



HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

KINGDOM OF SPAIN

Appellant

and

10

INFRASTRUCTURE SERVICES LUXEMBOURG S.À.R.L.

First Respondent

ENERGIA TERMOSOLAR B.V.

Second Respondent

RESPONDENTS' SUBMISSIONS IN RESPONSE TO REQUEST OF THE COURT ON
11 NOVEMBER 2022 FOR FURTHER SUBMISSIONS ON MATERIAL IN THE
FURTHER SUPPLEMENTARY JOINT BOOK OF AUTHORITIES

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PART I: CERTIFICATION

These submissions are in a form suitable for publication on the internet.

PART II: SUBMISSIONS

1. These submissions are filed in response to the request by the Court on 11 November 2022 for submissions addressing the relevance, if any, of the materials referred to at paragraphs [89] to [176] of the reasons of the primary judge (to the extent those materials have not already been provided to the Court) to the meaning of “immunity from...execution” in Article 55 of the ICSID Convention.

2. In the submissions below, the author or title of the material not already provided which is contained in the Further Supplementary Joint Book of Authorities (**FSJBA**) reference is underlined and its location identified by volume/tab/page with any relevant pinpoint. Where a cross-reference is made to material already provided to the Court in the Joint Book of Authorities (**JBA**) the reference is given.

II.a Relevance of the further material within the methodology of interpreting Art 55

3. The relevance of the further material referred to by the primary judge at [89]-[176] is its use in supporting the primary judge’s finding that for an ICSID award “Art 54(1)...imposes on each Contracting State...the obligation to recognise such an award by *exequatur* or judgment on the award...[and] Art 55 preserves any claim to foreign state immunity in relation to any steps to execute upon a judgment that recognises and enforces such an award and not in proceedings for the recognition and enforcement of an award” (PJ[175] CAB 53).

4. This ultimate conclusion is also stated in various sections of the judgment analysing Arts 54-55: at PJ[98] CAB 35 (as to the ordinary meaning of the text), at PJ[116] CAB 40 (as to the object and purpose of the Convention), at PJ[134] CAB 45 (as to the effect of the *travaux préparatoires*), at PJ[144] CAB 47 (as to the reconciliation of French and Spanish texts), and at PJ[172] CAB 53 (as to the international judicial decisions).

5. The *degree* of relevance of the material is to be assessed in light of the primary judge’s task to interpret Art 55 in accordance with customary international law principles embodied in Arts 31 to 33 of the Vienna Convention on the Law of Treaties (**VCLT**): PJ[83]-[85] CAB 31-33. To that end, the primary judge made findings as to:

a. the text and context of Art 55 within section 6 of Chapter IV (PJ[95]-[113] CAB 35-39) including the new materials referred to in paragraphs 8 to 9 below;

- b. the object and purpose of the ICSID Convention (PJ[114]-[116] CAB 39-40);
 - c. the *travaux préparatoires* relating to Arts 54-55, as a supplementary means of interpretation to assist in resolving ambiguity in the terms of Art 55 (PJ[86], [117]-[135] CAB 33, 40-45 and the further material referred to in paragraphs 11 to 13 below);
 - d. the equally authentic French and Spanish texts of Art 53-55 (PJ[136]-[144] CAB 45-47), having noted that ‘recognition and enforcement’ in Anglophone common law countries is equivalent to the civilian *exequatur* (PJ[89]-[94] CAB 34-35 and see the work of Prof. Briggs referred to in paragraph 7 below). See the further material of limited relevance at paragraph 14 below;
- 10 e. teachings of the most highly qualified publicists (and other commentators) on the interpretation of the ICSID Convention, being a subsidiary means for determining the content of international law rules (see Art 38(1)(d) of the Statute of the International Court of Justice (**ICJ**)) including with respect to treaties as a source of law (Art 38(1)(a)¹: PJ[145]-[161] CAB 47-51 and the further material at paragraphs 15 to 19 below;
- f. judicial decisions, especially of foreign states applying Arts 54-55 of the ICSID Convention: PJ[162]-[172] CAB 51-53 and the further cases at paragraphs 20 to 23 below). It should be noted that the primary judge did not consider these essential to his conclusion (PJ[197]-[198] CAB 59). These are however relevant:
- 20 i. as a subsidiary means of determining the content of international law rules (see Art 38(1)(d) of the Statute of the ICJ); and
- ii. because international treaties should be interpreted uniformly by contracting states, without reference to existing domestic laws such as the Immunities Act (PJ[85]-[86] CAB 33),²

They are not relevant in their interpretation of foreign national immunity laws, which may or may not differ from s 10 Immunities Act.

II.b Particular relevance of further material to the meaning of execution in Art 55

¹ See Alain Pellet & Daniel Mueller, "Article 38", in Zimmermann et al (eds), *The Statute of the International Court of Justice: A Commentary* (OUP, 3rd ed, 2019), 819, 944, paras. 305-306.

² See also *Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company* [2021] FCAFC 110 at [18] (Allsop CJ, Middleton and Stewart JJ) concerning interpretation of the New York Convention; *Shipping Corporation of India Limited v Gamlen Chemical Co (A/Asia) Proprietary Limited* (1980) 142 CLR 159 (Mason and Wilson JJ).

Concepts of recognition, enforcement and execution – PJ[89]-[94] CAB 34-35

6. The cases and materials cited in this section do not engage in an interpretation of Art 55 of the ICSID Convention, but rather provide general commentary on the concepts of recognition, enforcement and execution in the context of international awards especially under the New York Convention (s 8 of the Arbitration Act). Some do however indicate the obvious distinction between the stages of obtaining entry of judgment / *exequatur* and subsequent execution: see e.g. *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd (No 2)* [2011] FCA 206; 277 ALR 441 at [12]-[13] (PJ[92] CAB 34) (See Replacement of FSJBA 2/14/272 filed 24 November 2022), also reflected in the Immunities Act (Pt II vs. Pt IV: see
10 PJ[59]-[67] CAB 26-28).

7. Prof. Briggs' Conflict of Laws (3 ed) at 139, 140-141 (PJ[90], [94] CAB 34, 35) (See Replacement of FSJBA 3/15/306 filed 22 November 2022) discusses the English approach to recognition and enforcement and makes the point as found at PJ[94] CAB 35 that “recognition and enforcement by judgment on the award is equivalent to what is referred to in civilian jurisdictions as *exequatur*”. This conceptual commonality enables a reconciliation of English and French (and Spanish) texts such that it may not matter how the reconciliation of such legal terms in different texts is achieved; Art 55 on any view is to be interpreted as reserving to national law any question of State immunity from steps taken against State property after the making of orders in the nature of *exequatur* or ‘recognition
20 and enforcement’ as that term is used e.g. in connection with non-ICSID awards.

English text and ordinary meaning – PJ[95]-[113] CAB 35-39

8. Dicey, Morris & Collins on The Conflict of Laws (PJ[112]-[113] CAB 38-39) (FSJBA 5/33/1474) esp. at [16-189] (5/33/1697) gives a brief explanation of Arts 54 and 55, without relevant analysis of Art 55. The relevant citation to Art 55 (FN539) refers also to ***AIG Capital Partners Inc & Anor. v Kazakhstan*** [2005] EWHC 2239. There it was held that the restrictions in s 14(4) of the *State Immunity Act 1978* (UK) on execution against assets of a central bank do not deprive an ICSID award creditor (with an ICSID award registered under s 1(1) *Arbitration (International Investment Disputes) Act 1966* (UK)) of the human right of access to the enforcement jurisdiction or of peaceful enjoyment of possession of their award
30 (per Art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (**ECHR**) and Art 1 of Protocol 1 thereto) given Art 55, since the award “was always subject to the restrictions on enforcement that existed at the time it was made” (*AIG Capital Partners*, Aikens J at [95(5)]). It is plain that ‘enforcement’ is used commonly between the ECHR and Art 55 when used in the sense of execution once an award is

registered (registration of awards or judgments being a procedural step in common with *exequatur*: see *Firebird* at [47]-[48] (JBA 3/10/247-248).

9. As found at PJ[113] CAB 39, public and private international law scholars draw a distinction between enforcement by way of recognition, and enforcement by way of execution, reflecting the conceptual division between Art 54(1)-(2) embodying the former step and Art 55 embodying the latter. See: Fox and Webb in Chs 4 and 16 (FSJBA 5/31/1365 at 1376 and 1400), esp. see in Ch 16 p.482 (5/31/1403) referring to the general rule from state practice of immunity “from execution by arrest, sale and other measures of constraint”); Hill and Chong identifies execution in respect of property as a step in the enforcement of a foreign judgment (FSJBA 5/32/1430 contrasting ‘adjudicative jurisdiction’ as including award enforcement at [2.3.18] 5/32/1454) with ‘enforcement jurisdiction’ as relating to property (e.g.) at [2.3.46] 5/32/1464); McClellan and Abou-Nigm (FSJBA 4/24/1209 esp. at [6-014] 4/24/1211-1212)) contains no particular discussion of Art 55.³

Objects and Purposes of the Convention – PJ[114]-[116] CAB 39-40

10. There is no further material to the Report of the Executive Directors (JBA 9/51/2423).

Travaux préparatoires – PJ[117]-[135] CAB 40-45

11. The excerpts of debates at the preparatory conferences recorded in the History of the ICSID Convention (FSJBA 3/18/434-4/18/1039) have limited relevance to the interpretation of Art 55; they are apt to confuse given the many inconsistencies and interchangeable use of terms such as ‘enforcement’ and ‘execution’ (PJ[121]-[122] CAB 41), as well as the inevitable compromises built into any treaty drafting and negotiation.⁴ This is equally true of the ICSID Convention itself: FFC at [2] Allsop CJ CAB 74, [93] Perram J CAB 99, [118] Moshinsky J agreeing CAB 106.

12. Hence, the most relevant document is the Report of the Executive Directors, as the culmination of the work of the preparatory conferences, which makes clear at paragraphs 42-43 (JBA 9/51/2438-2439) the intended meaning of Arts 54 and 55 (PJ[132] CAB 44). The draft of that report (PJ[131] CAB 44), being the memorandum of ICSID General Counsel Mr. Broches (History Vol II, 952-965 at 962-963 (FSJBA 4/18/860-873)) which includes identical paragraphs save for one irrelevant word change, is relevant to

³ Specifically as to Art 55, Fox and Webb in Ch 5, p.106, n32 (not in JBA or FSBJA) in a section on national court decisions note only that despite State immunity under the Convention, national courts grant recognition of an award by *exequatur* or other order, citing *Benvenuti* and *LETCO*.

⁴ See also *El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA* (2004) 140 FCR 296, [146] (Allsop J, Black CJ agreeing); *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 256 (McHugh J).

understanding Art 55 because it was circulated close to but before the end of the drafting process as well as being distributed in its final form to World Bank member states with the final convention. It thus also confirms at paragraph 44 (FSJBA 4/18/871) that Art 55 was concerned with the stage of ‘forced execution’ and was inserted to guard against an overextension of the obligation in Art 54 to intrude into such execution (PJ[132] CAB 44).

13. The article by Mr Broches (at PJ[122] CAB 41) in *(1987) 2 ICSID Review – Foreign Investment Law Journal 287*, at 287 is only relevant to indicate his involvement in the preparatory work of the convention (see esp. ‘*Note from the editor*’ in footer at FSJBA 3/17/386). Prof. Schreuer’s work *The ICSID Convention: A Commentary* at p. 2 only (FSJBA 4/22/1112 as filed in Additional pages on 22 November 2022) supports the finding as to the regard given to Mr. Broches (at PJ[122] CAB 41), and so of his work as a publicist and of the Report as important *travaux préparatoires* in the interpretation of Art 55. Later sections of these works are relevant to the reconciliation of the English, French and Spanish texts and the interpretation of Art 55 (see paragraphs 16 to 17 below).

French and Spanish texts – PJ[136]-[144] CAB 45-47

14. Gardiner (PJ[137] CAB 45) at 423 (FSJBA 5/35/1715 at 1722) provides only general guidance on how to interpret treaties authenticated in more than one language, as does Comptroller-General of Customs v Pharm-A-Care Laboratories Pty Ltd (2020) 270 CLR 494 at [36] per Kiefel CJ, Bell, Gageler, Keane and Gordon JJ (FSJBA 1/3/11 at 28-29); see PJ[137] CAB 45. Neither has any *direct* relevance to the interpretation of Art 55.

Commentary on the ICSID Convention – PJ [145]-[161] CAB 47-51

15. The further material from commentators on the ICSID Convention support the Respondents’ proposition that Art 55 is concerned with further enforcement by execution, after orders are made per Art 54 whether by leave to enforce an award and/or entry of judgment on the award, to facilitate such subsequent ‘debt collection’: form of orders judgment [2021] FCAFC 112 at [10], [30], [31] CAB 116, 122, 123.

16. Broches’ 1987 article (PJ[146]-[148] CAB 47-48) at 317-318 and 329 (FSJBA 3/17/386 at 416-417 and 428) makes the clear distinction between ‘recognition and enforcement’ in Art 54(1)-(2) and ‘execution’ in Art 55, as found by the primary judge. Broches describes the distinction between enforcement in Art 54(1)-(2) and execution in Art 54(3) as between “enforceability which is governed and decreed by the Convention and its implementation by execution which is governed by domestic law” at 318 (FSJBA 3/17/417), before turning to discuss *Benvenuti & Bonfant v People’s Republic of the Congo*, Cour d’appel, Paris (26 June 1981) 65 ILR 88 (as per PJ[163]-[164] CAB 51; JBA 5/15/816) at 318-321 (FSJBA

3/17/417-420), and explains that Art 55, noting especially the content of the Report of the Executive Directors, protects State property from forced execution at 329 (FSJBA 3/17/428), before going on to discuss again *Benvenuti* and then *Liberian Eastern Timber Corporation (LETCO) v The Government of the Republic of Liberia* 650 F Supp 73 (SDNY 1986) (as per PJ[167]-[168] CAB 52; JBA 6/26/1344) at 330-332 (FSJBA 3/17/429-431).

17. Schreuer's Commentary on the Convention (PJ[149]-[153] CAB 48-49) includes extensive commentary on both Arts 54 and 55 (FSJBA 4/22/1112). For Art 55, at 1153 (FSJBA 4/22/1152), he also relies upon the Report of the Executive Directors to say (at [4]) that it deals with forced execution, and confirms his view that "Art 55 only applies to
10 immunity from execution not jurisdiction" (at [5]) and "comes into play when concrete measures of execution are taken to enforce the award's pecuniary obligations, typically after recognition has been granted" (at [6]).

18. Smutny et. al. (PJ[154] CAB 49 (FSJBA 3/16/354)) interpret "immunity from...execution" in Art 55 as relating to immunity from "attachment" of state assets, not immunity from recognition or enforcement (at 654 – FSJBA 3/16/359). The authors thus distinguish between the "special enforcement regime" provided for in the Convention (i.e. Art 54) and the absence of any special regime "in relation to the immunities of states in relation to execution (i.e., attachment) of state assets".

19. As found at PJ[155] CAB 49 (and PJ[160] CAB 50-51), a number of further
20 commentators "recognise the distinction in Art 54 between enforcement and execution and who argue that foreign state immunity [under Art 55] only applies at the stage of execution and not at the stage of judgment". Many of these articles illustrate the distinction by reference to the decisions in *Benvenuti* and *LETCO*.

a. Delaume (PJ[159] CAB 50) praises the Court of Appeal of Paris in *Benvenuti* for "segregating issues of recognition and enforcement from subsequent measures of execution" as this is "in complete accord with the provisions of the [ICSID] convention" (Arbitration with Governments FSJBA 4/26/1231 at 1240; and to the same effect see ICSID Arbitration and the Courts FSJBA 5/28/1276 at 1291-1292). He notes that Art 54 provides for recognition and once recognised the award "becomes a valid title on the
30 basis of which measures of execution can be taken, e.g. in the form of attachment, provided, however that if such measures are directed against State property, execution is possible under the law of the state in which execution is sought" (Arbitration with Governments FSJBA 4/26/1231 at 1240). See also Contractual Waivers of Sovereign

Immunity FSJBA 4/27/1244 at 1264; and Judicial Decisions related to Sovereign Immunity FSJBA 5/29/1296 at 1314-15).

- b. Booyesen (PJ[156] CAB 49) uses similar terminology to Delaume in arguing that recognition and enforcement constitute the ultimate phase of the arbitration process, noting that the ICSID Convention “prevents the contracting state from raising the defence of sovereign immunity during the recognition and enforcement proceedings” but the duty to recognise and enforce “does not include the duty to execute” save insofar as the law of the state of execution allows (FSJBA 5/30/1317 at 1356-1357).
- c. Franzoni (PJ[157] CAB 49-50) is a case note and commentary on the *LETCO* decision. Within that, she observes the distinction between ‘recognition and enforcement’ in Art 54 and execution in Art 55, the former enabling the award creditor to “obtain enforcement” so as to then “attempt to collect on the award debtor’s assets” i.e. subject to Art 55 (FSJBA 4/25/1213 at 1217-18).
- d. Soley (PJ[158] CAB 50) comments on the enforcement-execution distinction (FSJBA 4/23/1185 at 1189), where Art 54(1) obliges courts to “recognize and enforce ICSID awards against states regardless of defences such as sovereign immunity and public policy, Article 55 expressly does not touch upon the execution – the actual seizing and selling of the debtor’s property – of the judgment” which is left to domestic procedures.
- e. Buckley (PJ[160] CAB 50-51) (FSJBA 5/36/1747 at 1757-1758) sees a two stage process through (1) recognition and enforcement under Art 54(1); and (2) execution under Art 54(3), with Art 55 (n 58) preserving national laws such that award creditors must forum shop “to locate assets in jurisdictions with narrow immunity doctrines” (FSJBA 5/36/1747 at 1758).
- f. Chukwumerije (PJ[160] CAB 50-51), like Delaume and Booyesen, identifies that the ICSID Convention treats the recognition stage as the ultimate phase of the arbitral process, and execution as a separate stage. *Benvenuti* is again used to illustrate the “distinction between the two stages”, i.e. exequatur and subsequent execution (FSJBA 5/34/1698 at 1711). The Convention thus “guarantees that ICSID awards can be recognized and enforced with relative ease...[but] a private investor who wishes to execute an award on the property of a state party must contend with the immunity rules applicable at the forum where execution is sought” (FSJBA 5/34/1698 at 1712).
- g. AJ van den Berg (1989) (PJ[160] CAB 50-51), asserts a distinction between enforcement and execution, execution being dealt with in Art 55 of the ICSID Convention, and

recognition and enforcement being measures prior to execution (FSJBA 4/19/1040 at 1050). He illustrates the distinction by reference to *Benvenuti* and *LETCO* (at 1050-1053), observing that “Enforcement of an award against a State falls under immunity from jurisdiction. Immunity from execution comes into play when actual execution measures are sought against a State” (at 1052). He accepts that immunity from execution is preserved in the ICSID Convention by Art 55 and thus suggests express waiver clauses that extend to waiver “of immunity of any of its property from execution” (at 1053). (The same points are made in his 1987 article (FSJBA 4/20/1060 at 1068-1072)).

- 10 h. Toope (PJ[160] CAB 50-51) (FSJBA 6/37/1770 at 1799) relies on Delaume⁵ and the decision in *Benvenuti* to illustrate the distinction between recognition and execution. He comments that the distinction in the ICSID Convention “is that, although consent to ICSID jurisdiction can be seen as an irrevocable waiver of a state’s traditional immunity from suit, no concurrent waiver of immunity from execution is implied” noting Art 55 preserves national law. The distinction he sees between recognition and enforcement is exemplified in *Benvenuti*, and so is one between *exequatur* and subsequent execution (at FSJBA 6/37/1770 at 1800-1801).
- i. Juratowitch (PJ[160] CAB 50-51) notes that “execution” in Art 55 prevents execution against property of states, citing the provision’s effect in *Benvenuti* and *LETCO*, and its relevance to *AIG Capital Partners* (FSJBA 4/21/1078 at 1108-1109).

20 ***International judicial decisions – PJ[162]-[172] CAB 51-53***

20. The two further foreign decisions add to the weight of authority concerning the consistent interpretation of Art 55 as preserving the law in force in any Contracting State relating to immunity of that state or of any foreign state from execution in the sense of post-judgment execution against property (forced execution) after an award has been the subject of *exequatur* style orders giving it the status of a local judgment as required by Art 54. The cases already provided are *LETCO*, *Benvenuti* and *SOABI v Senegal* (1991) 30 ILM 1169 (PJ[165] CAB 51-52 at JBA 7/37/1919).

21. In *Blue Ridge Investments LLC v Republic of Argentina* 735 F3d 72 (2d Cir 2013), (FSJBA 2/7/112) the Second Circuit Court of Appeals affirmed the entry of judgment against
30 Argentina including based on the express or implication waiver in 28 USC §1605(a)(1) and a separate arbitration exception at 78, 84 (FSJBA 2/7/112 at 118, 124). Having confirmed

⁵ Another article by Delaume in 1983, “Foreign Sovereign Immunity: Impact on Arbitration” (1983) 38 *Arb J* 34.

that Argentina had no immunity *from suit*, the court noted (at 85 n23 FSJBA 2/7/112 at 125) that it “[had] no reason to consider the distinct question of whether Argentina may assert immunity from the execution of judgment over specific assets” dealt with in 28 USC §1609 and its exceptions (emphasis added).

22. In Mobil Cerro Negro Ltd v Bolivarian Republic of Venezuela 863 F3d 96 (2d Cir 2017), the same Circuit Court of Appeals affirmed (at 105 see Replacement of FSJBA 2/11/203 filed 23 November 2022) *Blue Ridge* (PJ [170] CAB 53). The Appeals Court drew a distinction between the obligation on Courts under Art 54 to “do no more than examine the judgment's authenticity and enforce the obligations imposed by the award” with enforcement per Art 55 (at 102). The Appeals Court plainly regarded Art 55 as dealing with subsequent execution of the award or judgment.

23. In Micula v Romania [2018] EWCA Civ 1801 at [258]-[260] (FSJBA 2/10/142 at 199-200), Leggatt LJ held that the obligation to enforce an award as if it were a judgment was not a licence to determine whether to enforce it (that question was determined exclusively by the procedure set out in the ICSID Convention) while ‘execution’ in Art 54(3) was confined to the process of execution, without qualifying the obligation. Art 55 is not directly referenced; this was dealt with in the Supreme Court at [72]-[73] (JBA 6/28/1415) in a way that supports the Respondents’ interpretation. However, Leggatt J’s interpretation militates against any implication that execution when used both in Art 54(3) and Art 55 would qualify the obligation to grant *exequatur* (whether termed ‘recognition’ or ‘recognition and enforcement’).

Dated 25 November 2022

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ANNEXURE

Legislation (in force at 23 April 2019 unless otherwise indicated)

Australian Legislation

1. *Foreign States Immunities Act 1985* (Cth) (**Immunities Act**), Part II (in particular s 10), Part IV
2. *International Arbitration Act 1974* (Cth) (**Arbitration Act**), s 8

Foreign Legislation

- 10 3. *Arbitration (International Investment Disputes) Act 1966* (UK), s 1(1)
4. *State Immunity Act 1978* (UK), s 14(4)

Treaties

5. *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159 (in force 14 October 1966) (**ICSID Convention**), Arts 54, 55
6. *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (in force 3 September 1953) (**ECHR**), Art 6, Protocol 1 Art 1
- 20 7. *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (in force 7 June 1959) (**New York Convention**)
8. *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (in force 27 January 1980) (**VCLT**), Arts 31, 32, 33