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

PART I: CERTIFICATION

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

2. Terms used in these submissions and not otherwise defined have the same meaning as in the Appellant's Submissions (**AS**).

PART II: STATEMENT OF ISSUES ON THE APPEAL

3. This appeal raises for determination two fundamental questions.

4. The first fundamental question is whether ss 10(1)-(2) of the Immunities Act applies where a foreign State has, in the terms of a treaty interpreted in accordance with principles of treaty interpretation in customary international law,[1] agreed to submit to the jurisdiction of an Australian court as the Courts below found (PJ [190] CAB 57; FFC [22] CAB 81), or imposes a stricter requirement for explicit language.

5. The second fundamental question is whether the primary judge and the Full Court correctly interpreted Arts 54-55 of the ICSID Convention in finding that the Appellant had submitted to the jurisdiction of the Federal Court of Australia[2] within the meaning of s 10 of the Immunities Act, because it agreed to (at least) recognition of awards under the ICSID Convention (**ICSID awards**) (PJ [181]-[182] CAB 55; FFC [37] CAB 85). The central issue is whether the express reservation to national law of immunity from 'execution' in Art 55 of the ICSID Convention applies to such proceedings. The primary judge and the Full Court held that Art 55 did not so apply, but on two different approaches to the distinction between recognition, enforcement and execution in the English text of the ICSID Convention (PJ [98], [173]-[175] CAB 35-36, 53; FFC [76]-[79] CAB 95-96).

6. At least nine issues arise from the AS, including entirely new issues not raised below or on the Special Leave Application (**SLA**).

7. *First*, whether the Appellant should be permitted to argue for the existence of a rule of customary international law (AS [§A.1]-[§A.3] and parts of [§D.2] and [§D.3]), to the effect that explicit language is necessary for a State to waive immunity. The Appellant contends that this affects both the interpretation of the ICSID Convention and s 10 of the Immunities Act. Such a contention requires establishing sufficiently widespread and representative State practice accompanied by *opinio juris*. No such case was advanced before the Courts below, nor was it mentioned in the SLA. It is contrary to a finding by the primary judge from which there is no appeal. See [18]-[22] below.

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[1] That is, "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose", per Art 31 of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (in force 27 January 1980) (**VCLT**).

[2] As a court designated by Australia (by s 35(3) of the Arbitration Act): PJ [76] CAB 29-30.

8. *Second*, and contrary to AS [§A.4], whether the Court should uphold the findings of the primary judge and the Full Court in applying s 10 of the Immunities Act to the ICSID Convention because: (1) the words of s 10(2) of the Immunities Act do not require 'explicit' language in any treaty, only the application of ordinary rules of treaty interpretation to its terms; (2) the extrinsic material, being ALRC 24 and the work of the International Law Commission (**ILC**) on which the ALRC relied, *supports* the Respondents' interpretation and *confirms* that Art 54 of the ICSID Convention is a submission to jurisdiction; (3) the approach taken by the NSW Court of Appeal in ***Li v Zhou*** (2014) 87 NSWLR 20 was correct; and (4) s 17(2) of the Immunities Act says nothing about the breadth of s 10, as this Court held in *Firebird*,[3] and as the primary judge found. See [23]-[33] below.

9. *Third*, whether the Appellant has failed to establish that the rule of customary international law contended for relevantly exists, because: (1) State practice relevant to State immunity from jurisdiction *supports* the Respondents' position; (2) State practice in the separate field of waiver of diplomatic immunity does not support any such rule for submission to jurisdiction; and (3) the Appellant has failed to prove the existence of the purported rule at the relevant time – being when the ICSID Convention was concluded (18 March 1965) or when the Immunities Act commenced (1 April 1986). See [34]-[44] below.

10. *Fourth*, and contrary to AS [§D.1], whether there is sufficient clarity in the submission to jurisdiction by the Appellant through Art 54 of the ICSID Convention despite differences between the English, French and Spanish texts because on any reconciliation of the authentic versions, a submission to jurisdiction has occurred, and it is unnecessary and inappropriate to await interpretation by the International Court of Justice (**ICJ**). See [49] below.

11. *Fifth*, and contrary to AS [§D.2], whether the Court should find that the relevant submission to jurisdiction arises from the agreement through Art 54(1) of the ICSID Convention between the Appellant, Australia, and the investors' home States (to whom Australia's obligation is owed) to recognise ICSID awards. See [50]-[54] below.

12. *Sixth*, and contrary to AS [§D.3], whether Arts 54(3) and 55 say nothing about the 'procedure' for recognition of an award in Arts 54(1)-(2) given: (1) they expressly apply to 'execution' only; (2) Art 69 permits Contracting States to formulate laws to give effect to Arts 54(1)-(2); (3) States are allowed a choice of means for implementing Arts 54(1)-(2); and (4) the subsequent practice of States[4] is to create effective procedures for recognition of ICSID awards. See [55]-[61] below.

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[3] French CJ and Kiefel J at [62], Gageler J at [131], and Nettle and Gordon JJ at [203]-[204].

[4] See VCLT Art 32; *Kasikili/Sedudu Island* [1999] ICJ Rep 1045, [79]-[80]; ILC, *Draft Conclusions on Subsequent Agreements and Subsequent Practice*, UN Doc A/73/10, [51] (2018), Conclusion 2.

13. *Seventh*, and contrary to AS [§D.4], whether the relevant international authorities support the interpretation of Art 54 as a submission to jurisdiction. See [62]-[65] below.

14. *Eighth*, and contrary to AS [§B] [51]-[55], whether the Court should find that s 35 of the Arbitration Act permits orders of the kind made by the Full Court, for the reasons given by that Court in the 'form of orders judgment'. See [66]-[68] below.

15. *Ninth*, and contrary to AS [§D.5], whether any ambiguity surrounding the status of Art 26 of the ECT under European law is irrelevant where: (1) the Courts below found (correctly) that the relevant submission to jurisdiction is through Art 54 of the ICSID Convention; and (2) no such case was advanced below, and no leave was given to appeal to the High Court on this basis. Further, whether for the above and other reasons, the application by the European Commission (**EC**) should be rejected. See [69]-[76] below.

PART III: SECTION 78B NOTICE

16. A notice under s 78B of the *Judiciary Act 1903* (Cth) is not required.

PART IV: CONTESTED FACTS

17. Items 8 and 28 in the Appellant's chronology (decisions in *Achmea* and *Komstroy*) are facts irrelevant to the appeal. See [69]-[76] below.

PART V: ARGUMENT ON THE APPEAL

V.A Response to Section A of the Appellant's Submissions

Section A – Appellant's new case

18. The Appellant's main argument in the AS ([§A.1]-[§A.3] [17]-[41], [§D.2] [71]-[74] and [§D.3] [85]) is that there exists a rule of customary international law that any waiver of immunity done in writing, such as by treaty, must be 'explicit', requiring the type of language found in Art XI(2) of the Convention on Oil Pollution and leaving no room even for a necessary implication from the language and context of the treaty (as per *Li v Zhou* at [38]) (see AS [25], [41], [72], [85]).

19. The Appellant says this rule affects the interpretation of the ICSID Convention itself (AS [26]) and of s 10 of the Immunities Act, either because they embody such a rule or must be interpreted consistently with it (AS [23]). The Appellant relies (inaptly) on selected material spanning from 1957 (AS fn 8) to 2018 (AS fn 19), including the UN Convention, the European Convention and other treaties and cases addressing State immunity, procedural law and diplomatic immunity (AS [26]-[40]) and select excerpts of ALRC 24 (AS [71]-[73]).

20. *First*, no such case was advanced below. Before the primary judge the Appellant never submitted that 'explicit' words, rather than an express or implied submission according to

the ordinary meaning of a treaty, were required.[5] In the Full Court, the Appellant sought to construe s 10 of the Immunities Act narrowly by reference to the common law,[6] but ultimately accepted that the Immunities Act exhausted the common law: FFC [12] CAB 77, noting *PT Garuda* at [8]. In its SLA, the Appellant again referred to the common law, but submitted that *Li v Zhou* supported the application of a strict common law approach to cases of foreign State immunity where submission by treaty was at issue.[7] The material now relied on was not cited, or not used to advance this new case.[8]

21. *Second*, there was accordingly no finding below of, or relevant to, the existence of the alleged rule of customary international law, which must depend upon establishing sufficiently widespread and representative State practice accompanied by *opinio juris*.[9]

22. *Third*, the Appellant's new case is *contrary to* the findings of the primary judge as to the application of ordinary principles of treaty interpretation to determine both the meaning of Arts 54-55 of the ICSID Convention (PJ [83]-[87], [117]-[144] CAB 31-33, 40-47) and whether a submission had occurred within the meaning of s 10 of the Immunities Act (PJ [177]-[190] CAB 54-57). It is also contrary to the findings of the primary judge (PJ [48]-[50] CAB 24) that: (1) per Allsop P in *Zhang v Zemin* (2010) 79 NSWLR 513 at [161], the Immunities Act was made to remove uncertainty in international law, "against the background of lack of clarity *at the time* in the underlying principles of foreign state immunity" (emphasis added), and lacks plasticity to evolve as (customary) international law does; and (2) that, per this Court in *PT Garuda* at [8] and in *Firebird* per French CJ and Kiefel J at [5] and Nettle and Gordon JJ at [174], the Immunities Act is the sole basis for foreign State immunity in Australian law. There has been no appeal from these findings.

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[5] The Appellant submitted: (1) s 9 of the Immunities Act alone reflected a 'general principle' of international law that a foreign State may not be subject to local jurisdiction; and (2) s 10 of the Immunities Act applies to an express or implied submission to jurisdiction, without relying on a higher requirement for 'explicit' terms. See '**Respondent's Outline of Submissions in Response**', 31 July 2019, [2.4] (as to the general principle of international law) and [5.2] (as to express and implied submission) RFB 226-227, 238.

[6] The Appellant submitted: (1) s 10 of the Immunities Act must be interpreted in light of "what constitutes submission to jurisdiction in Australian law"; (2) domestic case law establishes that there must be a "voluntary act 'unequivocally evincing an intention to abandon or not to assert a right'"; and (3) this test was not satisfied by Art 26 ECT or Art 54 ICSID Convention. See 'Appellant's Outline of Submissions', 29 May 2020, [40], [43] (citing e.g. *National Commercial Bank v Wimborne* (1979) 11 NSWLR 156), [44]-[45] RFB 326-328.

[7] SLA, [22]-[23].

[8] The material in AS [26]-[41], [71]-[73] was not relied upon before the Courts below at all or for this purpose. The US and UK immunity legislation and ALRC 24 were referred to, but in a context where *Li v Zhou* was adopted (**Transcript, FFC**, 24 August 2020, T 55.7-29 RFB 409; **Transcript, FC**, 29 October 2019, T 57.17-59.42 RFB 299-301). The European Convention was referred to, but only in the context of ALRC 24 and s 17 Immunities Act: Respondent's Outline of Submissions in Response, [4.7] RFB 228-229. The Convention on Oil Pollution was cited as an example of the approach in *Li v Zhou*: Transcript, FC, T 57.32-39 RFB 299.

[9] *North Sea Continental Shelf* [1969] ICJ Rep 3, [73]-[77]; *Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14, [186]; *Jurisdictional Immunities Case*, [55]; *Ure v The Commonwealth* (2016) 236 FCR 458, [29]-[35]; ILC, *Draft Conclusions on Identification of Customary International Law*, UN Doc A/73/10, [65] (2018), Conclusion 8.

Sections A1 and A4 – Proper interpretation of s 10 of the Immunities Act

23. Any interpretation of s 10 of the Immunities Act must begin, in accordance with orthodox principles of statutory interpretation,[10] with the plain words of the section.

24. *First*, nothing is said in s 10 that qualifies the obvious implication that a treaty will be interpreted according to principles of treaty interpretation in customary international law, well established by 1985.[11] This often means an interpretation that is more liberal than domestic statutes.[12]

25. *Second*, the text of s 10(2) makes plain that explicit words are not necessary. The explanatory words, "a foreign State shall not be taken to have so submitted by reason only that it is a party to an agreement the proper law of which is the law of Australia", would be otiose if 'explicit' words were required to waive immunity, and indicate the potential breadth of s 10 when construing the terms of a treaty or other instrument.

26. *Third*, the use of ordinary principles of treaty interpretation to identify the expression of submission is supported by the extrinsic material.[13] In proposing and formulating s 10, the ALRC drew heavily on and extensively cited the work of the ILC to determine the state of international law,[14] especially the **1982 ILC Report** on Jurisdictional Immunities of States and Their Property,[15] reporting on draft Art 8 ("express consent to the exercise of jurisdiction") and draft Art 9 (as to the effect of participating in court proceedings),[16] and the State practice the ILC assembled.[17] State practice identified by the ILC justified rejecting the restrictiveness of the approach at common law, by accepting, as an exception to immunity, submission by international agreement, contract, or declaration before the court (per draft Art 8(1)), expressed in s 10(2) as submission "by agreement or otherwise".[18] Sections 10(6)-(8) and (10) are in substantively the same terms as ILC draft Arts 9 and 10.[19]

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[10] *Visy Paper Pty Ltd v ACCC* (2003) 216 CLR 1, [24] (Gleeson CJ, McHugh, Gummow and Hayne JJ); *Combet v The Commonwealth* (2005) 224 CLR 494, [135] (Gummow, Hayne, Callinan and Heydon JJ).
[11] *Commonwealth v Tasmania* (1983) 158 CLR 1, 93-94 (Gibbs CJ), 177 (Murphy J), 222-223 (Brennan J).
[12] PJ [84] CAB 33, citing *Morrison v Peacock* (2002) 210 CLR 274, [16].
[13] *Acts Interpretation Act 1901* (Cth), s 15AB(2)(b). See *Tisand Pty Ltd v The Owners of the Ship MV Cape Moreton (Ex Freya)* (2005) 143 FCR 43, [61]-[65].
[14] See e.g., citing the 1982 ILC Report: ALRC 24 [78] fn 1, [79] fn 2, [81] fn 13, [87] fn 36; see also [15]. See e.g., additional citations of the *UN Materials*: ALRC 24, [4] fn 12; [12] fn 52, 55, 56; [13] fn 58; [45] fn 17.
[15] ILC, *Jurisdictional Immunities of States and Their Property*, UN Doc A/37/10, Ch V (1982) 202-247. The commentary and materials in the 1982 ILC Report were repeated in the ILC's 1991 report for the purposes of the subsequent adoption of the draft articles as a UN Convention: ILC, *Draft Articles on Jurisdictional Immunities of States and Their Property, with Commentaries*, UN Doc A/46/10, Ch II (1991) (**1991 Articles**).
[16] 1982 ILC Report, 238-247. Draft Arts 8-9 were renumbered as Arts 7-8: 1991 Articles, 45-60.
[17] Being UN Legislative Series, *Materials on Jurisdictional Immunities of States and Their Property*, Sales No E/F.81.V.10 (1982) (***UN Materials***).
[18] ALRC 24, [79].
[19] Section 10(6)-(8) is to the same effect as ILC draft Art 9, in which the ILC synthesised State practice: 1982 ILC Report, 216 [190]. Section 10(10) on counterclaims is relevantly identical to ILC draft Art 10 as adopted by the ILC in 1983, see: ALRC 24, [84] fn 20, 26; ILC, *Jurisdictional Immunities of States and Their Property*, UN Doc A/38/10, Ch III (1983) 45-51.

27. Section 10(2) does not use 'expressly' where it is used in draft Art 8, but the ILC saw treaty as one means by which consent, which is extinctive of immunity, is expressed.[20] Consent is only approximately equivalent to waiver, thus: (1) the ALRC said it was concerned in Ch 6 to identify "consent, whether express or implied";[21] and (2) s 10(2), like draft Art 8, does not compound submission and waiver, but has the same effect as waiver.[22] Similarly, none of the national legislation noted by the ALRC,[23] which was already assembled by the ILC,[24] provides that 'explicit' language is required to establish submission.[25] This legislation in turn provided a model for the language of ss 10(1)-(2).[26]

28. As to submission by treaty, the ILC explained that this was upheld by the law of
10 treaties.[27] It identified "certain multilateral treaties in point" as examples where a national court could exercise jurisdiction over a State that "has previously expressed its consent to such jurisdiction in the provision of a treaty or an international agreement".[28] These included Arts 53-55 of the ICSID Convention, as well as the earlier 1958 ***New York Convention*** *on the Recognition and Enforcement of Foreign Arbitral Awards* (Arts II-III, V-VII, XI, XIII-XIV)[29] and its predecessors,[30] the **1927 *Convention*** *on the Execution of Foreign Arbitral Awards* (Arts 1-2)[31] and the **1923 *Protocol*** *on Arbitration Clauses* (Arts 1-4).[32] These earlier treaties, which apply also to awards between States or their separate entities and private parties,[33] use similar language to Arts 54(1)-(2) of the ICSID Convention.[34] While the language of these conventions is less *explicit* than Art XI(2) of the Convention on Oil

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[20] 1982 ILC Report, 241-242 (Art 8, [8]-[11]).
[21] ALRC 24, [78].
[22] See R O'Keefe and C Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (OUP 2013) (**O'Keefe and Tams**), 114 (as to final Art 7). And see Immunities Act, s 10(5), which would cover ss 10(2) and 17(1).
[23] ALRC 24, [79] fn 6.
[24] See *UN Materials*, 7 (Canada), 20 (Pakistan), 28 (Singapore), 34 (South Africa), 41 (UK), 55 (US).
[25] Only Canada's *State Immunity Act 1985*, s 4(2)(a) requires "explicit" submission, but this includes submission where a foreign State has agreed to recognition and enforcement of arbitral awards by judicial process. See *TMR Energy Ltd v State Property Fund of Ukraine* (2003) 244 FTR 1, [65]; reversed on other grounds: *TMR Energy Ltd v State Property Fund of Ukraine* (2005) 250 DLR (4th) 10. See also: *Defense Contract Management Agency – Americas (Canada) v Public Service Alliance* [2013] ONSC 2005, [46]-[47].
[26] The corresponding sections in the immunity legislation of Pakistan, Singapore and the UK are materially identical to Immunities Act, s 10(1)-(2); these include the same exclusion of submission by choice of law.
[27] 1982 ILC Report, 241-242 (Art 8, [10]).
[28] Ibid, 242-243 (Art 8, [11] and fn 288). For those treaties, see: *UN Materials*, 150-178.
[29] Opened for signature 10 June 1958, 330 UNTS 3 (in force 7 June 1959). See *UN Materials*, 151.
[30] See New York Convention, Art VII(2).
[31] Opened for signature 26 September 1927, 92 LNTS 301 (in force 25 July 1929). See *UN Materials*, 153.
[32] Opened for signature 24 September 1923, 27 LNTS 157 (in force 28 July 1924). See *UN Materials*, 176.
[33] The New York Convention applies to (*inter alia*) States in arbitration with nationals of other States, being "persons" in Art I(1): C Schreuer, *State Immunity: Some Recent Developments* (Grotius 1988) 86-87; H Kronke et al (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer 2010) 26. The 1927 Convention and 1923 Protocol apply to separate entities of States, being "persons" (1927 Convention, Art 1) or "parties" to arbitrations (1923 Protocol, Art 1).
[34] New York Convention, Art III; 1927 Convention, Art 1; 1923 Protocol, Art 3.

Pollution (mis-cited as Art IX(2) at AS [72]-[73]), Art X of that convention (on recognition and enforcement of judgments) is to similar effect as the relevant provisions of the arbitration conventions, and Arts X-XI are cited by the ILC *alongside* the above treaties as examples of express submission.[35] So too is the European Convention (cited at AS [29]).[36] Commentators on Art 7 of the UN Convention agree that a treaty for recognition and enforcement of arbitral awards is an example of express submission.[37]

29. The true principle of interpretation of domestic statutes in light of international law as referenced at AS [23] (which is the crucial nexus to the Appellant's reliance on customary international law) is that where a choice arises for a court between an interpretation of a statute which causes Australia to infringe international law and one which does not, every statute is to be interpreted and applied *as far as its language admits* so as not to be inconsistent with the comity of nations or with the established rules of international law.[38] Further, the principle does not make s 10 'plastic' (see [22] above).

30. In any event, nowhere in s 10, ALRC 24 or the 1982 ILC Report is it suggested that submission by treaty must be 'explicit', nor that in interpreting a treaty the Court should depart from the application of customary rules of treaty interpretation. The extrinsic material contradicts the existence of any rule of custom of the kind advanced by the Appellant at the time when the Immunities Act was passed, supports the Respondents' interpretation of Art 54 of the ICSID Convention as an express submission to jurisdiction, and also supports the interpretation of s 10(2) of the Immunities Act as applying to Art 54.

31. Thus, in *Li v Zhou*, the NSW Court of Appeal (at [19] et seq.) correctly applied customary rules of treaty interpretation to the *Torture Convention*[39] in determining that no submission to jurisdiction under s 10(2) of the Immunities Act had taken place through the terms of the treaty, including by any necessary implication. This orthodox approach to treaty interpretation ensured that no submission within the meaning of s 10 had occurred "through inadvertence or based on ambiguity or derived from uncertain inference" (at [37]). This

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[35] *UN Materials*, 176.
[36] Ibid, 156.
[37] O'Keefe and Tams, 118-119, citing *Zimbabwe v Fick* [2012] ZASCA 122, [43]-[44] (PJ [194]-[195] CAB 58), where Zimbabwe "clearly" submitted to jurisdiction by agreeing that decisions of a regional tribunal "shall be … enforceable within the territories of the Member States concerned" using local law and procedure for registration and enforcement of foreign judgments. Upheld on appeal: [2013] ZACC 22, [33]-[35].
[38] *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363 (O'Connor J); *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J); *Kartinyeri v The Commonwealth* (1998) 195 CLR 337, [97] (Gummow and Hayne JJ); *Minister for Foreign Affairs v Magno* (1992) 37 FCR 298, 304 (Gummow J).
[39] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (in force 26 June 1987).

approach to s 10(2) is more than adequate to satisfy the principle of State jurisdictional immunity recognised in s 9 of the Immunities Act and also to ensure Australia complies with its obligations under Art 54 of the ICSID Convention.

32. The comment on the ICSID Convention in ALRC 24 [13] fn 74 (AS [71]) as to inability to "agree on the scope of immunity" is confined to Art 55, which reserved questions of immunity from execution to domestic laws. No mention is made of Art 54.

33. At AS [45]-[47], the Appellant attempts to import limitations on s 10 of the Immunities Act by reference to s 17(2) of that Act. This was rejected by this Court in *Firebird*[40] and the Appellant does not explain why that decision was plainly wrong and should not be followed. Section 17(2) and the 'narrower' view of submission by agreement to arbitration[41] is in no way inconsistent with a finding of submission under s 10 of the Immunities Act if the State agrees to recognition and enforcement of an arbitral award in the courts of other States.

Sections A2 to A3 – The claimed customary international law rule

34. Once it is accepted that, properly interpreted, s 10 of the Immunities Act does not require 'explicit' submission to jurisdiction in an agreement by treaty, the existence of any rule of customary international law to that effect becomes irrelevant to this Court's determination of the first fundamental issue identified at [4] above. However, the AS on the alleged customary rule are now dealt with.

35. At AS [26], it is submitted that there is "a reluctance in international law to identify implied waivers", but the two authorities relied on by the Appellant, which are not referenced by the ALRC or the ILC, either are inapposite or do not support this proposition. The *Norwegian Loans* case concerned whether a preliminary objection was maintained by Norway (which the parties agreed was the case).[42] In the *Armed Activities on the Territory of the Congo* case, the ICJ accepted in general terms that States could waive or renounce rights by implication, provided it was unequivocal.[43] The most highly qualified publicists consider that it is settled under international law that immunity can be waived expressly or by implication,[44] and do not support a further requirement that submission (or waiver) by treaty requires explicit language beyond the ordinary principles of treaty interpretation as applied to the treaty's express terms.

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[40] French CJ and Kiefel J at [62], Gageler J at [131] and Nettle and Gordon JJ at [203]-[204].
[41] ALRC 24, [106]-[107].
[42] *Norwegian Loans* [1957] ICJ Rep 9, 26.
[43] *Armed Activities on the Territory of the Congo* [2005] ICJ Rep 168, [293].
[44] *Statute of the International Court of Justice*, Art 38(1)(d). See e.g. J Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 486.

36. The UN Convention (AS [27]) arose from the work of the ILC. After the 1982 ILC Report, draft Art 8 was renumbered to Art 7 and adopted by the ILC in 1991 without substantial amendment.[45] Thus, contrary to AS [27]-[28], the resulting UN Convention contradicts rather than supports the Appellant's posited rule. The UN Convention is otherwise weak evidence to support a rule of customary international law; it is not in force, only 28 States have signed it,[46] and only 22 have ratified or acceded to it.[47] The Appellant points to no evidence of *opinio juris*.

37. Cases considering the UN Convention have *not* found that the Convention generally reflects customary international law (*contra* AS [27][48]), and have held that care must be taken to distinguish provisions which declare existing custom from those which are legislative, seeking to resolve differences rather than recognise consensus.[49] *AIG Capital Partners Inc v Republic of Kazakhstan* (AS [27] fn 11) assists the Respondents as: (1) no finding is made of a customary rule of the kind submitted by the Appellant; and (2) while the Court considered that the UN Convention "powerfully demonstrates international thinking" after "long and careful work", that work supports the Respondents.

38. The European Convention (AS [29]) does *not* support the Appellant as: (1) Art 2(a) on submission by treaty does not require 'express' submission, and certainly says nothing about 'explicit' language; (2) the Explanatory Report cited by the Appellant does not discuss the distinction between the use of 'express' in Arts 2(b)-(c) and its absence in Art 2(a), nor suggest that 'explicit' language is required. The report itself says that it is not "an authoritative interpretation of the text of the Convention" (Preamble, [II]); and (3) it is weak evidence of State practice: since 1972 only 8 of now 46 members of the Council of Europe have signed and ratified it and there is no evidence of *opinio juris*.

39. The Appellant then (AS [30]-[38]) errs in applying State practice concerning *diplomatic* immunity to *jurisdictional* immunity. Each of the UN Convention (Art 3), the European

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[45] The key amendment was the addition of paragraph 2 in 1990: "Agreement by a State for the application of the law of another State shall not be interpreted as consent to the exercise of jurisdiction by the courts of that other State". The Special Rapporteur agreed with the inclusion of such qualification in the commentary. See: ILC, *Preliminary Report on Jurisdictional Immunities of States and Their Property by Mr. Motoo Ogiso, Special Rapporteur*, UN Doc A/CN.4/415 (1988) 106 [91]; ILC, *Yearbook of the International Law Commission*, UN Doc A/CN.4/SER.A/1990, Vol I (1990) 311-312 [50]-[53]; 1991 Articles, 45-53 (Art 7).

[46] Even signing States doubt its declaratory effect. China, despite signing the UN Convention, has declared that it maintains absolute immunity until the UN Convention enters into force, see e.g. *Democratic Republic of the Congo v FG Hemisphere Associates LLC* [2011] HKCFA 43, [202], [211]. Since the UK signed the UN Convention, it has made no attempt to modify its 1978 legislation in line with the Convention, see e.g. ***Benkharbouche*** *v Embassy of the Republic of Sudan* [2019] AC 777, [12].

[47] The ratification of 30 States is required: Art 30(1).

[48] The authorities cited at AS fn 10-11 do not stand as authority for the proposition relied on by the Appellant.

[49] *Benkharbouche*, [32].

Convention (Art 32), the Immunities Act (s 6) and similar foreign laws[50] exclude diplomatic and consular immunity from their scope. The ILC did not cite any such practice for draft Art 7 of the UN Convention. The ALRC made clear the need to distinguish State immunity from diplomatic immunity and its like.[51] Courts and commentators emphasise that distinction.[52] The *travaux préparatoires* of Art 32(2) of the *Vienna Convention on Diplomatic Relations*[53] demonstrate that the requirement for express waiver of diplomatic immunity addresses the risk, absent here, that the diplomat's sending State would otherwise be unaware that the immunity had been waived.[54]

40. *Pinochet No 3* (AS [34]-[38]) does not assist the Appellant, because State immunity was *not* the issue. The case concerned the application of head of State immunity to a former head of State facing extradition for a *jus cogens* crime (torture).[55] Section 16(4) of the *State Immunity Act 1978* (UK) (**SIA**) excludes criminal proceedings from Pt I of the SIA. Section 2(2) of the SIA provides for submission by "prior written agreement", but does not require explicit words. Section 9 provides for submission in proceedings which "relate to" arbitration to which a foreign State has agreed, encompassing recognition and enforcement of awards (the so-called 'wider view').[56] Of the seven separate judgments in *Pinochet No 3*, only Lord Goff referred to s 2(2) of the SIA,[57] but his Lordship recognised the distinction between s 2(2) and s 9,[58] and made no comment on the clarity of expression required of any waiver of immunity in an agreement to submit disputes to arbitration under s 9 of the SIA.

41. The Appellant cites (AS [27] fn 11) *NML v Argentina*. Certainly s 2(2) of the SIA was broadly "consistent with" international practice, but Lord Collins (at [126]) includes §1605(a)(1) of the *Foreign Sovereign Immunities Act 1976* (US) (**FSIA 1976**) as an example of such practice, which covers waiver explicitly *or by implication*.

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[50] See ALRC 24, [158] fn 4.
[51] Ibid, [158]-[159].
[52] *HM The Queen in Right of Canada v Edelson* (2007) 131 ILR 279, 285-287 [8]-[10], 289-291 [13]-[15]; *Former Syrian Ambassador to the German Democratic Republic* (1999) 115 ILR 595, 608-610; *Pinochet No 3*, 252-257, 264 (Lord Hutton); *Benkharbouche*, [17]; E **Denza**, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (4th edn, OUP 2016) 235-236.
[53] Opened for signature 18 April 1961, 500 UNTS 95 (in force 24 April 1964).
[54] UN, *UN Conference on Diplomatic Intercourse and Immunities: Official Records, Volume I*, UN Doc A/CONF.20/14 (1962) 174-177; Denza, 277.
[55] *Pinochet No 3*, 202-203 (Lord Browne-Wilkinson), 209 (Lord Goff), 252-254 (Lord Hutton), 280, 285 (Lord Phillips). See also at 268 (Lord Millett), emphasising that the focus was on criminal jurisdiction.
[56] ALRC 24, [158]-[159]. On s 9, see: *Svenska Petroleum Exploration AB v Lithuania (No 2)* [2007] QB 886, [117]; *NML Capital Ltd v Argentina* [2011] 2 AC 495, [89] (Lord Mance, Lords Walker and Collins agreeing).
[57] Lord Millett held that the immunity "in question in the present case" (i.e., the immunity *ratione materiae* of a former head of State from criminal proceedings) "may be asserted or waived by the state, but where it is waived by treaty or convention the waiver must be express" (at 268); *contra* AS [35].
[58] *Pinochet No 3*, 216-217 (Lord Goff).

42. The FSIA 1976 (AS [39]) does not assist the Appellant. US courts have consistently interpreted §1605(a)(1) as extending to circumstances where States, by treaty, expressly agree to the recognition and enforcement of arbitral awards by the courts of other States, including in the ICSID Convention[59] and New York Convention.[60] The US Supreme Court's decision in *Argentine Republic v Amerada Hess* is consistent with (and cited in) the "unbroken" line of authority on this point (cf. AS [39]; see [65] below).[61] A narrow interpretation is favoured for implied waiver, but nothing in the *Restatement* or case law indicates that waiver must be explicit; the former says implied waiver must be "clear and unambiguous".[62] The *Restatement* relies on the DC Circuit in *Creighton*, which approved the Second Circuit's finding that ratification of the New York Convention amounts to waiver in proceedings for recognition and enforcement.[63] The waiver and arbitration exceptions in §1605(a)(1) and (6) are not 'outliers'; in the *Jurisdictional Immunities Case*, the ICJ at [88] referred only to §1605A concerning torture and extra-judicial killings (cf. AS [40] fn 20).

43. Accordingly, there is nothing in the material cited by the Appellant at AS [23]-[40] that demonstrates the existence of the alleged customary rule. Thus, in ***Sodexo*** *Pass International SAS v Hungary* (AS [88]), Cooke J applied the customary rules embodied in Art 31 of the VCLT to interpret the ICSID Convention and found that State practice and *opinio juris*, as well as the decisions of the Courts below, indicated that ratification of the ICSID Convention constitutes a submission to jurisdiction (at [22]-[31], [33]-[44]).

44. Finally, the Appellant has also ignored the intertemporal problem of when this supposed customary rule arose. As the ICJ has explained "the terms used in a treaty must be interpreted in light of what is determined to have been the parties' common intention, which is, by definition, contemporaneous with the treaty's conclusion."[64] This applies to

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[59] *LETCO*, 76; ***Blue Ridge*** *Investments, L.L.C. v Republic of Argentina*, 735 F.3d 72, 84 (2d Cir. 2013); ***Mobil Cerro Negro****, Ltd v Bolivarian Republic of Venezuela*, 863 F.3d 96, 104-105, 113 (2d Cir. 2017); *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain*, 397 F.Supp.3d 34, 38 (D.D.C. 2019); *Turan Petroleum, Inc. v Ministry of Oil and Gas of Kazakhstan*, 406 F.Supp.3d 1, 12-13 (D.D.C. 2019) (***Turan (DDC)***).

[60] ***Verlinden*** *B.V. v Central Bank of Nigeria*, 488 F.Supp. 1284, 1300 fn 84 (S.D.N.Y. 1980); *M.B.L. International Contractors, Inc. v Republic of Trinidad and Tobago*, 725 F.Supp. 52, 55-56 (D.D.C. 1989); ***Seetransport*** *Wiking Trader Schiffarhtsgesellschaft MBH & Co, Kommanditgesellschaft v Navimpex Centrala Navala*, 989 F.2d 572, 578 (2d Cir. 1993); ***Creighton*** *Ltd v Government of the State of Qatar*, 181 F.3d 118, 123 (D.C. Cir. 1999); ***Stati*** *v Republic of Kazakhstan*, 199 F.Supp.3d 179, 189 (D.D.C. 2016); *Pao* ***Tatneft*** *v Ukraine*, 301 F.Supp.3d 175, 192 (D.D.C. 2018); *Process and Industrial Developments Ltd v Federal Republic of Nigeria*, 506 F.Supp.3d 1, 7-10 (D.D.C. 2020) (***Process and Industrial (DDC)***).

[61] *Process and Industrial (DDC)*, 8-9; *Mobil Cerro Negro*, 113-115; *Mobil Cerro Negro, Ltd v Bolivarian Republic of Venezuela*, 87 F.Supp.3d 573, 587-589 (S.D.N.Y. 2015); *Blue Ridge Investments, LLC v Republic of Argentina*, 902 F.Supp.2d 367, 373-375 (S.D.N.Y. 2012); *Creighton*, 121; *Tatneft*, 183; *Stati*, 187.

[62] American Law Institute, ***Restatement*** *of the Law Fourth* (2018), §453, comment (a) (cf. AS [39] fn 19).

[63] *Restatement*, §453, Reporters' Note 1; see *Creighton*, 123; *Seetransport*, 578. The *Restatement* (§453, Reporters' Note 4) also cites *Stati*, which at 189 refers to and applies *Creighton* and *Seetransport*.

[64] ***Navigational and Related Rights*** [2009] ICJ Rep 213, [63].

multilateral treaties, other than treaties of a law-making or institutional character,[65] including where a State joins a treaty after its entry into force.[66] It may also be that the parties intended a generic term to be capable of change (e.g. 'commerce') where the parties were necessarily aware that the meaning of the term would evolve.[67] No such term is identified by the Appellant in Arts 54(1)-(2) of the ICSID Convention; terms like 'recognition', 'enforcement', 'execution', 'award', 'judgment', and 'court' might accommodate some evolution in meaning, including through State practice of States parties,[68] but the rule for which the Appellant contends would not affect these terms, while the subsequent practice of Contracting States has been to treat Art 54 as a waiver by submission.

V.B Interpretation of Art 54 of the ICSID Convention and s 35 of the Arbitration Act

45. The ordinary meaning of Art 54(1) of the ICSID Convention is that Contracting States (including an award debtor State) have agreed with other States (including the recognising State) to the recognition of awards against them in the territory of the recognising State. It is agreed by Art 54(2) that the award creditor need only present a certified award to the recognising State's courts, designated for that purpose.

46. It is express or necessarily implicit that the obligation in Art 54(1) can be fulfilled through a court proceeding, and the court will exercise its jurisdiction to that end (FFC [37], [54] CAB 85, 89). Such jurisdiction is necessarily exercised over the parties to the award, but the precise procedures are left to domestic law (FFC [39], [53] CAB 86, 89). Whatever the procedure, it must enable subsequent execution under local law (Art 54(3); FFC [55]-[57] CAB 89-90). By Art 54(1)-(2), the award debtor State has thus agreed to the exercise of jurisdiction over it in the above ways. This is the 'submission to jurisdiction' for the purposes of s 10 of the Immunities Act (FFC [72] CAB 94; PJ [183] CAB 55). Immunity is only preserved (for the purposes of s 10(3) of the Immunities Act) in respect of 'execution'.

47. This interpretation, and the use of court procedures to achieve this end by orders enabling the execution of the award as a local judgment, are confirmed by the subsequent practice of States (see e.g., FFC [40]-[41] CAB 86).

48. Section 35(4) of the Arbitration Act provides the basis for the Court to make orders to give effect to the obligation in Art 54(1) in a proceeding envisaged by Art 54(2) by giving

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[65] *South-West Africa* [1966] ICJ Rep 6, 439 (Judge Jessup, Dissenting Opinion); M Dawidowicz, 'The Effect of the Passage of Time on the Interpretation of Treaties: Some Reflections on *Costa Rica* v. *Nicaragua*' (2011) 24 *Leiden Journal of International Law* 201.

[66] The parties' intentions are those "contemporaneous to the time of conclusion of the treaty": D Hollis (ed), *The Oxford Guide to Treaties* (2nd edn, OUP 2020) 502; ILC, *Fragmentation of International Law*, UN Doc A/CN.4/L.682 (2006), [475]-[476].

[67] *Navigational and Related Rights*, [66]-[67].

[68] Ibid, [64].

express leave to (take steps to) execute the award and, to facilitate that end, by entering judgment on the award (FFC [58]-[61] CAB 90-91; form of orders judgment [5]-[14] CAB 114-118). It is thus appropriate to address the interpretation of Art 54 (AS [§D.1]-[D.4]) before addressing the interpretation of s 35(4) of the Arbitration Act ([§B]).

Section D1 – Reconciliation of the different authentic texts and ambiguity

49. *Contra* AS [64]-[65], there is no ambiguity or uncertainty on either available reconciliation of the different official languages of the ICSID Convention. A distinction between 'recognition and enforcement' and 'execution', as the primary judge found, or between 'recognition' and 'execution', as the Full Court found, has the same result. There is no need for determination of the meaning of Arts 54-55 by the ICJ. Even if the official language versions were in irreconcilable conflict, the customary rule embodied in Art 33(4) of the VCLT would support a waiver of immunity, as this accords with the objects and purposes of the ICSID Convention to encourage private international investment by promoting mutual confidence between States and investors through equality of arms and to secure binding and enforceable arbitral awards (PJ [114]-[116] CAB 39-40).[69]

Section D2 – The 'territorial' argument

50. The Appellant submits that the Courts below erred in not addressing a 'territorial limitation' in Art 54(1) of the ICSID Convention, i.e., that waiver only arises in the territory of the award debtor State.

51. *First*, the argument now made was *not* raised below or in the SLA. Rather, the Appellant argued that a territorial limitation in Art 26 of the ECT applied. The primary judge rejected that submission (PJ [184]-[185] CAB 56) and it has not been repeated since.

52. *Second*, the obligation on the Appellant to enforce an award in its territories is *additional to* the obligation on Australia as the recognising State to do the same, which the Courts below found was the relevant agreement to submit (PJ [181] CAB 55; FFC [37] CAB 85).[70]

53. *Third*, the enforcement 'within its territories' to which Art 54 is *primarily* directed is execution *by the recognising State*. The award debtor State is already bound by and must comply with an ICSID award under Art 53. The obligation in Art 54 does not require a recognising State to take measures of forced execution beyond its boundaries.

54. AS [69]-[74] on the effect of Art 54 and the application to it of s 10 of the Immunities Act are addressed above in response to AS [§A]. The import of Art 26(8) of the ECT (AS [75]) is addressed at [69]-[76] below.

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[69] IBRD, ***Report of the Executive Directors*** *on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (1965), [9]-[13]; ICSID Convention, Preamble and Art 1.
[70] See G Bermann, 'Understanding ICSID Article 54' (2020) 35 *ICSID Review* 311, 329.

Section D3 – The application of Art 55 to the procedure in Art 54(2)

55. As to AS [63] and [76]-[84], the Appellant makes a new argument, not advanced below or in its SLA,[71] that the Art 54(2) process of recognition is regulated by Arts 54(3) and 55.

56. The Appellant constructs the following 'straw man' argument: (1) Art 54(2) prescribes only presentation of a signed copy of the award; (2) "read strictly", this suggests "no scope" for any "additional procedural barrier or formalities" such as service or standards of disclosure, and this could not have been intended; (3) therefore, Art 54(3) which provides for national procedural laws for 'execution' *must* also apply to an Art 54(2) recognition process. Sophistry then follows (AS [79]-[80]) such that Art 55 on immunity from execution is said to apply to proceedings for recognition of an ICSID award under Art 54(2), by way of this claimed relationship between Arts 54(2) and (3).

57. *First*, the submission is contrary to the finding below that the 'how' of Art 54(2) is "governed by the relevant domestic law of the Contracting State" (FFC [39] CAB 86).

58. *Second*, the submission is contrary to the *explicit* words of Arts 54(3) and 55 which limit them to 'execution', and so is contrary to the customary rule of interpretation embodied in Art 31 of the VCLT (PJ [83]-[87] CAB 31-33; FFC [81] CAB 96). Art 55 merely confirmed the effect of the words "as if it were a final judgment of a court" in Art 54(1).[72]

59. *Third*, it is wrong that due to Art 54(2), the ICSID Convention leaves no scope for additional procedural formalities. Art 69 of the ICSID Convention provides that each State "shall take such legislative or other measures as may be necessary for making the provisions of this Convention effective in its territories". Wherever a treaty leaves to a State a choice of means to achieve its international obligations, it is up to the State concerned to select those means.[73] States have an obligation to comply with treaty obligations in good faith (Art 26 VCLT), which requires that States refrain from conduct which would prevent the due execution of the treaty or otherwise frustrate its objects.[74] Thus, procedural barriers which deprive a party of its rights under a treaty would be inconsistent with Arts 54(1)-(2) of the ICSID Convention. States have given effect to Art 54 by enacting procedures supporting early recognition free of any right to immunity, including the *exequatur* procedure in France[75] and *ex parte* registration in the United Kingdom.[76]

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[71] Despite a question from Edelman J regarding Art 55: Transcript, SLA, 18 March 2022, T 5.142 RFB 419.
[72] *Report of the Executive Directors*, [41]-[43].
[73] *Jadhav* [2019] ICJ Rep 418, [146]-[147]; *LaGrand* [2001] ICJ Rep 466, [125].
[74] ILC, *Draft Articles on the Law of Treaties with Commentaries*, UN Doc A/6309/Rev.1 (1966) 211 (Art 23).
[75] As in *Benvenuti* and *SOABI* (see AS [91]-[92]).
[76] *Arbitration (International Investment Disputes) Act 1966* (UK), ss 1-2; Civil Procedure Rules (CPR) rr 62.21(2)(b), 74.3(2)(b); *Micula v Romania* [2017] EWHC 31 (Comm), [122]; *Unión Fenosa Gas, S.A. v Arab Republic of Egypt* [2020] EWHC 1723 (Comm), [56]-[71].

60. As to AS [82] and the submission that these proceedings are not concerned with recognition, no reason is given as to why this is so once one accepts the dichotomy between 'recognition' and 'execution'. As below (FFC [69] CAB 93), the Appellant "[does] not make any substantive submission as to why the proceeding could not be characterised as a recognition proceeding although it had an abundant opportunity to do so". In AS [82] it is said that the finding is difficult to reconcile with order 1(a) of the Full Court. But there is no error identified in the Full Court's reasons for final orders; the entry of judgment was there explained as a practical device for recognising an award which enables the mechanisms of the Court for execution but is not itself an order under Art 55 (in any official language).[77]

10 61. As to AS [83]-[85], *Micula* was concerned with the question of equivalence; to what extent do the words "as if it were a final judgment of a court" in Art 54(1) of the ICSID Convention reduce an award to the same status as any other judgment when registered or made into a local judgment (the "award-cum-as-if-judgment": FFC [56] CAB 90), such that its enforcement may be stayed as with any other judgment of the court, or whether the recognition procedure is purely facultative of execution which cannot be so stayed. The case is thus irrelevant as found below (FFC [98], [110] CAB 100-101, 103). The comments of Lord Lloyd-Jones and Lord Sales JJSC at [71] and the report of Mr Broches were concerned with uncertainty as to enforcement as *execution* of an award. The same report of Mr Broches and the evolution into the final form of Arts 54-55 preserving State immunity at the stage of

20 execution only is explained by the primary judge (PJ [129]-[135] CAB 43-45).

Section D4 – International authorities

62. Contrary to AS [86]-[94], all international authorities that have squarely examined the question of the effect of Arts 54-55 of the ICSID Convention on the making of orders in the nature of *exequatur*, which make an award enforceable within the domestic system with the status of a judgment of the court,[78] support the Respondents. Such authorities are relevant to the interpretation of Arts 54-55 and their application to proceedings for *exequatur* relief, which is how the Courts below used them (PJ [193]-[198] CAB 58-59; FFC [38], [40]-[41] CAB 85-86). Whether any determination by the ICJ on the meaning of Art 54 would be binding, or more definitive (FFC [100] CAB 101), is immaterial to these proceedings.

30 63. *Tethyan Copper* (AS [87]) was an application to set aside the *ex parte* grant of registration of an ICSID award, by reason of failure to give full and frank disclosure where the applicant failed to address jurisdictional immunity at all, including any submission by agreement through the ICSID Convention (at [14], [25], [42]-[44], [52]). It is wrong for

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[77] Form of orders judgment [7]-[10] (Allsop CJ) CAB 114-117. Perram and Moshinsky JJ agreed at [30]-[31].
[78] FFC [8] CAB 75-76; form of orders judgment [7], [15] (Allsop CJ) CAB 114, 118.

precisely the reasons given by Cooke J in *Sodexo* at [28], namely that what matters is what the recognising State has agreed to do.[79]

64. *Benvenuti* and *SOABI* (AS [91]-[92]) make plain that the French courts, working with the French text of the ICSID Convention (PJ [166] CAB 52), found no entitlement to jurisdictional immunity in respect of *exequatur* orders. *Contrary to* AS [94], to the French courts the simplified process of Art 54 of the ICSID Convention is the presentation of a signed award in seeking *exequatur* of an award *outside* the territory of an award debtor State.

65. In the US, the claimed 'tension' between Circuits (AS [93]) does not exist. In *Process and Industrial Developments v Nigeria* (AS [93] fn 35), the DC Circuit (at 775) merely affirmed the lower Court's decision on the basis of the arbitration exception in §1605(a)(6) of the FSIA 1976, following misgivings expressed by the US State Department as to how rulings on implied waiver might be relied upon *against* the US in foreign countries.[80] The DC Circuit has long held that agreement by treaty to recognition and enforcement of arbitral awards amounts to waiver.[81] The position in the Second Circuit (which includes the Southern District of New York) is clear that ratification of the ICSID Convention amounts to waiver,[82] and that Circuit has applied the same reasoning to the recognition and enforcement of awards under the New York Convention,[83] even though (*contra* AS [94]) the 'implied waiver' in §1605(a)(1) is interpreted narrowly (AS [39]).

Section B – s 35(4) of the Arbitration Act

66. In [§B] (AS [51]-[55]) the Appellant conflates two different questions, arising at entirely different stages. The first is whether proceedings for *exequatur*-type relief are 'recognition' proceedings or 'execution' proceedings under the dichotomy found by the Full Court in Arts 54-55 of the ICSID Convention. The second is whether one can seek relief of a kind that would be considered 'recognition' in answer to the first question, in proceedings brought under s 35(4) of the Arbitration Act.

67. The reasons why s 35 *includes* proceedings in the nature of *exequatur* ('overlap' being the term used by the Appellant) are given at FFC [42]-[50] CAB 86-88; form of orders judgment [5]-[14] CAB 114-118. The Appellant does not identify any error made.

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[79] PJ [175], [181] CAB 53, 55; FFC [22], [28], [54] CAB 81, 83, 89.
[80] Noted at fn 3; and see *Process and Industrial Developments Ltd v Federal Republic of Nigeria*, Brief of the United States as *Amicus Curiae*, 20 January 2022, 5-6.
[81] See e.g. *Creighton*, 123; *Pao Tatneft v Ukraine*, 771 F. App'x 9, 9-10 (D.C. Cir. 2019) (affirming *Tatneft*); rehearing *en banc* denied 16 September 2019, *cert.* denied, 140 S. Ct. 901 (2020). See also *Turan Petroleum Inc. v Ministry of Oil and Gas of Kazakhstan*, Case No 21-7023 (unreported, 25 March 2022) (D.C. Cir. 2022); rehearing *en banc* denied 10 May 2022 (affirming *Turan Petroleum (DDC)*).
[82] *Blue Ridge*, 84; *Mobil Cerro Negro*, 104-105, 113; *LETCO*, 76.
[83] *Seetransport*, 578; *Verlinden*, 1300.

68. The Full Court did not suggest (*contra* AS [54]) that s 35 of the Arbitration Act is not also concerned with enforcement. As the Note to s 35 must use 'enforcement' in the sense of 'execution' as in the ICSID Convention (s 31(2) Arbitration Act), that note is a reference to Pt IV of the Immunities Act.[84] AS [55] is then unclear; Arts 54(3) and 55 *do* apply to the 'enforcement' proceedings contemplated by Art 54(2) where 'enforcement' means 'execution' in contradistinction to 'recognition'. Art 55 is not 'absent' from the Arbitration Act: (1) it is given force of law by s 32; and (2) the Note to s 35, in referencing Pt IV of the Immunities Act, identifies per Art 55 a "law in force in [Australia] relating to immunity of … any foreign State from execution".

V.C Response to Section D5 and the EC's application

69. The submission in Art 54 of the ICSID Convention, and similarly s 10(2) of the Immunities Act, is a submission to jurisdiction in a proceeding for the recognition and enforcement of the award. That submission is found in and only in Art 54. Art 26 of the ECT is the source of the parties' right to arbitrate but not of the Court's power to exercise jurisdiction over the proceedings. The claimed 'ambiguity' at AS [95] is as to the 'status' (i.e., invalidity) of the agreement to arbitrate under Art 26 of the ECT. That has no bearing at all on the *meaning* of Art 54 of the ICSID Convention, or the clarity of expression required for s 10 of the Immunities Act. It is a submission that: (1) Art 54 requires a valid agreement to arbitrate to be engaged; and/or (2) there cannot be a submission to jurisdiction under s 10 of the Immunities Act without a valid agreement to arbitrate, which is said to be absent here.

70. *First*, it is not open to the Appellant or the EC to argue this now. The Appellant points to nothing against the finding by Perram J at [15] CAB 78 (and see [115] CAB 104-105) that there was no submission below as to how any invalidity of Art 26 was "connected to any question relating to foreign state immunity" and that the Appellant "did not advance an argument at trial or on appeal that this Court should refuse to recognise the Respondents' award on such a jurisdictional basis". The proceedings at first instance and in the Full Court were fought on the issue of whether in Art 54(2) 'enforcement' meant 'execution', and, in the Full Court, if it meant that, whether the proceedings were for 'recognition' not 'execution' of the award.

71. *Second*, when the EC sought to intervene in the Full Court to argue that the "ECT does not contain a valid offer to arbitrate" so there was no submission under s 10(2),[85] the Appellant: (1) *accepted* it had not taken these points at trial; (2) *conceded* that had it done

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[84] Inserted by: *Courts and Tribunals Legislation Amendment (2021 Measures No. 1) Act 2022* (Cth), Sch 1, item 97 (commenced 18 February 2022).

[85] 'Outline of Submissions for Leave to Intervene', 7 August 2020, [13]-[14].

so this may have affected the conduct of those proceedings; and (3) said it did *not* seek to agitate the points raised by the EC (T 4.36-44 RFB 347).

72. *Third*, the Appellant was not given leave to appeal on this basis.[86] At the SLA hearing, the Appellant said its argument was to be that "where European law does not recognise the jurisdiction of ICSID in the circumstances of this case, it cannot be said that … the ICSID Convention applies with such clarity and unambiguity so as to amount to a waiver of sovereign immunity" (T 8.313-316 RFB 422). No mention was made of the submissions now advanced by the Appellant which appear to invite an intervention on entirely fresh issues.

10 73. The further submission made at AS [96] that the Appellant has not waived immunity in "an underlying agreement to arbitrate" misstates the relevant enquiry. The question is whether it has submitted by treaty to *proceedings* for *recognition* of the *award*. The relevant treaty is the ICSID Convention. The submission demonstrates the Appellant's confusion of consent to arbitrate and submission to jurisdiction.[87] By Art 54, the Appellant has consented not to the recognition of the award but to the exercise of jurisdiction in proceedings for the recognition of that award. Whether the Court should grant the relief sought, including any question of the tribunal's jurisdiction, is then for the Court, after immunity is determined.

74. *Fourth*, the invalidity of Art 26 of the ECT was unsuccessfully argued by the Appellant before its ICSID tribunal.[88] The award on jurisdiction can be recognised per Art 54(1). The

20 Appellant is bound by it, and cannot seek relief against it outside the Convention system.

75. *Finally*, as to the EC's application, made without notice: (1) it is not of significant assistance,[89] for the reasons above; (2) being lengthy submissions (**ECS**) in support of AS [95]-[96], the Appellant could and should have made them in *its* submissions (if it had leave to do so); and (3) having been dealt with below, this application should not be heard now, complaining of error by the Full Court in refusing the intervention (ECS [38] RFB 341) but without seeking special leave to appeal that decision.

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[86] As to the EC application, compare *Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514, [54], where an intervention application was refused, *inter alia*, because it went beyond the grant of special leave.

[87] Had a point about consent under Art 26 ECT been taken, the Respondents would have argued that: (1) the submission in Art 54, by its terms and in the context of the "closed" ICSID system (Arts 26, 27, 49(2) and 50-53; see PJ [79] CAB 30) leaves no room for the State to claim immunity by asserting the invalidity of the agreement to arbitrate or the tribunal's lack of jurisdiction; and (2) the question of submission in s 10 does not invite a hearing *de novo* on consent to arbitrate, which is a matter of the rights between the parties not the power of the court, as US courts have held on §1605(a) FSIA 1976. See *Chevron Corp v Republic of Ecuador*, 949 F.Supp.2d 57, 63 (D.D.C. 2013); *Blue Ridge*, 81-82; *Process and Industrial (DDC)*, 10.

[88] *Antin Infrastructure Services Luxembourg S.à.r.l. v Kingdom of Spain* (ICSID Case No ARB/13/31, 15 June 2018), [163]-[181], [204]-[230] RFB 67-73, 79-89; *Infrastructure Services Luxembourg S.à.r.l. v Kingdom of Spain* (ICSID Case No ARB/13/31, 30 July 2021) (***Infrastructure Annulment***), [123]-[130], [153]-[160].

[89] *Levy v Victoria* (1997) 189 CLR 579, 604-605 (Brennan CJ); *Roadshow Films Pty Ltd v iiNet Ltd (No 1)* (2011) 248 CLR 37, [4].

76. The application adds unduly to the burden of time and costs:[90] (1) the Respondents were not required below to answer the substance of the EC's arguments; (2) the issues are complex – and at least 56 international tribunals of eminent jurists including ICJ judges have considered in detail (and rejected) arguments similar to those put by the Appellant and the EC;[91] (3) the Appellant *did* adopt the EC's submissions in the case stated to the Full Court involving different investors, which is awaiting decision by the Full Court;[92] and (4) it is neither possible nor reasonable for the Respondents to respond to both the AS *and* ECS [16]-[36] RFB 336-341 per HCR r 44.03.2.

PART VI: ARGUMENT ON THE NOTICE OF CONTENTION (NOC)

77. **NOC Grounds 1 and 2 (reconciliation of authentic texts):** Two matters support the primary judge. *First*, the reasons his Honour gave for rejecting the analysis of Professor Schreuer. *Second*, in the absence of evidence of the meaning of the French and Spanish texts, the English text must prevail. The Chief Justice at FFC [9] CAB 76 (and Moshinsky J at [118] CAB 106, and implicitly Perram J) thus reversed the onus of proof (*contra* AS [60]). If the texts are not, on their face, reconcilable, the principles embodied in Art 33(4) of the VCLT then support a submission to jurisdiction by Art 54 of the ICSID Convention.

78. **NOC Grounds 3 (s 34 of the Arbitration Act) and 4 (implied repeal):** These Grounds arise if Art 54 of the ICSID Convention does not meet the level of clarity required by s 10 of the Immunities Act. Ground 3: The primary judge should have found s 9 of the Immunities Act is an "other" law "relating to" the recognition and enforcement of arbitral awards within the meaning of s 34 of the Arbitration Act and thus excluded. The primary judge wrongly applied (PJ [203] CAB 60) the reasoning in *Firebird* at [85] to s 34. Section 6 of Ch IV of the ICSID Convention has three aspects: (1) an obligation to comply, without remedy against the award (Art 53); (2) an obligation to give recognition (and enforcement) (Arts 54(1)-(2)); and (3) a reservation to national law of execution procedure and immunity (Arts 54(3) and 55). The first aspect requires the exclusion of Pts II-III of the Arbitration Act, as s 34 explicitly does. The second aspect is of central concern to Pt II of the Immunities

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[90] Ibid.

[91] *Infrastructure Annulment*, [154] (of which 35 were considering the intra-EU argument in the context of the ECT). See e.g. *BayWa r.e. Renewable Energy GmbH v Kingdom of Spain* (ICSID Case No ARB/15/16, 2 December 2019), [244]-[283] (Chair: Professor James Crawford AC, Judge of the ICJ); *Vattenfall AB v Federal Republic of Germany* (ICSID Case No ARB/12/12, 31 August 2018), [108]-[231] (Chair: Professor Albert van den Berg). More recently, see: *Sevilla Beheer B.V. v Kingdom of Spain* (ICSID Case No ARB/16/27, 11 February 2022) [631]-[676]; *NextEra Energy Global Holdings B.V. v Kingdom of Spain* (ICSID Case No ARB/14/11 (Annulment), 18 March 2022) [229]-[232].

[92] *Watkins Holdings S.à.r.l. v Kingdom of Spain* (NSD 449/2020): Transcript, FFC, T 5.11-6.4 (adoption), T 7.40-44 (the Full Court adjourning the proceedings) RFB 348-350.

Act, while the third is of central concern to Pt IV. While s 9 of the Immunities Act is a law of general application to State immunity, the overlap with Art 54 is very substantial.

79. Ground 4: Alternatively, Art 54 (given force of law by s 32) impliedly repealed s 9 of the Immunities Act to the extent that the former excludes any claim for State immunity in proceedings for (at least) recognition of an ICSID award and the latter confers the right to claim it in proceedings generally. The inconsistency is irreconcilable and 'clearly apparent'. The two provisions cannot operate sensibly together. The primary judge should have distinguished *Firebird* as the *Foreign Judgments Act 1991* (Cth) (**FJA**) differs substantially from the ICSID Convention: (1) Art 54 imposes a positive obligation on the Court to assert jurisdiction and recognise an award, it does not merely create a right to seek registration; (2) Art 54(2) (enforce 'as if a judgment') and Arts 54(3) and 55 (execution) deal expressly with immunity, where the FJA is silent; (3) under the FJA "judgments involving a foreign State will be but a small subset",[93] but that is not so for the ICSID Convention; and (4) Art 54 (via s 32 of the Arbitration Act) is not a later 'general' statute; it is a submission to jurisdiction inconsistent with s 9 of the Immunities Act for ICSID awards, where s 9 applies in any 'proceeding' involving a foreign State.

PART VII: TIME REQUIRED FOR PRESENTATION OF ORAL ARGUMENT

80. The Respondents estimate 3 hours to present their argument, excluding any substantive response to the submissions filed by the EC.

Dated 3 June 2022

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[93] *Firebird*, [86] (French CJ and Kiefel J), quoting Basten JA in *Firebird Global Master Fund II v Republic of Nauru* (2014) 89 NSWLR 477, [261].

ANNEXURE

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

Australian Legislation

1. *Acts Interpretation Act 1901* (Cth), s 15AB(2)(b)

2. *Courts and Tribunals Legislation Amendment (2021 Measures No. 1) Act 2022* (Cth), Sch 1, item 97 (commenced 18 February 2022)

3. *Foreign Judgments Act 1991* (Cth), Parts I and II

4. *Foreign States Immunities Act 1985* (Cth) (**Immunities Act**), s 6, Part II (in particular ss 9, 10 and 17), Part IV

5. *High Court Rules 2004* (Cth) (**HCR**), r 44.03.2

6. *International Arbitration Act 1974* (Cth) (**Arbitration Act**), ss 31, 32, 34, 35, Sch 3

Foreign Legislation

7. *Arbitration (International Investment Disputes) Act 1966* (UK), ss 1-2

8. *Civil Procedure Rules* (CPR) (UK), rr 62.21(2)(b), 74.3(2)(b)

Treaties

9. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (in force 26 June 1987) (**Torture Convention**)

10. *Convention on the Execution of Foreign Arbitral Awards*, opened for signature 26 September 1927, 92 LNTS 301 (in force 25 July 1929) (**1927 Convention**) Arts 1-2

11. *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**), Preamble, Art 1, Section 6 of Ch IV (in particular Arts 53, 54, 55), Art 69

12. *Energy Charter Treaty*, opened for signature 17 December 1994, 2080 UNTS 95 (in force 16 April 1998) (**ECT**), Art 26

13. *European Convention on State Immunity*, opened for signature 16 May 1972, 1495 20 UNTS 181 (in force 11 June 1976) (**European Convention**), Arts 2, 32

14. *International Convention on Civil Liability for Oil Pollution Damage*, opened for signature 29 November 1969, 973 UNTS 3 (in force 19 June 1975) (**Convention on Oil Pollution**), Arts X, XI

15. *Protocol on Arbitration Clauses*, opened for signature 24 September 1923, 27 LNTS 157 (in force 28 July 1924) (**1923 Protocol**), Arts 1-4

16. *Statute of the International Court of Justice*, Art 38(1)(d)

17. *United Nations Convention on Jurisdictional Immunities of States and Their Property*, opened for signature 2 December 2004, UN Doc A/RES/59/38, Annex (not yet in force) (**UN Convention**), Arts 3, 7

18. *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**), Arts I-III, V-VII, XI, XIII-XIV

19. *Vienna Convention on Diplomatic Relations*, opened for signature 18 April 1961, 500 UNTS 95 (in force 24 April 1964)

20. *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (in force 27 January 1980) (**VCLT**), Arts 26, 31, 32, 33