88]–[90]. The majority judgment noted that under English law a transnational issue

estoppel which otherwise satisfies these requirements will not arise where the foreign judgment is regarded by the English Court as "perverse in the sense that the law of the foreign country that was applied in and formed the basis of the foreign judgment is at variance with generally accepted doctrines of private international law" (at [93]–[95]).

76 As to the requirement that the foreign judgment be capable of being recognised (*Deutsche Telekom (CA)* at [64](a)), the possible grounds of jurisdiction of the seat court include the commencement of proceedings before that court, as India did (see *Deutsche Telekom (CA)* at [65]), and as the Russian Federation did in the present case; and the "defences to recognition" include that the foreign judgment was obtained by fraud, was contrary to the public policy of the domestic law of the recognising forum, or that it would involve the enforcement of some foreign revenue, penal or other public laws, either directly or through recognition of the foreign judgment (*Deutsche Telekom (CA)* at [66]). As to these defences, see also Peter R Barnett, Res Judicata*, Estoppel, and Foreign Judgments* (Oxford University Press, 2001) at paras 2.08–2.09.

77 The majority judgment also made observations as to the approach to be taken when determining whether the three requirements (summarised in *Deutsche Telekom (CA)* at [64]) are satisfied in circumstances where the issue estoppel arises from the judgment of a foreign court, thereby engaging questions of international comity (*Deutsche Telekom (CA)* at [67]).

78 The majority then observed that in this context, a balance is to be struck between competing considerations of comity and the forum court's constitutional role as the guardian of the rule of law within its jurisdiction. It continued at [68]:

> … This balance is a delicate one that calls for: (a) affirming that the elements of transnational issue estoppel are in broad terms the same as those of domestic issue estoppel, whilst taking special care in applying these elements in a transnational context; (b) exercising particular caution in delineating the outer limits of transnational issue estoppel; and (c) potentially adopting a different approach from that taken in the context of domestic issue estoppel to what is commonly referred to as the "*Arnold* exception", referring to the decision in *Arnold and Others v National Westminster Bank plc* [1991] 2 AC 33 at [33]–[34].

79 In *Merck Sharp* (at [33]), the Court of Appeal acknowledged the competing considerations of comity and reciprocal respect among courts of independent jurisdictions, which underlie the doctrine of transnational issue estoppel, as well as the constitutional role of the recognising court in overseeing the administration of justice and safeguarding the rule of law within its jurisdiction. In doing so, the court accepted that its constitutional role may pull in the opposite direction "given the possibility of error in a foreign determination and the reality that the rule of law is not always understood and applied consistently across jurisdictions".

80 The *Arnold* exception (see [78] above) as formulated in *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporate Advisory Pte Ltd and others, other parties) and another appeal* [2015] 5 SLR 1104 ("*RBS*") permits a party to reopen the determination of that issue in subsequent proceedings where there are "special circumstances" (*RBS* at [190]). In *Merck Sharp*, the court emphasised (at [62]) that in *RBS*, a narrow perspective of the *Arnold* exception had been adopted in the context of domestic issue estoppel which included, as one of the cumulative requirements to be met before that exception could apply, that "the decision must be shown to be clearly wrong" and for the relevant error to have stemmed from the fact that some point of fact or law was not taken or argued and could not reasonably have been taken or argued before the first domestic court. In

Merck Sharp at [65], the Court of Appeal did not express any concluded view as to how the *Arnold* exception might be applied in the context of a transnational issue estoppel.

81 At [69] of *Deutsche Telekom (CA)*, the majority set out four "important considerations", which it then described as "helpful signposts that guide the court's analysis in the context of transnational issue estoppel" (at [70]):

> (a) It is irrelevant that the court invoking transnational issue estoppel may form the view that the decision of the foreign court was wrong either on the facts or on the law.
>
> (b) The court must be cautious before concluding that the foreign court had made a final decision on the relevant issue because the procedures of the latter may be different and it may not be easy to determine the precise issues that were decided.
>
> (c) The determination of the issue must be a necessary part of the foreign court's decision.
>
> (d) The application of issue estoppel is subject to the overriding consideration that *it must work justice and not injustice* (see also, *PAO Tatneft v Ukraine* [2021] 1 WLR 1123 at [34]). Thus the correct approach is to apply the principles identified unless there are special circumstances such that it would be unjust to do so. Whether there are such special circumstances would, of course, depend on the facts of the case (*The Good Challenger* at [79]).
>
> [emphasis in original]

82 The first, third and fourth of these "considerations" are an important part of the "first step" inquiry formulated in *Merck Sharp*, and the second consideration informs the "third" of those steps (*Deutsche Telekom (CA)* at [70]).

83 Those observations follow reference to the earlier observations of the court in *Merck Sharp* at [33]–[34] and to the position under the law of the UK as summarised by the English Court of Appeal in *Good Challenger Navegante*

SA v MetalExportImport SA [2004] 1 Lloyd's Rep 67 ("*The Good Challenger*") (at [50]–[64]).

84 A difficulty which must be confronted in the context of the doctrine of transnational issue estoppel is the satisfaction of the "conclusiveness" principle, which, in the context of the recognition of a foreign judgment, requires that the judgment cannot be questioned on its merits in another jurisdiction once it has been recognised under that jurisdiction's conflict of laws rules. See *Godard and another v Gray and another* (1870) LR 6 QB 139; *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 ("*Carl Zeiss")* at 917 (Lord Reid); *Merck Sharp* at [63]; and *The Good Challenger* at [55]–[57] (Clark LJ, Rimer and Mentell LJJ agreeing).

85 Finally, in *Merck Sharp*, the issue as to the "outer limits" of transnational issue estoppel was "left open" because that issue did not squarely arise in that case (see *Deutsche Telekom (CA)* at [71]). Nevertheless, in *Merck Sharp* (at [54]–[58]), the court proposed some limitations which could potentially apply. They are set out in *Deutsche Telekom (CA)* as follows (at [177]):

> (a) First, transnational issue estoppel should not arise in relation to any issue that the court of the forum ought to determine for itself under its own law.
>
> (b) Second, transnational issue estoppel should be applied with due consideration of whether the foreign judgment in question is territorially limited in its application.
>
> (c) Third, additional caution may be necessary in applying the doctrine of transnational issue estoppel against a defendant in foreign proceedings, as opposed to against a *plaintiff*, who has the prerogative to choose the forum.
>
> (d) Fourth, transnational issue estoppel will neither arise in respect of a foreign judgment that conflicts with the public policy of this jurisdiction, nor possibly in respect of foreign judgments that may be considered to be perverse or reflect a sufficiently serious and material error.

> [emphasis in original]

86 The majority judgment in *Deutsche Telekom (CA)* considered whether the requirements for transnational issue estoppel as laid down in *Merck Sharp* had been satisfied (at [155]–[176]). It concluded they were, and that conclusion was "sufficient to dispose of the appeal" (at [176]). Nevertheless, the court considered whether any of the "potential limitations" or exceptions suggested in *Merck Sharp* were present. Having described the four potential limitations extracted above, the court concluded that none of them applied in that case (at [178]).

Disposition

Is the decision in Deutsche Telekom (CA) binding authority for the proposition that the doctrine of transnational issue estoppel can be applied to a question of state immunity arising under the State Immunity Act?

87 The Russian Federation contends that *Deutsche Telekom (CA)* is not binding authority for the proposition that the doctrine of transnational issue estoppel can be applied to questions of state immunity arising under ss 3(1) and 11(1) of the SIA.

88 Professor Cross in Rupert Cross & J W Harris, *Precedent in English Law* (Clarendon Press, 4th Ed, 1991) ("*Cross & Harris*") describes (at p 72) the *ratio decidendi* of a case as "any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him". As Kirby J said in *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at [56], such a binding rule should be derived from:

> … (1) the reasons of the judges agreeing in the order disposing of the proceedings; (2) upon a matter in issue in the

> proceedings; (3) upon which a decision is necessary to arrive at that order. …

89 The Claimants contend that *Deutsche Telekom (CA)* decided that the doctrine of transnational issue estoppel can be applied by an enforcement court in the context of international commercial arbitration to preclude a party from relitigating points that were previously raised and determined before the seat courts, including where a related question of a State party's immunity under the SIA turns on the application of that doctrine.

90 In oral argument, the Russian Federation relied on the English Court of Appeal decision in *Regina (Kadhim) v Brent London Borough Council Housing Benefit Review Board* [2001] QB 955 ("*Kadhim*") (at [33]) in support of a principle stated in fairly general terms, "that a subsequent court is not bound by a proposition of law assumed by an earlier court that was not the subject of argument before or consideration by that court".

91 This qualification to the principle of *stare decisis* only arises for consideration if the proposition contended for by the Claimants is part of the *ratio decidendi* of *Deutsche Telekom (CA)*.

92 At first instance, in *Deutsche Telecom (HC)*, India had sought to set aside the *ex parte* order granting Deutsche Telekom leave to enforce the Swiss arbitral award in Singapore. That application was dismissed. Before the Court of Appeal, India contended that the Swiss arbitral tribunal did not have jurisdiction to determine the dispute between it and Deutsche Telekom. Four arguments were made and, on India's case, if any one or more of those was accepted, there was no agreement to refer to arbitration the dispute concerning Deutsche Telekom's investment in Devas. It followed on India's case that it was entitled to immunity from the jurisdiction of the courts of Singapore in respect

of proceedings relating to the Swiss arbitration. That was sufficient to justify the setting aside of the leave order. It also followed that s 31(2)(*d*) of the IAA was satisfied, enlivening the court's power under s 31(2) to refuse enforcement of the foreign award (*Deutsche Telekom (CA)* at [38]–[39]).

93 In the appeal, India contended that for either reason, the SICC had erred in not setting aside the order granting leave.

94 The court dismissed the appeal (*Deutsche Telekom (CA)* at [188]). Ultimately, it did so because India was precluded from relitigating the jurisdictional issues it raised and relied on before the SICC, and in its appeal from the SICC's judgment.

95 The court gave effect to the issue estoppels arising in relation to each of India's four arguments by accepting that as between the parties the issues of law and fact which they raised had been finally determined in accordance with the decision of the Swiss Federal Supreme Court.

96 That was not controversial. As Lord Shaw said in *Hoysted and others v The Federal Commissioner of Taxation* (1925) 37 CLR 290 in relation to an estoppel with respect to an issue of fact, the legal quality of the fact as well as the fact itself must be taken as finally and conclusively established in favour of the party having the benefit of the estoppel (at 299):

> … In the opinion of their Lordships it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the

> Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle. …

97 In *Thoday v Thoday* [1964] P 181, Diplock LJ, having noted that "the concept of estoppel *inter partes* […] was developed under and is consistent only with the adversary system of legal procedure", continued (at 196–197):

> "Estoppel" merely means that, under the rules of the adversary system of procedure upon which the common law of England is based, a party is not allowed, in certain circumstances to prove in litigation particular facts or matters which, if proved, would assist him to succeed as plaintiff or defendant in an action. If the court is required to exercise an inquisitorial function and may enquire into facts which the parties do not choose to prove, or would under the rules of the adversary system be prevented from proving, this is a function to which the common law concept of estoppel is alien. …

98 It followed that the exception from immunity in s 11(1) of the SIA was satisfied by reason of the facts and matters decided by the Swiss Federal Supreme Court, which as between the parties finally and conclusively established those facts and matters as contended for by Deutsche Telekom.

99 The court's reasoning for rejecting the first of the two arguments relied on by India (see *Deutsche Telekom (CA)* at [38]–[39]) was that the question of state immunity and the satisfaction or otherwise of the exception in s 11(1) could and should be addressed by giving effect to the claimed issue estoppel. Accordingly, part of the *ratio* of the decision was that the doctrine of transnational issue estoppel can apply in the context of international commercial arbitration where its effect is to prevent the parties to a prior decision of a seat court from relitigating points that have been previously raised and decided, and notwithstanding that the application of that doctrine is determinative of a question of state immunity under the SIA.

100 In *Deutsche Telekom (CA)*, it was not argued by India that any different principle or proposition might apply. The question which remains is whether any exception to the *stare decisis* doctrine in relation to "decisions without argument" applies. In substance, the Russian Federation contends that it does, with the result that this court would not be bound to follow that part of the *ratio* of that decision.

101 Professor Cross and Ms Harris, in their treatment of exceptions to the *stare decisis* doctrine, address "decisions without argument" and conclude (*Cross & Harris* at p 161):

> The upshot of these decisions is a loosening in the doctrine of *stare decisis*. It does not encompass *rationes decidendi* where it can be inferred that the deciding court did not address its mind to a proposition of law, even if that proposition was essential to its decision; and that inference can be easily drawn from the absence of any (or even any adequate) argument on the point in question.

102 The cases supporting the existence of such an exception include *Eaton Baker and another v The Queen* [1975] AC 774 (Lord Diplock at 788); *National Enterprises Ltd v Racal Communications Ltd* [1975] Ch 397 (Russell LJ at 406); and the New South Wales Court of Appeal decision in *Markisic v Commonwealth of Australia and another* (2007) 69 NSWLR 737 at [56].

103 In *Kadhim*, Buxton LJ, writing for the court, said of the exception (at [38]):

> …this rule must only be applied in the most obvious of cases, and limited with great care. *The basis for it is that the proposition in question must have been assumed and not have been the subject of decision.* That condition will almost only be fulfilled when the point has not been expressly raised before the court, and there has been no argument upon it. […] And there may of course be cases, perhaps many cases, where a point has not been the subject of argument, but scrutiny of the judgment indicates that the court's acceptance of the point went beyond

> mere assumption. Very little is likely to be required to draw that latter conclusion: because a later court will start from the position, encouraged by judicial comity, that its predecessor did indeed address all the matters essential for its decision.
>
> [emphasis added]

104 In *Regina v Charles* [1976] 1 WLR 248, Bridge LJ emphasised the limited circumstances in which this exception might be applied (at 258):

> … [Counsel says] and with great force, that there is a distinction to be made between a point which has been decided *sub silentio* in circumstances in which the proper inference must be that the point was never in the mind of the court at all, and a point which has been decided without argument, even perhaps following a tacit concession by counsel, where, nevertheless, it is apparent from the judgment that the court must have applied its mind to the point and at least seen no obstacle in the way of the conclusion which it has expressed.

105 The reasons in *Deutsche Telekom (CA)* show that the Court of Appeal appreciated that the doctrine of issue estoppel was relied upon to determine the immunity question. They also show that in directing itself as to the applicable domestic law principles to be applied (see *Deutsche Telekom (CA)* at [96]–[102]), the court did not regard the existence of the immunity question as constituting an obstacle to its conclusion that the doctrine of transnational issue estoppel could be applied as part of the law of Singapore (and characterised as procedural for the purposes of conflict of laws, as to which see *Merck Sharp* at [55]) in adversarial litigation to answer the question whether there was a valid arbitration agreement.

106 The following matters lead to that conclusion. The relief sought by India was to set aside the grant of leave. The "starting point" of its argument was an entitlement to state immunity because the exception in s 11(1) was not engaged (*Deutsche Telekom (CA)* at [38]). Whether that was so depended on the court being satisfied as to the existence of a valid arbitration agreement. The claimant

relied upon the doctrine of transnational issue estoppel as finally and conclusively establishing in its favour the legal and factual issues on which that fact, and accordingly the absence of that immunity, turned.

107 The doctrine of issue estoppel was applied as part of the law of Singapore. It was not a legal attribute of the foreign judgment: *Deutsche Telekom (CA)* at [38], citing *Merck Sharp* at [41] and *Carl Zeiss* at 919.

108 The court in *Deutsche Telekom (CA)* held (at [97]) that this doctrine was available to be applied in domestic enforcement proceedings in respect of a foreign arbitral award and, more specifically, in the determination of the legal and factual issues upon which the claimed immunity from jurisdiction turned.

109 India had accepted that an enforcement court in the position of the SICC would be bound by a seat court decision if the elements of transnational issue estoppel were met (*Deutsche Telekom (CA)* at [47]). That acceptance extended to the resolution of the legal and factual issues with respect to the application of the exception in s 11(1) of the SIA. There was no further or separate question to be answered or discretion to be exercised. If the exception in s 11(1) was satisfied, s 3(1) of the SIA applied according to its terms.

110 Thus, the court in *Deutsche Telekom (CA)* saw no obstacle in the way of the application of the doctrine of transnational issue estoppel in circumstances where under the provisions of the SIA, the claim to immunity turned on the existence of an arbitration agreement between a State and non-state party. That claim did not involve or turn on any "challenge to or enquiry into any act of sovereignty, or governmental act of that state" (*cf I Congreso Del Partido* at 262, see [18] above). Rather, the question as to the existence of such an agreement, which also arose in relation to India's application under ss 31(2)(*b*)

and 31(2)(*d*) of the IAA, was to be dealt with according to Singapore law, both substantive and procedural.

111 For these reasons, this court must follow the decision in *Deutsche Telekom (CA)* as holding that the doctrine of transnational issue estoppel applies in the context of international commercial arbitration, and notwithstanding that the question of the Russian Federation's state immunity under the SIA is determined by the application of that doctrine.

Are the requirements for the application of the doctrine of transnational issue estoppel satisfied?

112 The requirements to be satisfied for the application of the estoppel are extracted at [74] above. The relevant decisions giving rise to the estoppel as relied on in the present case are those of The Hague Court of Appeal and the Supreme Court of the Netherlands. It is not disputed that these decisions were final and conclusive and on the merits. Consistent with that being the position, Mrs Justice Cockerill's decision that these requirements had been satisfied was not challenged by the Russian Federation in the appeal in *Hulley (EWCA)* (at [52]).

113 It is accepted that the Dutch Courts had jurisdiction over the Russian Federation, it having invoked the jurisdiction of those seat courts by commencing and prosecuting its proceedings to set aside the Interim and Final Awards. And it is not suggested that there are any defences to recognition of those judgments in Singapore.

114 The parties to the Dutch proceedings and those in this court are the same and, most significantly, it is accepted that the subject matter of the issue estoppels and the issues raised in determining whether the exception in s 11(1)

of the SIA is engaged, are the same. It is not suggested that the issue whether the Russian Federation had "agreed in writing" to submit its dispute with the Claimants to arbitration was not addressed in those terms by the Dutch Courts. In particular, and in the light of the Russian Federation's submission that an estoppel might enlarge the court's jurisdiction in respect of proceedings "which relate to the arbitration", it is not said that the Dutch Courts addressed a different question from that required to be addressed by the language of this exception. For example, those courts might have addressed the question whether a conventional estoppel between the parties had the same or substantially the same legal effect as a written agreement and was sufficient to satisfy the exception. If that had been the position, the Dutch Courts' decisions made on that basis would not have given rise to an estoppel with respect to the determination of an issue raised by the language of s 11 of the SIA.

115 In *Merck Sharp*, the Singapore Court of Appeal suggested that there may be exceptions which define the "outer boundaries" of the circumstances in which the transnational issue estoppel doctrine might be applied (see [85]–[86] above). In relation to those suggested limitations, the Russian Federation emphasises that they are not fixed or immutable or closed. More significantly, it identifies two matters which it submits fall to be considered in this context, and either as suggested exceptions within the categories described in *Merck Sharp* or as otherwise arising because of the question of state immunity.[31]

116 The first is whether, because state immunity involves international law obligations, the doctrine of transnational issue estoppel cannot be applied to such an issue which the court must decide for itself and on a *de novo* basis. It is suggested that this first matter would or at least might have fallen within

[31] Transcript dated 25 April 2025 at p 108, line 11 to p 109, line 27.

category (a) as formulated in *Deutsche Telekom (CA)* (see [85] above), as a matter which the forum court ought to determine for itself.

117 The second is that there is a risk that the application of the doctrine of transnational issue estoppel will confer "jurisdiction on the Court which it otherwise might not have".[32] It is suggested that this matter may not fit within any of categories (a) to (d) as formulated in *Deutsche Telekom (CA)*, and requires separate consideration.

118 Each of these arguments might equally have been made in *Deutsche Telekom (CA)* and necessarily in support of the contention that the doctrine of transnational issue estoppel could have no application where the ultimate question involves an issue of state immunity. In relation to that contention, we regard ourselves as bound by the holding of the Singapore Court of Appeal that the doctrine of transnational issue estoppel can be applied in circumstances such as those arising in the present case.

119 Furthermore, we consider that the Russian Federation's arguments in relation to these two matters,[33] and as to there being other reasons why the Singapore courts should not apply that doctrine to any question relating to state immunity,[34] to be without substance. These various arguments are dealt with below.

120 The Russian Federation's argument does not otherwise engage any of the matters in paras (b) to (d) as formulated in *Deutsche Telekom (CA)* and extracted above at [85]. With respect to category (d), it is not submitted or

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32 Transcript dated 25 April 2025 at p 109, lines 21–27.

33 RF's Written Submissions at paras 38–60.

34 RF's Written Submissions at paras 61–80.

suggested that the decisions of the Dutch Appellate Courts were or are either contrary to Singapore public policy or obviously wrong to the extent of being perverse. Category (a) describes circumstances in which the relevant "issue" should be determined by the court of the "forum" under its "own law". In *Deutsche Telekom (CA)*, the court held (at [178]) that this exception had no application given that in that case, as here, the relevant "issue" arose in the context of international commercial arbitration and concerned a prior decision of the relevant seat court as to the jurisdiction of the arbitral tribunal. The "issue" to which these observations are directed is whether there was a valid arbitration agreement under s 31(2)(*b*) of the IAA. That was not an issue which a Singapore court was required to determine "under its own law"; and there was no mandatory Singapore law that applied irrespective of any choice of law rule that might otherwise have applied (*cf Merck Sharp* at [55]). Indeed, s 31(2)(*b*) of the IAA required that the relevant issue be decided by reference to the law chosen by the parties, and in the absence of any such choice, by the law of the place of the award. In its analysis in relation to the application of category (a), the court in *Deutsche Telekom (CA)* (at [177(a)] and [178]) was not addressing as the relevant "issue" to be determined "for itself under its own law" whether India was entitled to state immunity.

Whether transnational issue estoppel contradicts a* de novo *review of questions of state immunity?

121 This argument proceeds from an asserted "consensus" between the parties that this court must consider the claim to immunity *de novo*.[35] The expression *de novo* is often used to describe the nature or type of an appeal from or review of an earlier decision of a tribunal or court. The Russian Federation contends that the preclusive effect of a transnational issue estoppel contradicts

[35] RF's Written Submissions at paras 38–60.

all notions of a *de novo* determination. First, it is said that it would give "legal or evidential value" to the findings of a foreign court by recognising them to have legally and evidentially binding effect. Secondly, it is said that it would preclude the court from conducting its "obligatory fresh examination" of the Russian Federation's arguments asserting state immunity. And thirdly, it is said it would undermine the notion that the court is to consider the matter "as if the original [hearing] had not taken place". In this context, the Russian Federation accepts that the SIA does not prescribe how a Singapore court should approach the determination of the questions raised by the exceptions in ss 4–13. In relation to that point, its submission is that the "case law dictates and parties agree" that this inquiry must be approached *de novo*.[36]

122 In support of their position, the Claimants rely on the following analysis in *Hulley (EWCA)* (at [56]) with respect to the question of whether Mrs Justice Cockerill had declined to make a determination or finding that the exception in s 9 of the State Immunity Act 1978 (UK) was engaged:

> 56 So here, in deciding that Russia is not immune, Mrs Justice Cockerill did not decline to determine whether Russia had agreed in writing to submit the dispute in question to arbitration. On the contrary, she determined that it had so agreed, applying the substantive principle of English law that when the requirements for an issue estoppel are satisfied, as they were in this case, the previous decision of a court of competent jurisdiction is conclusive on the issue in question. As explained in *Associated Electric & Gas v European Re* [2003] 1 WLR 1041 at [15] an issue estoppel creates a substantive [private law] right which is recognised and protected in English law. There is nothing in the State Immunity Act 1978 which is capable of depriving a party of that right.

123 The majority judgment in *Deutsche Telekom (CA)* (at [155]–[178]) undertook the same analysis as had been undertaken by Mrs Justice Cockerill.

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[36] RF's Written Submissions at para 46.

Being satisfied that Singapore law included the doctrine of transnational issue estoppel, the court then considered whether the requirements for the application of that doctrine had been satisfied and held that they had. Having then concluded that none of the suggested exceptions to the application of that doctrine arose, it proceeded to treat the decision of the Swiss Federal Supreme Court as conclusive on the issue as to whether the exception to state immunity was engaged.

124 None of the authorities cited by the Russian Federation in relation to the content or scope of a *de novo* review or decision supports a conclusion that the question whether the exception in s 11(1) of the SIA is engaged should be determined by an enforcement court in adversarial proceedings between the parties to the alleged agreement, but without reference to the principle of transnational issue estoppel as part of its residual domestic law.

125 As to seat courts exercising powers under s 10 of the IAA, it is not controversial that the seat court reviews the arbitral tribunal's jurisdictional ruling on a *de novo* basis, understood as meaning that the hearing is conducted as if there was no ruling of the relevant tribunal. Nor is it conducted on the basis that deference should be accorded to the tribunal's own view of its jurisdiction. The reviewing court is "unfettered by any principle limiting its fact-finding abilities": see *Dallah Real Estate* at [30]; *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 ("*PT First Media*") at [163]–[164]; *AQZ v ARA* [2015] 2 SLR 972 at [57]; *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [41]–[42]; *Jiangsu Overseas Group Co Ltd v Concord Energy Pte Ltd and another matter* [2016] 4 SLR 1336 at [48]; *CLQ v CLR* [2022] 3 SLR 145 at [28]. None of these cases involved proceedings before an enforcement court in

circumstances where there was or were prior seat court decisions on the question of the tribunal's jurisdiction.

126 The position in such a case is as stated by Lord Collins (with whom Lords Hope, Saville and Clarke agreed) in *Dallah Real Estate* (at [98]). The relevant passage is extracted at [22] above.

127 As to courts exercising powers under s 31 of the IAA with respect to the enforcement of a foreign award, the Russian Federation refers again to *PT First Media* (at [162]–[163]) for the proposition that where an issue as to the tribunal's jurisdiction arises and there has not been any decision made by the seat court, "it is black letter law" that as part of the court's *de novo* review, the tribunal's view of its own jurisdiction has no legal or evidential value. That is not controversial. The position is different, as in the present case, where there is a decision of the seat court which might give rise to a transnational issue estoppel under the domestic law of the enforcement court.

128 The Russian Federation also refers to the decision of the United States District Court for the District of Columbia in *Global Voice Group SA v Republic of Guinea* 2025 US Dist Lexis 28564 ("*Global Voice Group*") as a case in which that court had to resolve the question whether Guinea was a party to an arbitration agreement and subject to the Foreign Sovereign Immunities Act 28 USC § 1604 (the "FSIA"). An arbitration was undertaken in Paris and resulted in an award in favour of Global Voice Group SA ("GVG"). An application was made to the Paris Court of Appeal to annul that award for want of jurisdiction. After that court's ruling dismissing that appeal, Guinea appealed to the French *Cour de Cassation*, which upheld the ruling of the Paris Court of Appeal. GVG sought to commence recognition and enforcement proceedings in the District of Columbia. In response Guinea relied on the arbitration exception

in the FSIA. Ultimately, the court was not satisfied that Guinea had made an agreement to arbitrate. The Russian Federation submits that the court in *Global Voice Group* accepted that the immunities question had to be addressed on a *de novo* basis, gave no regard to the prior decision or proceedings before the Paris Court of Appeal and did not give effect to any issue estoppel.

129 However, none of this is of assistance or relevance in the present case. There was no evidence before the District Court for the District of Columbia as to whether the findings of the French Courts were final and conclusive such as might give rise to an issue estoppel; the arbitrator's determination was treated as the only earlier decision on the state immunity question. Although reference was made to the Paris Court of Appeal's decision, it was not argued that it gave rise to any issue estoppel or that the issues before the District Court were the same as those earlier decided by the French Courts.

Transnational issue estoppel cannot be used to enlarge the statutory jurisdiction of Singapore courts

130 The Russian Federation submits that if a transnational issue estoppel is relied upon to establish the exception in s 11(1) of the SIA – that the Russian Federation agreed in writing to submit the Yukos Oil dispute to arbitration – the jurisdiction of the Singapore courts in proceedings which relate to the arbitration will rest "solely on an estoppel". If that proposition is understood as referring to an issue estoppel, whether based upon a foreign or domestic judgment, where each of the relevant requirements for the estoppel is satisfied, the estoppel would support the making of findings as to each of the elements of the exception in s 11(1) and, accordingly, would support the conclusion that the exception was engaged so as to enliven the Singapore court's jurisdiction in proceedings relating to the relevant arbitration. Whether that would involve any unjustified or unlawful "conferral" or enlarging of the court's jurisdiction is not addressed

or answered by saying that such jurisdiction would rest "solely on an estoppel". Under the domestic law of Singapore, conclusions of mixed fact and law may be made between parties in adversarial litigation based on issue estoppels, whether of fact or law. The court has implied jurisdiction to decide whether it has jurisdiction and may err in the exercise of that implied jurisdiction. If a court's decision is subsequently overturned on appeal for error, the court having wrongly been satisfied that the requirements for the exercise of its jurisdiction were met, there would not have been any enlargement or conferral of jurisdiction which was not otherwise conferred, but rather an error in determining the question of jurisdiction, and its subsequent correction.

131 What then is the nature of the "enlargement or conferral of jurisdiction" which is said to follow from the adoption of a transnational issue estoppel? Reference is made in the Russian Federation's submissions to the English Court of Appeal decision in *Republic of Yemen v Aziz* [2005] ICR 1391 ("*Republic of Yemen*"). It is said that the court in *Republic of Yemen* expressly endorsed the proposition that "there can be no question of ostensible authority, this being a species of estoppel and incapable therefore of extending the court's jurisdiction".[37] The question in issue was whether there had been a submission to the jurisdiction of the English Courts. That required something to have been done with the authority of the foreign sovereign. Under s 2(7) of the State Immunity Act 1978 (UK), the head of a State's diplomatic mission or the person for the time being performing his or her function was "deemed" to have authority to do an act which constituted a submission to jurisdiction.

132 Mr Aziz, a member of staff at the London Embassy of the Republic of Yemen, made an unfair dismissal claim to an employment tribunal. Solicitors

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37 RF's Written Submissions at para 58.

purportedly acting on behalf of the Republic entered a notice of appearance. Mr Aziz sought to argue, beyond the express words of s 2(7), that either the solicitor acting for the Republic, or an *attaché* at the Embassy, had ostensible authority to authorise the entering of the notice of appearance.

133 In these circumstances, Pill LJ, with whom Sedley and Gage LJJ agreed, said that he did not consider "that the doctrine of ostensible authority applies either to the solicitors or to [the *attaché*] or that jurisdiction can be created by an estoppel" (*Republic of Yemen* at [58]). Section 2(7) of the State Immunity Act 1978 (UK) required for there to be a submission to jurisdiction, that the person involved in the relevant conduct be either the head of the diplomatic mission or the person for the time being performing his or her functions.

134 Apparent or ostensible authority describes a legal relationship between a principal and another person who is held out by the principal as having some authority. The existence of such a relationship could not satisfy the requirements for the statutory deeming under s 2(7) of the State Immunity Act 1978 (UK) (*Republic of Yemen* at [53]). The requirements for a domestic or transnational issue estoppel include that the same issue or issues have arisen and been decided between the same parties in the domestic or foreign decision as arises or arise before the court of the forum. Those requirements avoid the possibility of an outcome such as might have occurred in *Republic of Yemen* if Mr Aziz's argument had been accepted by an earlier court and was subsequently relied on in later proceedings as giving rise to an issue estoppel. The requirement that the issue arising be the same as the issue earlier decided would not be satisfied. But that is not suggested to be the position in the present case.

135 There are three further cases relied on by the Russian Federation to which reference should be made.

136 The first is *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2010] 1 SLR 658 ("*Chip Hup Hup Kee Construction*") (at [43]–[45]). The dispute between the parties related to a progress claim made under a building contract by the claimant subcontractor upon the respondent head contractor. The claim was the subject of an adjudication application under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) (the "SOP Act"). The adjudicator's determination addressed questions of irregularity of procedure or non-compliance with statutory provisions under the SOP Act which were relied on by one or other of the parties as involving a waiver or giving rise to an estoppel. Judith Prakash J (as Her Honour then was) referred to two senses in which the word "jurisdiction" might be used; namely, in the strict sense and as referring to a court or tribunal's authority to decide, or in a much looser sense and to questions involving "irregularity of procedure or contingent jurisdiction or non-compliance with a statutory condition" which arise in the course of a tribunal or adjudicator exercising an overarching jurisdiction (*Chip Hup Hup Kee Construction* at [43]–[44]). In relation to the latter, it was observed that "if the tribunal concerned does not have such jurisdiction any party to the dispute may assert the lack of jurisdiction at any stage and can never be held to be estopped from doing so or to have waived its right of protest" (*Chip Hup Hup Kee Construction* at [44]). That is not controversial. Ultimately, the issues between the parties in that case involved procedural irregularities and non-compliance with statutory provisions which could be the subject of waivers operating between the parties because "the effect of the waiver would not be to create or confer any jurisdiction [on the adjudicator] that did not previously exist" (*Chip Hup Hup Kee Construction* at [44]). That is not the present case.

137 The second is *Koh Zhan Quan Tony v Public Prosecutor and another motion* [2006] 2 SLR(R) 830 ("*Koh Zhan Quan Tony*"). The prosecution,

successful in its appeal in criminal proceedings, opposed a reopening of the appeal on the basis that the appellate court did not have jurisdiction to hear the applicant's motion as it was *functus officio*. The court rejected that argument on the basis that it had jurisdiction to deal with the point sought to be raised. The court then rejected the "only conceivable objection" which might be made to it addressing the argument as to its jurisdiction after the appeal had been decided, namely that the relevant issue should have been argued and heard as a preliminary point of law at the commencement of the appeal. It reasoned that "such an objection from estoppel cannot succeed in circumstances where the issue relates to the court's very jurisdiction itself" (*Koh Zhan Quan Tony* at [22]). The guiding principle being that, where a court or tribunal does not possess the requisite jurisdiction to hear a particular matter, the parties cannot confer the necessary jurisdiction on the court by consent or by reason of conduct giving rise to an *inter partes* estoppel.

138 Finally, the Russian Federation refers to *J & F Stone Lighting and Radio Ltd v Levitt* [1947] AC 209. The owners of a dwelling house brought proceedings for possession, relying upon the application of the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 (UK) and the Rent and Mortgage Interest Restrictions (Amendment) Act 1933 (UK) (together, the "Rent Restriction Acts"). Whether those acts applied depended on whether the actual rent of the dwelling at the relevant time was less than two-thirds of its rateable value (s 12(7) of the 1920 Act). If it was, those Acts did not apply. The true facts established that at the relevant time, s 12(7) was satisfied. There had, however, been earlier proceedings between the owners and tenant in which the same judge who heard the second application held that the relevant tenancy was protected by the Rent Restriction Acts. Thus, as formulated by counsel for the appellants, the question for the court was (at 212):

> … Where, in the suit of a statutory tenant, a final judgment, erroneous in point of law, is obtained in the tenant's favour, securing for him a reduction of rent so that his tenancy is thereby removed from the control afforded by the provisions of the Rent Restrictions Act, can [he] thereafter, in different proceedings between the same parties in respect of a later rent period, whilst that judgment stands, and, notwithstanding that he has taken advantage of its benefits, disavow it …

139 The House of Lords answered that question unanimously and in the negative. It is sufficient to cite the opinion of Lord Thankerton (at 215–216):

> … [However] bad in law the judgment on the [earlier] counterclaim may now be demonstrated to be, on the ground that it was without jurisdiction in view of sub-s (7) of s 12 of the Act of 1920, the fact remains that the parties, by their actions, were agreed that the rent payable in respect of the tenancy at the material date was 10 s per week. Having reached this conclusion in fact, it is idle to suggest that either estoppel or *res judicata* can give the court jurisdiction under the Rent Restriction Acts, which the statute says it is not to have. I agree with the comments of Lord Greene MR in *Griffiths v Davies*. …

140 The transnational issue estoppel relied on in the present case does not require, or have the effect, that this court, in deciding whether the s 11(1) exception is satisfied on the basis of that estoppel, does not do so in accordance with Singapore law and by making findings, whether of fact or law or mixed fact and law, as to the existence of the state of affairs which engages that exception.

Are there any policy considerations which require the Singapore courts not to apply the doctrine of transnational issue estoppel to any question relating to state immunity?

141 The submissions made by the Russian Federation focus on whether obligations of Singapore and the Singapore courts under international law to give effect to state immunity require that the doctrine of transnational estoppel not be applied to any question of immunity arising under the SIA.

142 As is observed by the Singapore Court of Appeal in *Yong Vui Kong v Public Prosecutor and another matter* [2010] 3 SLR 489 at [89], citing Lord Atkin in *Chung Chi Cheung v The King* [1939] AC 160 at 167–168, international law has no validity save insofar as its principles are accepted and adopted by Singapore's common law. So far as state immunity is now concerned, the relevant principles to be applied are the subject of domestic legislation which is to be interpreted as Lord Diplock described in *Alcom Ltd* in the passage extracted at [19] above.

143 Under that domestic legislation, the foreign State does not have absolute immunity. The exceptions of which s 11(1) of the SIA is one "relate to a broad range of acts conceived to be of a private law nature, including widely defined categories of "commercial transactions" and commercial activities" (see *Benkharbouche* at [10]). The purpose or objective of the SIA was to recognise state immunity only in respect of acts done by a State in the exercise of sovereign authority, as opposed to acts of a private law nature. In relation to the latter, the legislation acknowledges that it is necessary in the interests of justice that individuals who have entered such transactions with States be allowed to bring those transactions before the courts (*I Congreso del Partido* at 262, reproduced above at [18]).

144 The exception in s 11(1) of the SIA describes a transaction which is plainly of a kind appropriately undertaken by private individuals or entities. As such, whether an agreement of that kind has been made should be determined in adversarial litigation between the parties to the alleged transaction applying the procedural and domestic law of Singapore, including its conflict of laws rules. Furthermore, whether as a matter of Singapore law, and in the context of international commercial arbitration, the doctrine of transnational issue estoppel

can apply to a legal or factual issue upon which a question of state immunity will turn is answered in the affirmative by *Deutsche Telekom (CA)*.

Are there any other special circumstances which render transnational issue estoppel inapplicable?

145 Reference has been made above to the four suggested exceptions or limitations in *Deutsche Telekom (CA)* (see [85] above). It is not the Russian Federation's case that the decisions of the Dutch Appellate Courts are at all to be considered to be "perverse or reflect a sufficiently serious and material error". Nor is it suggested that either of those decisions in relation to any of the four arguments involves an outcome which is shown to be "clearly wrong" by reason of some error resulting from a point of fact or law which was not taken or argued and could not reasonably have been taken or argued before the first domestic or foreign court (the *Arnold* exception, as to which see [80] above).

Conclusion

146 For these reasons:

(a) We hold that the Russian Federation is precluded from arguing otherwise than that it agreed in writing to submit to arbitration its dispute with the Claimants concerning their investments in Yukos Oil. We do so because the legal and factual issues which are determinative of that question are the subject of final and conclusive decisions on the merits by the two relevant Dutch appellate seat courts and give rise to issue estoppels under Singapore law which are relied upon by the Claimants and have that effect. We also hold that the exception under s 11(1) of the SIA is satisfied, and that the proceedings brought in Singapore by the Claimants to enforce the Final Award in favour of each of them relate to arbitrations which are the subject of that agreement. It follows and we

conclude that the Russian Federation does not have immunity under s 3(1) of the SIA "as respects proceedings in the court in Singapore which relate to" each of the three arbitrations. Accordingly, in SUM 286, the Russian Federation is not entitled to the declaration sought in para (1) or to the consequential order sought in para (2) that the Claimants' Leave Order be set aside on the ground that Russia is immune from the jurisdiction of the Singapore courts. In reaching these findings and conclusions, we have not found it necessary to consider the application of the Primacy Principle.

(b) Addressing the Preliminary Issues as formulated in [11(a)] above, the Russian Federation is precluded from relitigating the issue of whether it had agreed to arbitration, which it pressed before the Dutch Appellate Courts.

(c) It follows that the Russian Federation is also precluded from relitigating the Immunity Issues (see [11(b)] above), and that we do not need to hear any oral argument on those issues.

(d) What remains is the Postliminary Issue (see [11(c)] above), namely whether, having failed in relation to the Preliminary Issues and Immunity Issues, the Russian Federation is entitled to directions for the filing of "challenges against the enforcement of the Final Awards on the merits".

147 We propose that directions be given for the hearing of oral argument on the Postliminary Issue. However, we first invite the Russian Federation to state the grounds on which it seeks to challenge enforcement of those Final Awards. In view of our decision above, those grounds cannot include state immunity, or

any other ground precluded by the application of the transnational issue estoppel doctrine to the decisions of the Dutch Appellate Courts.

Andre Maniam
Judge of the High Court

Anthony Meagher
International Judge

James Allsop IJ (delivering a concurring opinion):

148 I have had the advantage of reading the judgment of Maniam J and Meagher IJ. I agree with the orders that their Honours propose in answering the Preliminary Issues and with their reasoning therefor. I also agree with their directions for the balance of the matter.

149 I wish to express in my own words my essential reasons for joining in the making of the orders and to make some further comments on the issues and arguments. I do this because of the importance of the issues before the court, and out of deference to the care and detail of the arguments of both sides.

150 The importance of the issues derives from the responsibility, under public international law, of Singapore through its court, to obey, through the proper application of its enacted statute, the SIA, the *ius cogens* of state immunity. The Russian Federation emphasises this importance because the principle of sovereign immunity provides the foundation for the equality of nations. Without such immunity, subject to its proper exceptions (most relevantly here that of consent and relatedly participation in international commerce) a State can be put in the place of a subject of another State through the latter's judiciary exercising judicial power, being a species of state power, over it, without consent. To these matters which Russia emphasises can be added the recognition that it is the first duty of a court to be satisfied that it has jurisdiction, that is the authority, over the parties to hear and determine the matter.

151 That importance of the issues does not, however, directly answer any present question, but it does help frame the conceptualisation of the present problem.

152 The principle of sovereign immunity, now enshrined in legislation in the SIA, finds its place or context, for present purposes, in the intersection of modern public international law and private law. Most relevantly, this intersection involves the use of international commercial arbitration as a mechanism for resolving international commercial disputes between States and nationals of other States under the framework of investment treaties.

153 There are two aspects to this place or context. The first is the growth of international commercial arbitration as a widespread mechanism, indeed an institution, for the resolution of international commercial disputes. This has been enabled by the almost universal adoption of the New York Convention, which has underpinned a worldwide international commercial justice system, involving arbitration and supervising and enforcing courts, for over 70 years.

154 The second is the growth of international arbitration to resolve disputes between individuals and States, where such individuals (as foreigners in or to such States) have invested in such States and the dispute involves the treatment of the investment. This can be seen in the making of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"), which established the International Centre for Settlement of Investment Disputes (ICSID) in 1965.

155 The growth of investor and State arbitration since the 1960s has been an underpinning feature of global economic activity. The resolution of disputes between States and nationals of other States through a form of international arbitration of a commercial character, whether ICSID arbitration or under other regimes or rules, has become widespread. This has been built on consent of states. The contractual agreement to arbitrate between States and foreign nationals involves consent of the State to arbitrate from a bilateral or multilateral

investment treaty or free trade agreement containing terms for arbitral resolution of disputes as part of investor protection in the treaty or agreement. The consent is derived from an open and unilateral offer by the State to be accepted by the investor in its actions: see generally, David Foxton *et al*, *Mustill and Boyd: Commercial and Investor State Arbitration* (LexisNexis, 3rd Ed, 2024) at pp 713–716. The consent and agreement through many such treaties has created interconnected rights, obligations and relationships of private investors and State parties for the perceived mutual benefits of commercial investment and profit, and the obtaining of capital for economic development. Such mutual benefits have been underpinned by the widespread use of international commercial arbitration to resolve disputes related thereto.

156 This is a reflection of the interest and willingness, through conscious action, of States to attract investment by using international dispute resolution by international commercial arbitration as well as by ICSID to provide neutral and reliable protection, both to States and to investors. This has not reflected any erosion of sovereign immunity. Rather, it has involved the exercise of sovereign will in the perceived manifest interest of the sovereign nations involved.

157 These matters have lain at the foundation of globalised international commerce for more than 50 years. Globalised economic investment and development would have been more difficult and commercially more perilous without a workable, fair and trusted dispute resolution system, including that founded on international commercial arbitration, provided for in such treaties.

158 It may be overstating the matter, but it is against the above background that Russia here seeks to elevate the *ius cogens* of state immunity above the

framework of international commercial arbitration and the finality involved in its use as the dispute resolution mechanism in the relevant treaty, the ECT.

159 This court sits at first instance. As Judges sitting in the High Court, we are bound by the Court of Appeal. The parties' arguments raised (unfortunately, almost tangentially as they developed) the extremely important question of the proper approach for first instance Judges (even though sitting as a bench of three) to assess whether they are bound to follow the Court of Appeal. Fine distinctions should generally be eschewed by a lower court in assessing whether it is bound hierarchically by a superior court. If it is wrong, as it clearly is, for a lower court to decide that a higher court's decision can be branded as per incuriam and set to one side (*Attorney-General v Au Wai Pang* [2015] 2 SLR 352 at [18], per Belinda Ang Saw Ean J (as her Honour then was); *Cassell & Co Ltd v Broome and another* [1972] AC 1027 at 1054, per Lord Hailsham), the kind of fine distinctions made in cases such as *Kadhim* (at [22]–[27]) should be applied with great caution, as such cases make clear.

160 Here, the Court of Appeal in *Deutsche Telekom (CA)* decided that transnational issue estoppel applies to provide for the preclusive effect of a seat court's decision in the context of international commercial arbitration. That is, however, not all that *Deutsche Telekom (CA)* decided relevantly for this matter. It decided the aforesaid proposition in circumstances where the thrust of the case of the party against whom the principle of transnational issue estoppel was applied (India) was that the arbitral tribunal had no jurisdiction and that it, India, was immune from the jurisdiction of the courts of Singapore: *Deutsche Telekom (CA)* at [38]. Clearly the Court of Appeal was directing itself to that conclusion as to India's lack of immunity.

161 The four arguments of India in support of that proposition of sovereign immunity (set out at [38(a)]–[38(d)] of *Deutsche Telekom (CA)*), are replicated in character by three of Russia's four arguments here, discussed at [40]–[45] above, in the reasons of Maniam J and Meagher IJ. Though for different reasons than those involved in India's arguments, Russia argues, as India had argued, that the relevant treaty did not apply on the facts and in the circumstances. In that respect, the Swiss Federal Supreme Court (as the seat court) had decided otherwise against India, as the Dutch Appellate Courts (as the seat courts) have decided against Russia's arguments here, finding that the ECT was applicable on the facts and in the circumstances. Thus, there is no relevant distinction in kind or quality between the issues involved in these three arguments of Russia and the issues involved in India's four arguments, which were the subject of decision by the Court of Appeal in *Deutsche Telekom (CA)*.

162 The fourth argument of Russia here (put forward in fact as its first), summarised by Maniam J and Meagher IJ at [37]–[39] above, was that it did not consent to the dispute resolution mechanism of international commercial arbitration in Art 26 of the ECT, because such provision was inconsistent with Russian law for the purposes of Art 45 of the ECT. Thus, the argument was that it had not consented, at all, to the process of international commercial arbitration. This argument is capable of being distinguished from the other three made (and from India's four arguments) that the treaty was not applicable on the facts and in the circumstances present, and that the arbitral tribunal made errors in so finding that they were.

163 Russia, however, in argument explicitly eschewed any such distinction. That eschewal can be understood if one conceptualises a question as to whether a treaty applies on the facts and in the circumstances as jurisdictional, which if answered one way or the other leads to the conclusion that the treaty does or

does not apply, and so consent has or has not been given by the State to the tribunal over that particular dispute. This conceptualisation may be seen, relevantly, as overly refined, because if the State has given consent to such questions being resolved by such a tribunal, it cannot be heard to say that it (the State) has only consented to such questions being decided favourably to it. Of course, if it wishes to rectify what it perceives as the "jurisdictional" error of the tribunal, that can be addressed by approaching the seat court to decide the issue *de novo* on review. If the seat court decides that the tribunal was correct to apply the treaty, there the matter lies. The parties have received that to which they agreed: a decision of the arbitral tribunal which (on this hypothesis) they chose or to which they submitted; and a decision of the seat court that they chose. There is, or may be seen to be, a difference in kind or character if a State says that it did not and has never, in the treaty or otherwise, agreed to the process of international commercial arbitration, or to the international commercial arbitral tribunal in question having any role to play, in resolving disputes under the treaty.

164 It can be accepted that India made no argument in *Deutsche Telekom (CA)* that transnational issue estoppel can have no application in deciding questions that determine sovereign immunity. But it cannot be doubted that the Court of Appeal in *Deutsche Telekom (CA)* decided that transnational issue estoppel drawn from decisions of a seat court applied to preclude re-argument of the same issues and so to decide questions that defeated a claim of sovereign immunity.

165 This court saying that *Deutsche Telekom (CA)* does not bind it, could only be based on the proposition that a different argument has now been put to address the same issues which the Court of Appeal had addressed and decided in *Deutsche Telekom (CA)*. That is not a course open to this court.

166 That the argument is basal can be accepted: that issues which decided one way defeat a claim for sovereign immunity cannot be resolved through issue estoppel; that such issues are beyond the outer boundaries of the principle of transnational issue estoppel; and that such issues involve a public policy (of protecting the *ius cogens* within the SIA of sovereign immunity) higher than the public policy of the finality of litigation. These are matters that, if decided one way, could or would recast entirely the framework and operation of international commercial arbitration as a dispute resolution mechanism in international investment arbitration. They are matters which would lay open the vista of countless repetitive enforcement applications in country after country where assets lay, in investment treaty cases.

167 Certainly to the extent that the claims or issues do not deny the consent to the use of international commercial arbitration as a dispute resolution mechanism, but relate only to the correctness of the decision of the seat court that the tribunal was correct or incorrect that the treaty was applicable in the circumstances (even if, for other purposes, such decision is capable of characterisation as a jurisdictional decision of the tribunal) less tension arises with the principle of sovereign immunity than does so where (as here in Russia's first argument) the claim or issue is that no consent was ever given to the process of international commercial arbitration, or the tribunal in question, resolving any dispute under the treaty.

168 The importance of all these issues in circumstances where the Court of Appeal has decided that transnational issue estoppel does apply to defeat a claim for sovereign immunity does not weaken, but rather makes more cogent, the proposition that it is for the Court of Appeal, not Judges at first instance to decide the issues.

169 The underlying arguments raise other important questions integral to the operation of transnational issue estoppel that are for the Court of Appeal to decide in any argument as to the operation and reach or outer boundaries of the principle of transnational issue estoppel presently formulated in a binding way by *Deutsche Telekom (CA)*. These include:

(a) Whether the distinction that I have sought to draw between the first of Russia's arguments and the other three (and the four arguments of India in *Deutsche Telekom (CA)*) is valid to distinguish between issues that may or may not be appropriately decided by the application of the principle of transnational issue estoppel based on a seat court judgment.

(b) If the issue decided (that defeats sovereign immunity) may possibly be wrong by some measure, does the public policy within the *ius cogens* of sovereign immunity require some reviewability of even a seat court judgment? Such reviewability cannot be effected by reference to the application of the doctrine of transnational issue estoppel, a doctrine which has a premise that the relevant binding finding may be wrong. But it may be effected by a nuanced and contextual application of the Primacy Principle that recognises in its particular application the responsibility of Singapore (through its courts) to be *satisfied* that the exception in s 11 of the SIA applies. The public policy underlying sovereign immunity may require this satisfaction to be reached by application of a doctrine or principle of law directed to reaching a suitable state of satisfaction of the correctness of, or at least lack of error in, the conclusion of the seat court, rather than by a doctrine or principle of law which contains a premise of the (irrelevant) possibility of error in the seat court. Such means of satisfaction need not be restricted to the

bald so-called *de novo* hearing propounded by Russia, but may involve a nuanced and flexible approach in being persuaded of the correctness or at least lack of error in the conclusion of the seat court.

(c) Such may be seen to be particularly important (and perhaps the limit of any qualification is) where (as with Russia's first argument) the claim or issue is that there is said never to have been any agreement at all to engage in or submit to the process of international commercial arbitration. Such might be seen to engage more powerfully the public policy of Singapore respecting the *ius cogens* of sovereign immunity underlying the SIA than in respect of other, even "jurisdictional", issues.

(d) The above issues find their place for examination within the framework to which reference was first made: the irretrievably embedded place of international commercial arbitration as an institution in the resolution of international commercial disputes, including those involving States pursuant to investment treaties entered by States, where such treaties to which consent has been given can be seen to provide for such means of dispute resolution.

170 Whatever may be the weaknesses or strengths of Russia's arguments, they are founded on the important public international law principle of sovereign immunity, the importance of which cannot be gainsaid. That such arguments can be despatched with the elegant simplicity of the private-law-rooted doctrine of transnational issue estoppel that contains the premise that the seat court's judgment founding the estoppel may be otherwise wrong, does give one pause for thought as to whether Singapore's obligation to be satisfied of its authority over the State should be reached by a procedure or principle that allows it to be satisfied of the correct answer to that question, at least where the

State contends that it did not agree to the decision-making process of international commercial arbitration. Where consent to such process (that necessarily involves a seat court) is not an issue, there may be seen to be powerful reasons for holding the State party to the conclusions on the application of the treaty of the seat court by issue estoppel as the culmination of the dispute resolution process agreed by the State. Such questions are, however, matters for the Court of Appeal, as the highest court of Singapore, in any re-examination of the principle of transnational issue estoppel and its boundaries, which are presently elucidated in *Deutsche Telekom (CA)*.

James Allsop
International Judge

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