HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 06 May 2022 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S43/2022
File Title:	Kingdom of Spain v. Infrastructure Services Luxembourg S.
Registry:	Sydney
Document filed:	Form 27A - Appellant's submissions
Filing party:	Appellant
Date filed:	06 May 2022

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY S43/2022

BETWEEN: **KINGDOM OF SPAIN**

Appellant

and

INFRASTRUCTURE SERVICES LUXEMBOURG S.À.R.L

10 First respondent

ENERGIA TERMOSOLAR B. V

Second respondent

APPELLANT'S SUBMISSIONS

PART I: CERTIFICATION

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

PART II: STATEMENT OF ISSUES ON THE APPEAL

2. The Appellant is a foreign State and brings this appeal to continue to assert its claim for immunity from the jurisdiction of the Australian courts as recognised in s 9 of the *Foreign State Immunities Act 1985* (Cth) (**Immunities Act**).

3. The appeal raises for determination the identification of what amounts to waiver of immunity or submission to jurisdiction for the purpose of s 10 of the Immunities Act. The Appellant's case is that consistent with the gravity of State immunity as recognised in customary international law, and given effect in domestic law by the Immunities Act, a waiver of immunity in writing can only be communicated by express words. A waiver cannot arise from ambiguous words or by implication.

4. Applying that standard to the present case, this appeal then considers whether the mere fact that the Appellant is a party to both the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (**ICSID Convention**);[1] and the *Energy Charter Treaty*[2] (**ECT**) amounts to an express waiver of State immunity by the Appellant.

5. The Appellant's case is that no such waiver of immunity or submission to the Australian courts can be found in the text of the ECT nor the ICSID Convention, nor the domestic application of the ICSID Convention by the *International Arbitration Act* 1974 (Cth) (**Arbitration Act**). The ICSID Convention does not contain any waiver – express or implied – of a Contracting State's immunity before the courts of other States. On the Appellant's case, Art 54 of the ICSID Convention imposes a positive obligation on a Contracting State to recognise and enforce awards brought before its own courts – but says nothing of waiver of immunity before other courts. Acceptance of that proposition is sufficient for Spain to succeed on this appeal.

6. Further, Spain's case is that properly construed the use of the word "execution" in Art 54(3) and Art 55 was intended to qualify and explain the process set out in Art 54(1), and (2). On that basis, Art 55 preserves State immunity from the process in Art 54.

---

[1] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States,* (opened for signature 18 March 1965, entered into force 14 October 1966) 575 UNTS 159. The ICSID Convention was signed by Australia on 24 March 1975, and is given the force of law within Australia by s 32 of the *International Abritation Act 1974* (Cth).

[2] *Energy Charter Treaty*, opened for signature 17 December 1994, 2080 UNTS 95 (entered into force 16 April 1998) to which Australia is not a party.

Notably, the use of the three terms "recognition", "enforcement", and "execution" in the English text is difficult to reconcile with the use of just two in the equally authoritative French and Spanish texts. That means that even if, contrary to Appellant's case, the Court identifies an implied waiver of immunity, it is at best ambiguous. Similarly, in light of recent decisions of the ECJ,[3] doubt surrounds the underlying submission of the parties' dispute to arbitration purportedly pursuant to Art 26(2) of the ECT. That ambiguity further militates against this Court concluding that the Appellant has submitted to the processes of the Australian courts.

PART III: SECTION 78B NOTICE

7. The Appellant considers that no notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

PART IV: CITATION OF RELEVANT DECISIONS BELOW

8. *Eiser Infrastructure Ltd v Kingdom of Spain* [2020] FCA 157, 142 ACSR 616 (**PJ**).

9. *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* [2021] FCAFC 3; 284 FCR 319 (**FFC**); and [2021] FCAFC 112; 392 ALR 443 (**form of orders judgment**).

PART V: RELEVANT FACTS

10. In November 2013, the Respondents (**Investors**) commenced arbitration proceedings against the Appellant (**Spain**) (ICSID case number ARB/13/13). The arbitration was commenced pursuant to what was asserted to be consent to arbitration contained in Art 26 of the ECT, claiming that Spain had failed to accord the investors fair and equitable treatment: PJ [9]-[14], [27] CAB 16-17, 19.

11. Article 26 of the ECT affords various options for the resolution of qualifying disputes between an investor and the host State of the investment. The words of Art 26(2)(c), (3)(a) and (4) provide for a dispute to be submitted to ICSID arbitration: PJ [178] CAB 54.

12. In October 2016, the Tribunal conducted a hearing in Paris on jurisdiction and the merits: PJ [27] CAB 19. On 15 June 2018, the Tribunal issued an award, which was rectified on 29 January 2019, finding in favour of the Investors and awarding compensation of €101 million: PJ [29]-[31] CAB 19-20.

13. On 23 April 2019, the Investors commenced proceedings in the Federal Court: AFB 4-8. The Originating Application sought orders: (1) that the award be *"enforced as if*

[3] The option for arbitration in Art 26(2)(c) of the ECT has been interpreted by the CJEU not to be applicable to disputes between an investor and a Contracting Party both from the EU: *Republic of Moldova v Komstroy LLC* [2021] 4 WLR 132 [66].

it were a judgment of the Court"; (2) a declaration that Spain had breached Art 10(1) of the ECT; (3) that Spain pay the Investors €101 million; (4) interest on that sum; (5) costs of the arbitral proceedings and legal costs; (6) costs of the Federal Court application: AFB 7.

14. In May 2019, Spain applied to ICSID for annulment of the award: PJ [32] CAB 20. That application was dismissed by an *ad hoc* Committee on 30 July 2021.

15. On 6 June 2019, Spain filed a Notice of Conditional Appearance in the Federal Court for the limited purpose of asserting immunity from jurisdiction: AFB 9-11.

16. The reasons for the primary judge were published on 24 February 2020: CAB 5-62. The reasons of the Full Court on the substantive questions were published on 1 February 2021 CAB 70-106, and in respect of orders on 25 June 2021: CAB 109-123.

PART VI: ARGUMENT

A FOREIGN STATE IMMUNITY AND SUBMISSION TO JURISDICTION

A1. The Immunities Act

17. The immunity of a foreign State from the jurisdiction of courts of other States is a rule of customary international law that Australia is obliged to uphold. There is a "*right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity*".[4] The principle is derived from the sovereign equality of States, a fundamental principle of the international legal order.[5]

18. The Commonwealth Parliament has given effect to Australia's international obligations to respect State immunity by enacting the Immunities Act.

19. The scheme of the Immunities Act and the limited exceptions to absolute immunity contained within it were considered by this Court in *Firebird Global Master Fund ll Ltd v Republic of Nauru* (2015) 258 CLR 31 (***Firebird***) and *Pt Garuda Indonesia Ltd v ACCC* (2012) 247 CLR 240 (***PT Garuda***). There it was accepted that s 9 of the Immunities Act establishes immunity from jurisdiction. Jurisdiction in s 9 refers to the amenability of the defendant to Australian process, and not to the subject matter of the proceeding, such that Australian courts are "*not to implead*" the foreign State unless an exception to immunity applies: *PT Garuda* [17]; *Firebird* [35]; PJ [51] CAB 24.

---

[4] *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* [2012] ICJ Rep 99 (***Jurisdictional Immunities Case***), p 99 at [56].
[5] Jurisdictional Immunities Case, [57].

20. That presumptive immunity in s 9 is subject to limited statutory exceptions. Relevantly, those exceptions include s 10(1) concerning "*submission to jurisdiction*", which in s 10(2) may be evidenced in an agreement. The term "agreement" is specifically defined in s 3 to mean a "*treaty*" or other international agreement "*in writing*": PJ [44]-[56] CAB 23-25; FFC [17] CAB 79.

21. Notably, s 17(2) of the Immunities Act confirms that the mere fact of agreement to arbitrate will not amount to submission for the purpose of recognition and enforcement of an arbitral award, unless some other exception to immunity would apply.[6] Section 17(1) provides a limited exception to immunity in respect of the Australian court's supervision of arbitration (not presently applicable).

22. The present case concerns the question of what will amount to an agreement by treaty by a State to waive its immunity within the meaning of s 10 of the Immunities Act, such that an Australian court may exercise jurisdiction over it.

A2. Waiver of State immunity requires unambiguous, express words

23. The resolution of that question for the purposes of Australian law must start with the words of the Immunities Act. Section 10(2) must be interpreted and applied "*as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law*".[7]

24. Section 10(2) of the Immunities Act requires the moving party to establish the foreign State has waived immunity by becoming a party to an "*agreement*" (including a treaty) in which it has "*submitted*" to Australian jurisdiction. Where that waiver is said to arise from a treaty, that question can only be answered by reference to international law and the interpretation of the treaty in question.

25. As discussed below both international law, and the text, context, and extrinsic materials in respect of the Immunities Act, require that any waiver of State immunity by agreement of a State be express, clear, and unambiguous.

---

[6] For example the underlying dispute between the parties concerned a commercial transaction within the meaning of section 11 of the Immunities Act. No such exception applies in the present case.

[7] *Kartinyeri v The Commonwealth* [1998] HCA 22; 195 CLR 337 [97] (Gummow and Hayne JJ), where the Court also noted that on the other hand, the provisions of such a law must be applied and enforced even if they be in contravention of accepted principles of international law. See also *Jumbunna Coal Mine NL v Victorian Coal Miners Association* (1908) 6 CLR 309 at 363; *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298 at 303-305.

A3 Waiver in international law

26. In respect of waivers generally, there is a reluctance in international law to identify implied waivers in writing (although an inference may be drawn from unequivocal conduct).[8] As a matter of treaty interpretation, moreover, States cannot be held to have contracted out of important rules of customary international law (such as State immunity), in the absence of words making such an intention clear.[9]

27. In respect of waiver of State immunity specifically, the United Nations' *Convention on Jurisdictional Immunities* (**UN Convention**)[10] provides some indication of customary international law.[11] Article 7 of the UN Convention is entitled "Express consent to exercise jurisdiction" and provides (emphasis added):

> A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case:
>
> (a) by international agreement;
>
> (b) in a written contract.

28. Of note is that Art 17 of the UN Convention addresses agreements to arbitrate (in terms that are similar to s 17(1) of the Immunities Act), by removing immunity in respect of a matter before a court of another State with respect to supervision of the arbitration. But Art 17 does not provide for any automatic waiver of immunity from enforcement by mere reference to submission to arbitration.

29. Similarly, Art 2 of the *European Convention on State Immunity*[12] (**European Convention**) refers to "*international agreements*" without including the word "express" but in respect of contracts Art 2(b) requires "*an express term contained in a*

---

[8] *Norwegian Loans (France v Norway),* Preliminary Objections [1957] ICJ Rep 9 at 26 ("*abandonment […] must be declared expressly*"). *Armed Activities on the Territory of the Congo (DRC v Uganda)* [2005] ICJ Rep 168 [293] ("*waivers or renunciations of claims or rights must either be express or unequivocally implied from the conduct of the State alleged to have waived or renounced its right*").

[9] See *Electtronica Sicula SpA (ELSI) (US v Italy*) [1989] ICJ Rep 15, [50] in which the ICJ considered whether 1948 Treaty of Friendship, Commerce and Navigation between Italy and United States contracted out of the exhaustion of local remedies rule for claims of diplomatic protection and stated it was "*unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so*".

[10] *Convention on Jurisdictional Immunities of States and their Property* , adopted by the General Assembly in 2004 but yet to come into force. See also *Jurisdictional Immunities Case*, [55].

[11] Referred to by Lord Collins in *NML v Argentina* [2011] 2 AC 495, 541 [126]; see also *AIG Capital Partners Inc & Anor v Republic of Kazakhstan* [2006] 1 WLR 1420 (Aikens J) at [80], referring to the UN Convention as "*a most important guide on the state of international opinion*" and noting that its "*existence and adoption by the UN after the long and careful work of the International Law Commission and the UN ad hoc committee, powerfully demonstrate international thinking on the point*".

[12] *European Convention on State Immunity,* opened for signature 16 May 1972, 1495 UNTS 181 (entered into force 11 June 1976).

contract in writing". The Explanatory Report to the European Convention makes clear that the absence of the word "express" with respect to the latter was not intended to allow the possibility of an implied waiver in the context of a treaty, but not a contract. Its drafters said at [21] with respect to Art 2: *"This article concerns cases in which a Contracting State has expressly undertaken to submit to the jurisdiction of a foreign court.*"

30. Similarly, States insist upon express words to waive other immunities.

31. Article 32(2) of the *Vienna Convention on Diplomatic Relations*[13] provides that the "*[w]aiver* [of diplomatic immunity] *must always be express*". Article 45(2) of the *Vienna Convention on Consular Relations*[14] permits waiver of consular immunities, but insists on express written words, unless the consular official commences proceedings. Article 41(2) of the *Convention on Special Missions*[15] requires "*express waiver*" of immunity from jurisdiction for special mission members.

32. This Court would conclude that in respect of a written waiver by a State of its own immunity from jurisdiction and that of its diplomatic, consular, and special mission personnel, international law insists on express waiver.

33. In interpreting any treaty, including the ICSID Convention, Art 31(3)(c) of the *Vienna Convention on the Law of Treaties*[16] provides that regard must be had to "*any relevant rules of international law applicable in the relations between the parties*". The weight of international authority supports the conclusion that State parties will use and insist on express language when waiving immunity in writing.

34. In the United Kingdom, s 1 of the *State Immunities Act* 1978 (UK) enacts presumptive immunity subject to exceptions. Section 2(2) contains the similar exception for submission by written agreement.

---

[13] *Vienna Convention on Diplomatic Relations*, opened for signature 18 April 1961, 500 UNTS 92 (entered into force 24 April 1964).
[14] *Vienna Convention on Consular Relations,* opened for signature 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967).
[15] *Convention on Special Missions* opened for signature 8 December 1969, 1400 UNTS 231 (entered into force 21 June 1985).
[16] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 [1974] ATS 2 (entered into force 27 January 1980).

35. In *Pinochet No 3*[17] in the House of Lords, Lord Millett stated at 268C that State immunity "*may be asserted or waived by the state, but where it is waived by treaty or convention the waiver must be express.*"

36. Lord Goff (in dissent but not on this point) noted the submissions of Lawrence Collins QC (as his Lordship then was) in concluding that (at 216): "*...consent by a state party to the exercise of jurisdiction against it must, as Dr. Collins submitted, be express.*" Lord Goff went on to interpret s 2(2) of the *State Immunity Act 1978* (UK) narrowly (at 216-217):

> Section 2(2) recognises that a state may submit to the jurisdiction by a prior written agreement, which I read as referring to an express agreement to submit. There is no suggestion in the Act that an implied agreement to submit would be sufficient, except in so far as an actual submission to the jurisdiction of a court of this country, may be regarded as an implied waiver of immunity

37. Lord Goff concluded at 223:

> how extraordinary it would be, and indeed what a trap would be created for the unwary, if state immunity could be waived in a treaty sub silentio. Common sense therefore supports the conclusion reached by principle and authority that this cannot be done

38. The speech of Lord Goff in respect of waiver of immunity merits consideration. It is persuasively reasoned, and is consistent with international law developments since its time in recognising State immunity as a matter of procedural law, unaffected by the content of the underlying claim: see *Jurisdictional Immunities Case* [93]. Subsequent commentary on the decision has endorsed Lord Goff and Lord Millet's insistence on express waiver as recognising that the "*rule that waiver of immunity by treaty must always be express is well established in international law*".[18]

39. The United States *Foreign State Immunity Act 1976*, §1604 enshrines State immunity subject to various exceptions. Notably, §1605(a)(1) contemplates waiver by implication. Nevertheless, that has been interpreted narrowly.[19] In *Republic of Argentina v. Amerada Hess Shipping Corporation* (1989) 488 US 428; 109 S.Ct. 683, Rehnquist CJ said (at 442-443; 693):

---

[17] *R (Pinochet Ugarte) v Bow St Metropolitan Stipendiary Magistrate (No 3)* [2000] 1 AC 147. See also Lord Hope at 243-246 referring to *Amerada Hess*.
[18] McLachlan, C "Pinochet Revisited" (2002) 51 Int'l & Comp LQ 959, 961.
[19] *American Law Institute, Restatement (Fourth) of the Foreign Relations Law of the United States* (2018) §453, comment (a), and Reporters' Note 2.

> Nor do we see how a foreign state can waive its immunity under §1605(a)(1) by signing an international agreement that contains no mention of waiver of immunity to suit in United States courts, or even the availability of a cause of action.

40. The US legislation is an outlier in a number of respects,[20] and includes §1605(6) which permits the court to seize enforcement jurisdiction based on submission to arbitration. That provision is one of the main grounds upon which ICSID awards have been enforced in the US.[21] It is not replicated in other codifications of State immunity, and stands in direct contrast to s 17(2) of the Immunities Act.

41. In the New South Wales Court of Appeal in *Li v Zhou* (2014) 87 NSWLR 20 [37], Basten JA, with whom Bathurst CJ and Beazley JA agreed, stated that respect for party autonomy "*militates against the easy acceptance of the conclusion that any party to a treaty has acceded to the jurisdiction of other national courts through inadvertence or based on ambiguity or derived from uncertain inference*". Insofar as Basten JA went on to suggest (at [38]) that a waiver could be identified by "*necessary implication*", Spain respectfully submits that the conclusion was in error, unsupported by any relevant authority, and contrary to the principles of customary international law set out above. Further and in any event, no necessary implication arises on the proper construction of Art 54 of the ICSID Convention.

A4 The proper construction of the Immunities Act requires express waiver

42. The proper construction of the Immunities Act by reference to the text, context, and extrinsic material requires the party invoking Australian jurisdiction to enforce an arbitral award to identify express written words of waiver or submission.

43. First, the definition of "*agreement*" in s 3 of the Immunities Act emphasises the need for words, by reiterating the need for "writing" both in the chapeau of the definition ("*means an agreement in writing*") and in each example ("*a treaty or other international agreement in writing*"). The insistence on a written agreement to submit to jurisdiction is consistent with requiring express words of submission.

44. Second, the gravity of the obligation to respect foreign State immunity imposed on Australia, and the fact that immunity can only be waived by a positive act of a State are relevant context consistent with Parliament having required express words of waiver by agreement.

---

[20] See *Jurisdictional Immunities Case*, [88].
[21] See *Mobil Cerro Negro v Venezuela* 87 F. Supp. 3d 573 (SDNY 2015), at 588.

45. Third, the exception in respect of arbitration in s 17(2) of the Immunities Act takes a narrow approach to waiver of immunity arising from mere submission to arbitration. As this Court observed in *Firebird* at [205]:

> whereas s 17(2) is intended to reflect the idea that, in the case of a proceeding to enforce a foreign arbitral award, a foreign State should be immune notwithstanding that it agreed to the arbitration unless the foreign State would not be immune in a proceeding concerning the underlying transaction or event the subject of the award

46. That approach is confirmed by the ALRC's Report 24 on Foreign State Immunity[22] (**ALRC 24)** in a number of places. In discussing the provisions that would become s 17(2) of the Immunities Act, ALRC 24 states at [107] p62 (emphasis added):

> In the Commission's view it is too much to say that a foreign state which agrees to arbitrate a dispute waives its immunity from jurisdiction to enforce the resulting award throughout the world. A foreign state is competent to waive its immunity, and (by agreement to accept service or otherwise) to submit to the jurisdiction of the courts of any country. In the absence of express submission the more defensible view is that the local courts should only be able to enforce an award against a foreign state if, had the underlying dispute been brought before those courts for resolution, the foreign state would not have been immune.

47. Viewed in that light it is clear that s 17(2) of the Immunities Act reflects a deliberate policy decision not to treat the fact of agreement to arbitration by a foreign State as amounting to a submission to jurisdiction of the Australian courts with respect of proceedings for recognition and enforcement of resulting arbitral awards. Moreover, it is clear from the final sentence of the quotation that the ALRC considered that "express" submission was required to demonstrate a contrary position. Any interpretation of s 10(2) in respect of an "agreement" must not undermine the effect of s 17(2).

B THE ARBITRATION ACT AND ICSID CONVENTION

B1 The text of the Arbitration Act and the incorporation of the ICSID Convention

48. Part IV of the Arbitration Act addresses the ICSID Convention. Section 32 of the Arbitration Act provides that "*Chapters II to VII (inclusive) of the Investment Convention have the force of law in Australia*". Relevantly those provisions include Chapter IV "Arbitration", and "Section 6 Recognition and Enforcement of the Award", which provides relevantly:

SECTION 6
Recognition and Enforcement of the Award

Article 53

---

[22] Law Reform Commission, *Foreign State Immunity,* (Report No. 24, Australian Government Publishing Services, 1984).

(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

(2) For the purposes of this Section, "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.

Article 54

(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

(2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.

(3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

Article 55

Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.

49. The obligation on a Contracting State contained in those Articles have been incorporated into Australian law by the Parliament as follows.

50. Section 33 of the Arbitration Act mirrors Art 53 and provides that an "*award is binding on a party to the investment dispute*", and that "*the award shall not be subject to any appeal"*. It operates as a legislative declaration that all such awards are binding on the parties so far as Australia is concerned and would bind Australia directly if an award was enforced against it here: by s 2B the Act is binding on the Crown.

51. By contrast, ss 35(2) and (4) of the Arbitration Act provide: "*An award may be <u>enforced</u>* [in the court] *with the leave of that court as if the award were a judgment or order of that court* (emphasis added).

52. What is clear from the text of s 35 is that despite being entitled "Recognition of awards" it clearly deals with "enforcement". This overlap of recognition and

enforcement in s 35 of the Arbitration Act militates against the conclusion reached by Perram J in the Full Court, that the proceeding could be characterised as "*a recognition proceeding*" only: FFC [23],[96] CAB 81-82, 100. That proposition was central to the approach of the Full Court and is respectfully in error. It is discussed further below.

53. Significantly, s 35 includes an important "Note":

> Note: For the enforcement of an award against a foreign State, or a separate entity of a foreign State, see the *Foreign States Immunities Act 1985.*

54. That notation necessarily acknowledges that s 35 is concerned with "enforcement" and not simply recognition. But second, it draws out the important point that the Immunities Act is only an impediment to enforcement against a foreign State. That is to say, the Immunities Act will not impede enforcement under s 35 of the Arbitration Act where an award is sought to be registered by a foreign State (or by Australia for that matter) against an investor (e.g. to enforce an award of costs against an unsuccessful investor); or where enforcement action is brought by an investor against Australia in the Australian courts.

55. Moreover, that notation is consistent with Parliament treating Art 54(3) and 55 as preserving immunity from (enforcement) proceedings contemplated by Art 54(2). Noting there is no provision of the Arbitration Act directly equivalent to Art 55.[23]

C REASONS OF THE COURTS BELOW

C1 The Primary Judge's Reasons

56. The primary judge held that by agreeing to designated courts of a Contracting State *"having the power, and obligation to recognise and enforce arbitral awards against it*, *Spain inevitably consented to them doing so"*: PJ [182] CAB 55.

57. The primary judge's construction identified a distinction between recognition and enforcement on the one hand, and execution on the other: PJ [98] CAB 35-36. The primary judge, with respect, identified the central problem in identifying the meaning of "enforcement", when stating that if execution and enforcement have the same meaning in Art 54(3) and Art 55, then Art 55 would not be limited only to preserving immunity from execution (noting that was the view of Prof Schreuer): PJ [152] CAB 48-49. His Honour engaged in a detailed review of textbooks, the *travaux preparatoire*, the French and Spanish texts, academic commentary, decisions of foreign courts, and concluded that the weight of the material confirmed his Honour's

[23] See also the Explanatory Memorandum to the ICSID Implementation Bill 1990 [52] p22.

view that recognition and enforcement were distinct from execution: PJ [112]-[113], [135], [144], [161]-[162], [172] CAB 38-39, 45-47, 51, 53. In respect of the French and Spanish texts the primary judge considered the English text should control the meaning: PJ [143] CAB 47. Thus, his Honour found that by becoming party to the ICSID Convention, Spain *"thereby waived any reliance on a foreign state immunity…"* in respect of recognition and enforcement: PJ [182] CAB 55. And held that "*by becoming a Contracting State expressly submitted to the jurisdictions of courts of other Contracting States in respect of the recognition and enforcement, but not execution, of any resulting award*": PJ [190] CAB 57.

C2 The Full Court's reasons

58. The Full Court concluded that Spain had submitted to jurisdiction because Art 54(1) and 54(2) are evidence of Spain's consent to the Investors applying to a competent Australian court for recognition of the award: FFC [37] CAB 85.

59. By contrast to the primary judge's distinction between "recognition and enforcement" and "execution", the Full Court drew a strict dichotomy between "recognition" on the one hand, and 'enforcement and execution' on the other. The Full Court then characterised the proceeding as a recognition proceeding only: FFC [22]-[23], [96] CAB 81, 100.

60. Further, Perram J accepted Spain's submission that *"'execution' and 'enforcement' are essentially synonymous in Art 54 and Art 55"*, and identified the inconsistencies between the English, French and Spanish texts: FFC [79] CAB 95-96. His Honour held that the French and Spanish text should control the meaning (referring also to Prof Schreurer's commentary: 2 ed, 2009): FFC [87]-[88] CAB 97-98. Allsop CJ and Moshinksy J declined to determine issues relating to the French and Spanish texts in the absence of evidence: FFC [9], [118] CAB 76, 106.

D THE PROPER CONSTRUCTION OF ICSID CONVENTION ART 53-55

D1 Summary of Spain's construction

61. Starting with the text of the ICSID Convention itself: there are no words within Art 54 (or indeed elsewhere) by which a Contracting State waives its State immunity before a foreign court. Article 54(1) is addressed to what a Contracting State must do "*within its territories"*. Acceptance of that proposition is sufficient for Spain to succeed on the Appeal.

62. On the proper interpretation of Art 54 of the ICSID Convention, there is no waiver, or to the extent a waiver can be said to exist, it is at best weakly implied, and therefore ineffective.

63. Further, on Spain's case Art 54(3) and Art 55 should be understood as qualifying the obligation and process provided for in Art 54(1) and (2). So read, Art 55 expressly preserves State immunity in respect of the Art 54 process. But, Spain accepts, Art 54 and Art 55 are ambiguous.

64. First, it is difficult to distil recognition, enforcement, and execution as terms capable of clear and consistent application. Their particular use in Art 54 and 55 is complicated by the equally authoritative French and Spanish texts only using the equivalent of enforcement. Second, the qualification "*as if it were a final judgment*" leaves scope for the application of State immunity in Art 54(1).

65. The true construction of those provisions and the extent of the immunity preserved by Art 55 may ultimately require resolution by the International Court of Justice. While that ambiguity endures, it is not possible for an Australian court to identify a clear, unambiguous waiver of the right to assert foreign State immunity from jurisdiction.

D2 ICSID Convention, Article 54 contains no waiver of foreign State immunity

66. Article 54(1) is addressed to all Contracting States, and (by contrast to Art 53) makes no mention of the parties any particular arbitration. Textually Art 54 is not addressing immunity and does not use that word. Rather, Art 54(1) properly read is addressing the obligation on a Contracting State to enforce "*within its territories".* Article 54(2) refers to procedure the Contracting State must establish when (and if) a "*party"* seeks recognition and enforcement *"within the territories of a Contracting State"*. The Article does not address conduct of a State anywhere other than "*within its territories*", and makes no reference to waiver of immunity, or submission to jurisdiction.

67. In respect of Spain, its obligation under Art 54 to recognise and enforce an award would arise only upon an application to the Spanish courts. In other words, Spain would be obliged if and when approached by a party to a valid award, to give effect to that award in Spain. In respect of an award sought to be enforced by a foreign State against an investor in Spain, or an award sought to be enforced by an investor against

Spain no question of foreign State immunity arises: the investor is not immune on any analysis and Spain does not benefit from State immunity before its own courts.[24]

68. Neither the primary judge nor the Full Court address the territorial limitations on the obligations in Art 54(1). That was in error. Neither the primary judge nor the Full Court contemplated the operation of the Art 54 process in circumstances other than enforcement against a foreign State. With respect that may have blinded their Honours to the utility of the provision as establish a process for recognition and enforcement, irrespective of any attempt to read into the words a waiver of immunity.

69. Both the primary judge's analysis that Spain "*inevitably consented"* to Australian jurisdiction, and *"waived any reliance on foreign state immunity"* (PJ [182] CAB 55), and the Full Court's reasoning by reference to earlier cases (FFC [37]-[38] CAB 85-86) are best understood as findings of implied waiver.

70. On Spain's case that approach is unsupported by the text, and even if accepted, would be contrary to principle, as falling short of evidence of express unambiguous waiver of immunity.

71. The ALRC 24 sheds light on how it viewed the Immunities Act would operate in respect of the ICSID Convention. The Report assumes no express waiver was contained in the ICSID Convention at [13] "*On the other hand there are treaties where the negotiators were unable to agree on the scope of immunity with respect to ships or more generally*" (citing footnote 74): ALRC 24, Ch 2 [13], p 11-12. Footnote 74 in turn referred to the ICSID convention and said:

> [ICSID Convention] art 55 merely reserves questions of "immunity of any foreign state from execution", pursuant to awards under the Convention, to the law of the state where enforcement of the award is sought.

72. By contrast, as the ALRC noted when drafting ALRC 24 (see footnote 72, p 12) there are many examples of international treaties or agreements that expressly require waiver by a Contracting State. The *International Convention on Civil Liability for Oil Pollution Damage* 1969,[25] Art IX(2) states that (emphasis added):

> With respect to ships owned by a Contracting State and used for commercial purposes, each State shall be subject to suit in the jurisdictions set forth in Article IX and shall waive all defences based on its status as a sovereign State.

---

[24] *Jurisdictional Immunities Case*, [93]: "*The rules of State immunity are procedural in character and confined to to determining whether or not the courts of one State may exercise jurisdiction in respect of another State*".

[25] International Convention on Civil Liability for Oil Pollution Damage, opened for signature 29 November 1969, 973 UNTS 3 (entered into force 19 June 1975) (**Convention on Oil Pollution**).

73. Article IX is then given effect in Australia by the *Protection of the Sea (Civil Liability) Act 1981* (Cth) s 18(4) in the following terms (emphasis added):

> Every country to which the Civil Liability Convention applies shall, in any proceedings brought in a court in Australia to enforce a claim in respect of a liability incurred under the applied provisions of the Convention, be deemed to have submitted to the jurisdiction of that court and to have waived any defence based on its status as a sovereign country, but nothing in this sub-section shall permit the levy of execution against the property of such a country.

10 74. No words of similar clarity can be found in the ICSID Convention; nor in the implementing legislation.

75. Contrary to the primary judge's reasons in obiter, neither can any such words of waiver be found in the ECT Art 26(8): PJ [185] CAB 56. Article 26(8) contains an obligation on a Contracting Party to enforce "*in its Area*" (which is defined geographically in Art 1(10)) – that is, where no issue of foreign immunity arises. The primary judge's reasoning on this question appears to be premised on a distinction between an agreement between Spain and an investor and a multilateral treaty. With respect, the nature of the treaty does not overcome the absence of clear words addressing waiver of immunity.

20 **D3 Art 55 preserves immunity in respect of an application under Art 54(2).**

76. The words of Art 54(2) set out the process for enforcement of awards in a Contracting State. Read strictly, they suggest that a mandatory obligation on the Contracting State to enforce an award arises simply upon the presentation of the certified copy of the award. That would suggest there is no scope for any Contracting State to impose any additional procedural barrier or formalities to recognition and enforcement of an ICSID award at all. That would, for example, preclude rules on service of proceedings, or standards of full and frank disclosure on an *ex parte* application.

77. It seems unlikely that such an approach was intended by the parties with respect to those procedural concerns. It would entail requiring domestic courts to forego even the
30 most basic procedural rules for regulating their jurisdiction when dealing with an application for the recognition or enforcement of an ICSID award.

78. The more plausible reading is that Art 54(3) (in the same article) qualifies the process described in Art 54(2) above despite using the word "execution". So understood the effect of Art 54(3) is that the "recognition and enforcement" process in Art 54(2) shall be governed by (in this case) Australian law in respect of "recognition and enforcement" of judgments.

79. Similarly then, on Spain's case, if Art 54(3) referring to "execution" is best understood as referring to the process in Art 54(2), even stronger then, is the conclusion that "execution" in Art 55 is in fact referring to the Art 54(2) process (however described).

80. That is because the introductory words "*Nothing in Article 54*" identify that the Art 55 is qualifying Art 54(2). Read that way, Article 55 has the effect of preserving the rules of foreign State immunity in respect of the process described in Art 54(2).

81. Further as both the primary judge and Perram J identified there is ambiguity as to the meaning of enforcement and execution between the English, French and Spanish texts: AFB 12-14. Spain submits that Perram J was correct to conclude that the French and Spanish texts should control the meaning such that each of Art 54(3) and Art 55 are understood as referring to execution: FFC [87], [90] CAB 97, 99.

82. In the result, Spain submits that Perram J was in error to characterise these proceedings as exclusively concerned with "recognition": FFC [96] CAB 100. That conceptual distinction is difficult to draw in the abstract. It is particularly difficult to reconcile with the process Australia has provided in s 35 that permits the award to be "enforced" by leave. It is also difficult to reconcile with the orders made by the Full Court that state "… *the Court orders that judgment be entered in favour of the applicants against the respondent for the pecuniary obligation under the Award in the sum of…"*: (Order 1(a), CAB 124).

83. Finally ambiguity arises from what was intended by the scope of enforcement "*as if it were a judgment*" of the local court. In *Micula v Romania* [2020] 1 WLR 1033, although not a case concerned with foreign State immunity, the Supreme Court identified in passing and in *obiter* that the *travaux*[26] identified that many States considered that the words of Article 54(1) brought no change to existing law in relation to foreign State immunity, and that Article 55 was included out of an abundance of caution. At [71] Lord Lloyd-Jones and Lord Sales JJSC said:

> In his report on the Regional Consultative Meetings, Mr Broches referred to certain comments that had dealt with the effect of what was then draft section 15 (which became article 54(1)) on existing law with respect to sovereign immunity. Mr Broches explained that the drafters had no intention to change that law. By providing that the award could be enforced as if it were a final judgment of a local court, section 15 implicitly imported the limitation on enforcement which in most countries existed with respect to enforcement of court decisions against Sovereigns. However, this

[26] See also the PJ [129]-[135] CAB 43-45.

point might be made explicit in order to allay the fears expressed by several delegation.[27]

84. The Supreme Court concluded that it was "*not altogether surprising*" that there is some doubt about the meaning and effect of Art 54 in light of the fact the drafting of Art 54 was undertaken under "*great time pressure*" and was characterised by "*great fluidity*": *Micula* at [83] (citing Prof Schreuer, p 1135, [66]).

85. With respect, that is no answer to the requirement in customary international law that any waiver be express. Drafting a waiver of immunity with the required level of certainty has been achieved in other international agreements: see Art IX(2) of the Convention on Oil Pollution. In those circumstances Art 54 remains a tenuous footing on which to implead a foreign State.

D4 Consideration of Art 54-55 of the ICSID Convention in other municipal courts

86. Spain's case is that unless and until the ICJ authoritatively determines the meaning of Art 54(1) there is no judicial determination that will bind this Court as to the meaning of Art 54(1). Of course that does not prevent this Court from looking to the interpretation adopted in other municipal courts and to assess for itself the persuasiveness of the reasoning of other courts.

87. Among the most recent decisions to consider whether Art 54 of the ICSID Convention contains a waiver of immunity is the decision of the BVI High Court of Justice in *Tethyan Copper Company Pty Ltd v Islamic Republic of Pakistan* (25 May 2021, unreported) (***Tethyan Copper***). The decision was published after argument in the courts below. In that case, Pakistan was resisting recognition and enforcement by an investor, who had brought an application in the BVI High Court. Although an initial application had proceeded ex parte, the substantive case was determined after extensive argument by experienced counsel appearing for each party. The court embraced the position adopted by Pakistan (and argued by Spain in this case) at [51]:

> Moreover, Article 54(1) of the Convention imposes on Pakistan, as a contracting state, an obligation to allow recognition and enforcement of the award before its own courts. Article 54(1) places no obligation on Pakistan, at all, before the BVI courts and so it cannot constitute a waiver by Pakistan of its immunity or anything else.

88. In *Sodexo Pass International SAS v Hungary* [2021] NZHC 371, the High Court of New Zealand disagreed with the analysis in *Tethyan Copper*. At [28] Cooke J's reasoning appears to accept that the obligation on Contracting States in Art 54(1) imports no *"international obligation"*, but concluded that was the wrong enquiry.

---

[27] See the *History of the ICSID Convention* (1968), vol II-1: Doc 33 (9 July 1964), p575, [78].

Rather, the court held, it was enough to identify "*what that state has agreed are the obligations of other states, implemented in their judicial systems*". The reasoning is unpersuasive. Once it is accepted that Art 54(1) contains no obligation on a State before the courts of another Contracting State, it cannot be characterised as a waiver of immunity, still less an express waiver. Nevertheless, Cooke J appears to have characterised the waiver as express (at [40]-[43]). With respect, that was in error.

89. There are a number of other decisions considered by the primary judge: PJ [163]-[170] CAB 51-53.

90. As to *Lahoud*,[28] as the primary judge noted at PJ [99] CAB 36 the court did not have the benefit of a contradictor. The conclusion at *Lahoud* [28] in respect of the interplay with the Immunities Act was brief, and was based on the fact that the respondent had submitted to the jurisdiction of the ICSID 'tribunals' (ie submission to arbitration). It does not appear that s 17 of the Immunities Act was drawn to the Court's attention.

91. As to *Benvenuti,*[29] the primary judge correctly identifies the central reasoning (PJ [164] CAB 51), that Art 54 lays down a "*simplified procedure for obtaining an exequatur and restricts the function of the court… to ascertaining the authenticity of the award".* The Court of Appeal then held that an order for exequatur is not an order for enforcement. There is no overt reasoning that engages with a waiver of immunity.

92. In *SOABI,*[30] the Court of Cassation premised its reasoning overtly on the assumption that submission to arbitration amounts to submission to what it described as "*recognition (exequatur)*".

93. As to *LETCO*,[31] it was decided by a single Federal Court judge and predated the US Supreme Court's decision in *Amerada Hess*. As to the subsequent US authorities in *Blue Ridge Investments v Argentina,*[32] and *Mobil Cerro Negro v Venezuela*[33] they each came after the introduction of §1605(6) of the US legislation, which is one basis for the decision in each.[34] Since those decisions a tension has emerged in the United States Court of Appeal, as to whether jurisdiction can be seized to enforce an arbitral award

---

[28] *Lahoud v Democratic Republic of Congo* [2017] FCA 982.
[29] *Benvenuti & Bonfant v People's Republic of the Congo, Cour d'appel*, Paris (26 June 1981) 65 ILR 88, 91.
[30] *Société Ouest Africaine des Bétons Industriels (SOABI) v Senegal* (1991) 30 ILM 1169, 1169-1170.
[31] *Liberian Eastern Timber Corporation (LETCO) v The Government of the Republic of Liberia* 650 FSupp 73 (SDNY 1986).
[32] *Blue Ridge Investments LLC v Republic of Argentina* 735 F3d 72 (2d Cir. 2013).
[33] See *Mobil Cerro Negro v Venezuela* 87 F. Supp. 3d 573 - Dist. Court, SDNY (2015), at 588.
[34] Public Law 100-669, 1988.

against a foreign State in the US based on the broader ground of waiver of immunity in §1605(1); or whether, it should be confined to the more narrow and novel statutory basis in §1605(6). The Court of Appeal the District of Columbia Circuit has confined itself to the statutory justification based on §1605(6).[35]

94. In summary, insofar as the authorities cited by the courts below are premised on submission to arbitration amounting to submission before the enforcing court, that reasoning is directly in conflict with s 17 of the Immunities Act. The reference to a simplified process for recognition is consistent with Spain making that process available in its own jurisdiction; but says nothing about the issue of waiver. Insofar as the authorities identify a waiver of immunity, they do so by implication. Spain's case is that even if (contrary to its primary submission) an implied waiver can be identified, such an interpretation falls short of what is required by international law, and an implied waiver is not a permissible basis upon which an Australian court can proceed with enforcement against a foreign State.

D5 Ambiguity in the agreement to arbitrate under ECT 26

95. Further ambiguity surrounds the status of an agreement to arbitrate under Art 26 of the ECT in a dispute between a Contracting Party and an investor from the EU. In determining the existence of clear submission to jurisdiction in the Australian courts the Investors assumed the burden of identifying that Spain was both a Contracting State to the ICSID Convention, and that there was an agreement to arbitrate the dispute. The primary judge observed that the Investors "*rely on Spain being a party to the ECT and the Investment Convention to found their case that Spain submitted to the jurisdiction this Court under s 10"*: PJ [56] CAB 25. In the Full Court, Perram J was in error to reject what his Honour characterised as an "*orphan*" submission in respect of foreign State immunity: FFC [15] CAB 78.

96. In the present case, it cannot be said that Spain has clearly and unambiguously waived its immunity by reference to an underlying agreement to arbitrate; now held to be unfounded following *Achmea*,[36] and since the Full Court's decision, *Komstroy*.[37]

---

[35] *Process and Industrial Developments Limited v. Federal Republic of Nigerial,* 27 F.4th 771 (DC Cir. 2022), at FN3.
[36] *Slovak Republic v Achmea BV* [2018] 4 WLR 87.
[37] *Republic of Moldova v Komstroy LLC* [2021] 4 WLR 132, [66].

D6 Conclusion on the appeal

97. Spain submits that the Investors can identify no waiver of immunity or submission to jurisdiction in the language of Art 54(2). The waiver found by the primary judge was based on implication and was contrary to the proper construction of the Immunities Act in the context of international law. Additionally, Perram J was correct to identify that the French and Spanish texts point to the word "execution" in Art 54(3) and 55 mean something broader. Spain's case is that Art 55 was intended to preserve the operation of immunity from the process provided for in Art 54. Even if contrary to the above, the court were satisfied that it could identify waiver, it would conclude that the problems arising from the interpretation of "enforcement" and "execution", and the preservation of State immunity suggest that any waiver said to exist is beset by ambiguity. Further ambiguity surrounds the submission to arbitration in ECT itself.

98. On those grounds an Australian court ought not implead Spain.

E NOTICE OF CONTENTION

99. Spain will respond in full after it has received submissions on the Notice of Contention. At this stage it is sufficient to note that acceptance of Spain's primary argument that Art 54 contains no submission to jurisdiction or waiver of immunity is a complete answer to grounds 1 and 2 of the Notice of Contention.

PART VII: ORDERS SOUGHT BY THE APPELLANTS

100. The orders sought are those set out in the notice of appeal.

PART VIII: TIME REQUIRED FOR PRESENTATION OF ORAL ARGUMENT

101. The Appellant estimates it will require 3 hours for oral submissions in chief plus a reply of not greater than half an hour.

Dated 6 May 2022

.....
C S WARD SC
6 St James Hall
T:(02) 9236 8670
cward@stjames.net.au

.....
P F Santucci
New Chambers
T: 02 9151 2071
santucci@newchambers.com.au

ANNEXURE

Legislation (as in force at 23 April 2019)

1. *Foreign State Immunity Act 1985* (Cth), whole.
2. *International Arbitration Act 1974* (Cth) Part IV (ss 31-38), sch 3.
3. *Protection of the Sea (Civil Liability) Act 1981* (Cth), 18(4).
4. *Foreign State Immunity Act 1976* (US), §1604, 1605.
5. *State Immunities Act 1978* (UK) s 1, 2.

Extrinsic material

6. Explanatory Memorandum, *ICSID Implementation Bill 1990* (Cth)

Treaties

7. *Convention on Jurisdictional Immunities of States and their Property,* (opened for signature 17 January 2005, UN Doc A/RES/59/38 (not yet in force).
8. *Convention on Special Missions*, opened for signature 8 December 1969, 1400 UNTS 231 (entered into force 21 June 1985) Art 41.
9. *Convention on the Settlement of Investment Disputes between States and Nationals of the Other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) Arts 27, 52-55.
10. *European Convention on State Immunity,* opened for signature 16 May 1972, 1495 UNTS 181 (entered into force 11 June 1976) Art 2, 12.
11. *Energy Charter Treaty*, opened for signature 17 December 1994, 2080 UNTS 95 (entered into force 16 April 1998) Arts 1, 10, 26.
12. *International Convention on Civil Liability for Oil Pollution Damage*, opened for signature 29 November 1969, 973 UNTS 3 (entered into force 19 June 1975) Art IX(2).
13. *Vienna Convention on Consular Relations*, opened for signature 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967) Art 45.
14. *Vienna Convention on Diplomatic Relations*, opened for signature 18 April 1961, 500 UNTS 92 (entered into force 24 April 1964) Art 32.
15. *Vienna Convention on the Law of Treaties,* opened for signature 23 May 1969, 1155 UNTS 331 [1974] ATS 2 (entered into force 27 January 1980) Arts 31.