[2022] HCATrans 192

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Sydney

No S43 of 2022

B e t w e e n -

KINGDOM OF SPAIN

Appellant

and

INFRASTRUCTURE SERVICES LUXEMBOURG S.À.R.L

First Respondent

ENERGIA TERMOSOLAR B.V.

Second Respondent

GAGELER J
GORDON J
EDELMAN J
STEWARD J
GLEESON J
JAGOT J

TRANSCRIPT OF PROCEEDINGS

AT CANBERRA ON WEDNESDAY, 9 NOVEMBER 2022, AT 2.00 PM

MR C.S. WARD, SC: May it please the Court, I appear with my learned friend, **MR P.F. SANTUCCI**, for the appellant. (instructed by K&L Gates)

MR B.W. WALKER, SC: If it please the Court, I appear with my learned friends, **MR J.A. HOGAN-DORAN, SC** and **MR C.W. BROWN**, for the respondents. (instructed by Norton Rose Fulbright)

GAGELER J: Before you begin, Mr Ward, it is appropriate that I record that the parties have been advised that the Chief Justice is unwell and will not participate in this hearing today or tomorrow. The parties have advised the Court that they are content for the Chief Justice to participate in the consideration of the appeal on the basis of the written submissions, of reading the transcript and, if necessary, watching the audio-visual recording of the hearing. The hearing will, therefore, proceed before six Justices, but the appeal will be determined by all seven Justices of the Court.

Mr Ward.

MR WARD: Thank you, your Honour. We confirm we are content to proceed on that basis, although I am sure everybody in the court room understands that it is appropriate that I first make the point that I appear on behalf of the Kingdom of Spain for the sole purpose of continuing to assert Spain's immunity from the adjudicative jurisdiction of the Australian courts in this matter and for no other purpose.

Could I outline for your Honours first the various parts of Spain's argument on this appeal. I propose to address first in relation to the statutory provisions in issue by conventional principles of statutory construction. By that, I mean that the proper construction of section 10(2) of the Immunities Act – which is an exception to the general immunity of section 9 – requires, in Spain's case, that there would be an express written agreement involving a decision by a foreign State to submit to the local adjudicative jurisdiction and thereby waiving foreign State immunity – the presumption of foreign State immunity.

There are some references to implied waiver that appear in some of the authorities and also make some appearances in our learned friends' written submissions. References to implied waiver, we will be submitting, tend to distract as the preparatory materials, and we will be spending some time with the Law Reform Commission Report 24.

As the preparatory materials make clear, the distinction that was sought to be drawn in the legislation between express exceptions to immunity and implied waiver is one of implication by conduct; that is, where a State by its actual conduct before or in the course of a proceeding sought to remove itself or not avail itself of the immunity - - -

GORDON J: Mr Ward, before you keep going, would you mind raising your voice just slightly so that we can hear? Would that be possible?

MR WARD: I will try, your Honour. Is that better?

GAGELER J: We have also investigated turning up the microphone, Mr Wood, so - - -

MR WARD: Thank you, your Honour. I do tend to speak somewhat more softly than others.

GLEESON J: Mr Ward, when you speak of the immunity, there is not just one single immunity, is there? There is quite a well-known distinction between immunity from jurisdiction and immunity from execution.

MR WARD: Yes, and we are dealing with the adjudicative immunity, not the execution immunity contained in Part IV of the Act. So, everything that I say is in relation to the immunity from the processes of the Australian Courts and we place that squarely – and all our submissions are directed squarely to those propositions contained within the exception in section 10. I will be saying something about the statutory context which includes the treatment of immunity from execution in Part IV as something to do with the statutory context.

As I said, we will be looking at the statutory context and the legislative history of section 10 – including the ALRC Report 24 which was the basis of the Act. We will also be making reference to provisions of international law and, particularly, customary international law, for two reasons. First, because as a matter of statutory construction – as this Court has most recently, but in previous occasions as well, suggested in *Firebird v Nauru* – because the Immunities Act should be construed so far as language permits consistently with the customary international law of foreign State immunity.

Secondly – and quite independently – because, in this case, the form of submission or waiver that is said to be identified, arises in the form of a treaty – or, we say, treaties plural – and the proper interpretation of those treaty provisions requires attention to be paid to the international obligations of the nations involved by reason of Article 31(3)(c) of the *Vienna Convention on the Law of Treaties*. Although that provision does not apply in terms because the Vienna Convention, as we know, predated the ICSID Convention, the provision is treated by all as reflecting customary international law.

Spain's case in relation to the contents of the customary rule, either at the present time – that is, today – or any earlier relevant time, is that customary international law requires, consistently with the approach expressly adopted by the ALRC, that any submission to jurisdiction embodied in a treaty must be in express and unambiguous written terms but not – as our learned friends have posed in their written submissions, in a way that we do not adopt, and never put – as something called explicit.

EDELMAN J: Was there any evidence at first instance as to what the State practice was in relation to this asserted customary international law rule or the opinion juris?

MR WARD: No. What happened, your Honour, is that particularly the primary judge approached the task, we say, correctly, accepting that Article 31 of the Vienna Convention in its entirety applied to the interpretative task, but no attention appears to have been paid to the provision of Article 31(3)(c). Now, we accept that that was not put in those terms below. We also accept that his Honour did not make reference to Article 31(3)(c), nor did the Full Court. Notwithstanding that, it is a plain, we say, principle of law that is obviously relevant to the interpretative task - - -

EDELMAN J: It may depend upon what it means. For example, on one view, it is impossible in any sentence that is ever spoken to just have regard to the express words of the sentence without considering the mountain of underlying presuppositions and implications that are involved in communication of language.

MR WARD: Yes.

EDELMAN J: I do not understand you to be disputing that. So, what is it then at some stage you will need to come to that is impermissible about an inference that you say cannot be drawn?

MR WARD: It is not so much that we say something is impermissible. We say there is a positive requirement for certainty, and that that is both the customary international law basis that existed prior to the implementation, or the passage of the Sovereign Immunities Act – *Foreign State Immunity Act* – and is also something that the ALRC was expressly adverting to and relying upon in its preparatory work. So, whichever way we get there, the content of the rule informs the construction task that is presently before the Court.

GORDON J: Is your argument any more, though, that the entry into the treaty or treaties is not sufficient for the purposes of section 10(2)?

MR WARD: It is the question of the entry into these particular treaties and the content of those treaties.

GORDON J: That is what I am asking. Is that not what, in a sense, the argument boils down to?

MR WARD: Yes. That is what it boils down to, but there is a number of intermediate steps, and there are three different ways we approach it.

GORDON J: I see.

MR WARD: Could I indicate to your Honours that the third part of our argument is that – and, in this, I draw attention to what the Full Court and the primary judge did in their treatment of the issues.

First, they found, by different routes, that Article 54 of the ICSID Convention constituted a waiver as to the adjudicative immunity in relation to the domestic courts, not just of Australia, but of every contracting State to the ICSID Convention. That is, by doing – and I will spend time looking at how the ICSID Convention actually operates – but the proposition is that by reason of the combination of entry into, in this case, the Energy Charter Treaty, which contained an option for ICSID dispute settlement, as one of the many options – not a sole dispute settlement procedure – combined with Spain being a party to the ICSID Convention. There was, for that reason, in Article 54, a sufficiently expressed waiver of the adjudicative immunity in relation to the domestic courts of every other contracting State of ICSID in relation to a species.

The Full Court identified a species of proceeding called recognition proceedings. We say a number of things about that. The first is that, properly construed, Article 54 of ICSID does not contain any such waiver, and I will spend some time expanding on that proposition. That is the first point, that Article 54, in terms, does no such thing.

Secondly, if there is any waiver by implication, which must be the only way, we say, it could arise, it is not sufficiently clear or unambiguous or, in the language of the International Law Commission which informed the ALRC, the waiver, if it exists at all, is not in no uncertain terms.

Fourth, the *International Arbitration Act* that gives effect to the ICSID Convention in Australia through sections 33 to 35 and, as a result, the ICSID Convention as part of the domestic law of Australia, maintains an immunity by Article 55 of the Convention in respect of the entirety of the Article 54 process.

GAGELER J: So, is that different from the construction argument?

MR WARD: It is, your Honour. There are two construction arguments. The first is that Article 54, in terms, does not contain any waiver of immunity. The second is that Article 55 – we would be wrong to some extent, Article 54 trespasses into the language of immunity, Article 55 preserves an immunity in relation to - - -

GAGELER J: I follow that. But why did you mention the *International Arbitration Act*?

MR WARD: Because the *International Arbitration Act* gives the ICSID Convention the force of law. I am not simply treating it as a treaty for the purposes of international law. It becomes part of the domestic law of this country to the extent that that might be something of importance. The next proposition - - -

GLEESON J: I am sorry. You are saying that Article 55 operates as an immunity in relation to a recognition application?

MR WARD: Yes. Can I explain how that works out, because this is the final limb of this thread of the very important part of our argument. There are two separate but related tasks, each of which was undertaken by the primary judge and the Full Court. The first is a construction argument, that is, what do Articles 54 and 55 mean – although we are also going to draw attention to Article 53 as something of great significance.

So, there is, first, a construction task. There is second, and quite independently, a characterisation task – what is the true characterisation of these proceedings presently before this Court? Each of the primary judge and the Full Court undertook those steps - - -

GAGELER J: Characterisation for what purpose?

MR WARD: Characterisation of whether or not it is possible to identify these proceedings as being proceedings for recognition alone as opposed to something called recognition and enforcement.

EDELMAN J: Is it characterisation of these proceedings or characterisation of the proceedings before the primary judge?

MR WARD: Characterisation of the proceedings before the primary judge, your Honour.

EDELMAN J: So, there may be an issue, then, on your submissions, as to what happened in the Full Court from paragraph 71 onwards?

MR WARD: Yes, and also the form of orders ultimately made by the Full Court after further debate about the form of orders. So, can we say this. The characterisation task is one point of departure between the primary judge and the Full Court in that his Honour Justice Stewart identified the proceedings as being proceedings for recognition and enforcement as a joint concept, and then found that the Article 55 immunity did not apply to enforcement proceedings and therefore managed to avoid what his Honour Justice Perram describes as the dyspeptic result of Spain succeeding in these proceedings.

The Full Court overcame that by finding that there was only a recognition proceedings, that is, that these proceedings could in some way be described as proceedings for recognition alone such that enforcement and execution are quite independent.

EDELMAN J: Is that right? Is that what the Full Court found, or did the Full Court recharacterise the proceedings as ones that could be treated as though they were just for recognition, even though the claim itself and so on had been a claim and a proceeding for recognition and enforcement?

MR WARD: I do not think much turns on that distinction, your Honour. Either way, the essence of the Full Court's decision was that the proceedings could be treated as – however they had been framed – could be treated as proceedings for recognition alone. Could I say to your Honours what we say about that, because it is a part of the debate – although I will probably get to it later in the proceedings.

GAGELER J: Mr Ward, just to understand where you are at, you are still just mapping out where your argument is going to go, is that right?

MR WARD: Yes. Because I think, your Honour, this is a proceeding of some complexity. All I am seeking to do is to identify the steps and the chains of reasoning that we will go through. We end - - -

GAGELER J: Do we see these steps in your outline of argument?

MR WARD: Yes, we do, your Honour. We are currently at 13.

GAGELER J: At where?

MR WARD: Paragraph 13 of the outline, your Honour.

GAGELER J: Thank you.

MR WARD: What we do and what we say is the correct approach to this is to first – although it matters not in which order these tasks are

undertaken – but to first deal with the question of construction. That is to say, properly construed – by reference to the understood rules of customary international law and, for the purposes of domestic law, the way the ALRC approached the task – does section 10, and therefore Articles 53, 54 and 55 of ICSID, create an immunity or a waiver of immunity in sufficiently clear terms?

The second point is, does the characterisation of these proceedings – or the relief sought by them – amount to a proceeding for recognition alone? And we have quite a lot to say – I will not do it in summary – we have a lot to say about the definition of recognition proceeding – the way enforcement is understood to relate to recognition. We primarily – as our primary submission on that point, we will be asking your Honours to find that there is no relevant distinction, largely for the reasons given by the primary judge, between recognition and enforcement – and that, if there is something as a standalone concept called recognition, it is what I will describe as bare recognition – that is, an acceptance that an award, properly given, determines the merits of a dispute between parties for all purposes. But the moment one goes beyond that simple recognition of the binding effect of an award and seeks the intervention of a domestic court to "give effect to" or to, in essence, give effect to the award as a judgment of the local court, one has moved into the territory of enforcement. The primary judge's reasons in this regard are very significant.

Finally, we will be – and in any event and independently to everything else that we have said – we will be saying that there is an additional ground of ambiguity that arises in the particular circumstances of this case – because the agreement that is the subject of the search from section 10 is necessarily not just the ICSID Treaty but the treaty which gives rise to the choice to arbitrate in ICSID. Without that, there is no agreement.

The totality of that agreement has now been called into question by the decision of the European Court of Justice in *Komstroy*, which was handed down after the proceedings below. It has found – and there is no debate about this – that it is not possible as a matter of intra-EU law for one State to agree with investors of another EU State to refer to arbitration a matter which involves the binding interpretation of a provision of EU law, in this case the *Energy Charter Treaty*. We do not, and expressly do not, take any jurisdictional point. That is, we do not before your Honours say the lack of – the European Court of Justice's finding that there is no jurisdiction in the ICSID tribunal means that the award cannot be recognised in this country. That was not a point taken below in relation to an earlier but similar decision known as *Achmea* and we do not take the point today.

What we do say is that the decision of *Komstroy* is an additional and powerful indication that there is a lack of certainty, and ambiguity surrounding the proposition that by entering into the *Energy Charter Treaty* Spain has agreed with all other domestic courts of States parties to ICSID that decisions, whatever their basis, will not be the subject of an immunity claim for the purposes of recognition and enforcement. As I said, that is the last point I will come to in the oral argument and it is a standalone point.

GLEESON J: How do you ask this Court to take into account *Komstroy*? Is it just a matter of the reasoning of the judgment?

MR WARD: Yes. It is almost just taking notice of the outcome of *Komstroy* as being an additional indicia of lack of clarity in relation to what is said to be the waiver of immunity.

GLEESON J: I can understand how we might take into account some reasoning process, but how would we take into account an outcome?

MR WARD: Because what the European Court of Justice has done is attempt to reconcile the reasoning or the provisions of two treaties which give rise to a serious doubt as to the jurisdictional basis of ICSID's award. Now, we do not, and we cannot, say to your Honours this Court lacks jurisdiction to consider in any way the outcome of the award. What we can say is that States such as Spain, which is said to have agreed by entering into the *Energy Charter Treaty* to have waived its immunity in this Court in circumstances where as a matter of EU law that is now said to be an impossibility, sheds further lack of clarity and further ambiguity on what is said to be the otherwise asserted waiver of immunity. I think that is all I can say about it by way of an introduction.

GAGELER J: All right. So, are we at this point at paragraph 1 of your outline, or paragraph 2 perhaps?

MR WARD: We are. Paragraph 2, your Honour, yes. We are now at the construction point and I will try not to belabour simple points, and as soon as possible I will try and get to the Law Reform Commission issues. Could I ask your Honours please to turn to volume 1 of the joint book of authorities, to sections 9 and 10, at page 22.

EDELMAN J: Which tab of the book of authorities is this?

MR WARD: Sorry, which tab?

EDELMAN J: For those of us working electronically.

MR WARD: I do not have tabs, your Honour, that is a very good question – tab 3, your Honour.

EDELMAN J: Thank you.

MR WARD: Thank you. Your Honours, the structure of the Act, I think, is uncontroversial but it is important to start with it. Section 9 is a statement of a general immunity from jurisdiction. That reflects – as we will ultimately conclude – the accepted international law proposition. We will be taking your Honours, in due course, to learned text writers, including Professor Crawford's edition of Brownlie which make clear that the starting point is a presumption of immunity and only where a clear exception is found, on our case, does one move away from the presumption. Section 10(2) is one such exception. Again, we will be identifying the historical basis of the section 10(2) exception. It provides that:

> A foreign State may submit to the jurisdiction at any time –

So, including a prior submission to the jurisdiction, as in this case:

> whether by agreement or otherwise –

and without taking your Honours to it, section 3 identifies a treaty as a potential form of agreement. I will not take your Honours to it, but could your Honours note that we draw attention to what was said by this Court in *Firebird v Nauru* – which is in joint bundle volume 3, page 256, paragraphs 79 and 80. It is in relation to the significance of Australia's international obligations in the construction of the provisions of the Immunities Act.

The Court in *Firebird*, we say correctly, also placed emphasis upon the decision of the International Court of Justice in the significant decision of *Jurisdictional Immunities of the State*. That International Court decision is extracted in joint bundle volume 5, at page 1162, paragraphs 56 to 57, behind tab 21. The relevant provision from the decision of the ICJ is the passage that reads, foreign States' immunity:

> is a right to immunity under international law –

and it carries with it:

> a corresponding obligation on the part of other States to respect and give effect to that immunity.

Could I note in passing what is said by the ICJ at paragraph 58, which is that the law of immunity is a procedural law and that the relevant law is that

which applies at the time of the proceedings by which the immunity is threatened, not at some earlier time when a substantive issue may arise. In other words, the law of immunity, we say, that we need to look to, is the law of immunity as it exists today – at the time that the immunity is threatened – or, at least, as my learned junior says, before the first instance judge.

Section 10 – which includes reference to an agreement by treaty – is informed by a number of conventional statutory construction techniques. One, is the legislative history – and I will turn to the ALRC Report in a moment. Before I do that, could I ask your Honours to turn to section 17 of the Act, which is on page 28 of the book 1, on tab 3.

Section 17 is an express provision by which the legislature sought to treat arbitrations to which a foreign State was a party. Now, anticipating something my learned friends are likely to say, it is clear that, for the purposes of Australian law, there may be overlap between the operation of various immunities in this piece of legislation. But there is great significance to section 17 and I will come back to it a couple of times this afternoon. The effect of section 17 is to limit the local jurisdiction of local courts to cases where a foreign State is a party to an agreement to submit a dispute to arbitration but only 17(1) in relation to the supervisory jurisdiction of the court.

Subsection (2) is crucial. Subsection (2) directly addresses the problem that we are dealing with. Subsection (2) provides that if a State "would not be immune" in relation to an underlying transaction for one of the other overlapping reasons, then the foreign State would:

> not be immune in a proceeding concerning the recognition as binding for any purpose, or for the enforcement, of an award made pursuant to the arbitration –

Now, the trigger for section 17(2) is not met in this case, it does not apply, and we will be explaining to your Honours why section 17(2) was inserted and the way the Law Reform Commission thought it was making a deliberate choice in relation to section 17(2) by deliberately rejecting alternatives which had been adopted at that stage, at least in England and perhaps also in the United States.

GLEESON J: Why does 17(2) not apply?

MR WARD: Because the proceedings here are not proceedings for which the State would otherwise not be immune. There is no commercial transaction, in other words, at the heart of this dispute. Then, as your Honour Justice Gleeson indicated at the beginning, of course we then

have another completely separate part of this legislation, Part IV, dealing exclusively with execution, and everybody accepts we are not in that territory because there is, at this stage, no attempt to execute against the particular property, which is the subject matter concern of Part IV. It deals with the well-understood doctrines of restrictive State immunity and the commercial property exception to what would otherwise be immunity from execution against State property.

Could I then turn to the ALRC Report. That is found - - -

STEWARD J: Can I just ask before you move on, in 17(2) the reference to enforcement, do you say that includes execution?

MR WARD: I certainly say it includes execution, and - - -

STEWARD J: So, this would trump the immunity from execution rules?

MR WARD: Yes.

STEWARD J: Yes, I see. Thank you.

MR WARD: My learned junior, quite rightly, draws attention, your Honour, in answer to that question, to section 7(4). I think the answer that I gave is correct, but section 7(4) is relevant to it, that is, you only get to the execution immunities once you pass the gatekeeper of the adjudicative immunities.

STEWARD J: Thank you, both.

MR WARD: Could I ask your Honours to turn to book 10 – I apologise, your Honours, I do not have tab numbers in mine, so I am - - -

GORDON J: What is it you are taking us to?

MR WARD: I am going to take your Honours now to the ALRC Report, tab 64, page 2983. The background of this is that the *Foreign State Immunities Act* came after detailed consideration by the Australian Law Reform Commission, which ended up being Report No 24 – and this is Report No 24.

I will also say that the ALRC was itself informed and heavily influenced by the work of the International Law Commission – which is a United Nations body of experts on international law who had worked diligently for some years earlier, and who had produced draft articles relating to State responsibility and had collected and collated – in answer to your Honour Justice Edelman's, perhaps, question – a great deal of the State

practice and customs surrounding this topic. Starting at page 2983, paragraph 78, and you see that about halfway through the paragraph:

> The concern in this chapter is with submission to the jurisdiction by way of actual consent, whether express or implied, rather than by 'constructive' consent as a substitute for substantive rules of immunity.

So, the focus of the chapter is on "actual consent" and, as I have perhaps indicated in my opening, there is reference to something called "implied consent" and I will come back to what the ALRC thinks it is dealing with. Further down the paragraph:

> The consent may be express – for example a waiver in writing or a statement to the court dealing with the dispute. Or the waiver may be implied from the state's conduct before the court in the particular proceeding.

Now, historically, that had been the basis upon which the common law understood waivers of immunity involving States to have to take place. That is, the historical common law position had always been that for a State to be amenable to local processes of jurisdiction – of adjudicative jurisdiction – somebody like me had to stand up before a court and positively waive the immunity. Time moved on and the Law Reform Commission and the ILC collate a great deal of State practice showing a shift from that definitive practice, but it remained what the Law Reform Commission believed was, correctly, waiver by implication, that is, a State by its conduct – by filing a defence, by taking a positive step in the proceedings in ways we are familiar with - - -

GAGELER J: Mr Ward, can I just understand why we are looking at these statements in the Law Reform Commission Report? Is it just to assist us to understand section 10(2) - - -

MR WARD: Yes, section 10(2).

GAGELER J: Where is it going? Just to let us into the destination point, where are we going with it?

MR WARD: It goes to this, your Honour. It goes to this very simple point. Section 10(2) requires a search for an express agreement. That is, words that are unambiguous that, in the words of the International Law Commission, waive the immunity in "no uncertain terms".

GAGELER J: So, it is the nature of the agreement to which section 10(2) refers?

MR WARD: Yes.

GAGELER J: Okay, thank you.

MR WARD: This is conventional statutory construction, not dealing with anything esoteric.

GAGELER J: Very well.

MR WARD: At the foot of that page, your Honours will see that there is a reference to the three forms of what might be express submission to jurisdiction, international agreement, written contract or a declaration in the particular case.

There is a very significant passage, which I will have to spend just a few moments on, on the next page, 2984 – and I will ask your Honours to bear with me because we have to dart around between two footnotes to make sense of what is happening here. The starting point is that, halfway through the page, halfway through the paragraph, there is a sentence that reads:

> There are a number of multilateral treaties in which parties either explicitly –

That is where the word "explicit" comes from – we do not use it in our submissions, but my learned friends draw attention to it; that is where it comes from:

> There are a number of multilateral treaties in which parties either explicitly or (arguably) impliedly waive foreign state immunity. The most important of these are referred to in Chapter 2.

There is a reference there to footnote 7. Footnote 7, your Honours will see, down the page – and I will do it this way – footnote 7 directs attention to paragraph 13. And your Honours will find the relevant part of paragraph 13 at page 2972 – we go there. In the middle of the paragraph – paragraph 13 started on the previous page, but the important point is here. Halfway through to paragraph at the top of 2972 of the sentence that reads:

> Similar provisions appear –

And then examples are given of the 1982 *Law of the Sea Convention* and *The International Convention on Civil Liability for Oil Pollution*, which:

> requires a state party to 'waive all defences based on its status as a sovereign State' with respect to its liability under the Convention.

And the next sentence is critical, this is the Law Reform Commission:

> On the other hand there are treaties where the negotiators were unable to agree on the scope of immunity with respect to ships –

Footnote 73, which is to the *Marine Pollution by Dumping of Wastes Convention*:

> or more generally.

Footnote 74 in reference to the ICSID Convention. So, the ALRC was all over this issue when they were dealing with this, and they knew that the ICSID Convention was an example of a treaty in which the parties had been unable to agree in the scope of immunity. If I could take your Honours back to 2984, and at 2984, the sentence in the paragraph then continues:

> Thus the legislation –

That is, what became the *Foreign States Immunities Act*:

> Thus the legislation should make provision for submission by way of treaty which may affect both the foreign state itself and its political subdivisions –

That is the federal issue – deals with the question of, even though there may not be a contract for lack of consideration, but then the next sentence:

> The need for clarity and certainty entails that a waiver be express, rather than being to inferred from such things as the fact that Australian law was chosen, or determined to be, the proper law of the contract.

Being, I think, used as a euphemism for the more generalised agreement. And then the last sentence was what became section 17(2):

> the fact that a foreign state has agreed to submit a dispute to arbitration in Australia need not imply a submission to the local courts as to the merits of the dispute.

That is section 17(1). That takes you, your Honours, there is a reference in footnote 8 to paragraph 104. Could I take your Honours to that paragraph, which is at page 3000? The relevant section of this report, at paragraph 104, deals with the supervisory jurisdiction of courts over

arbitrations and an express considered decision was taken by the Law Reform Commission not to recommend the United Kingdom State immunity model which did treat submissions to jurisdiction or acceptance of proper law as being something which could sound in an effect upon more general waivers of immunity.

What happens at paragraph 105 on page 3001 is, in the second sentence, an express treatment by the Law Reform Commission of the topic of recognition and enforcement of arbitral awards as a distinct question. Recognition and enforcement may be:

> sought under established machinery for the recognition and enforcement of foreign arbitral awards.

With footnote 72 being a reference to the New York Convention, but obviously not to ICSID. There is one more thing I would like to say about that, which is that the Law Reform Commission is treating recognition and enforcement as a concept which is unitary, not as his Honour Justice Perram described, a dichotomous, easily distinguishable relationship between recognition and enforcement. Could I ask your Honours to turn to page 3002, at the top of the page, third sentence on that page:

> It is better to deal with the question expressly, and the question is whether a foreign state should be regarded as not immune from proceedings for the registration or recognition of an arbitral award against it in all cases whatever, or only in those cases in which it would not have been immune had the dispute itself been brought before the courts of the forum.

Now, I am sorry that this is so complicated, but that is what becomes section 17(2) of the Act. Over the next two pages, the Law Reform Commission expressly considers what it describes as the wider view and it rejects it. At paragraph 107, it adopts a narrower view which is that section 17(2) is the correct approach, which is why section 17(2) ultimately ends up in the statute.

Now, throughout the treatment of this topic, the Commission is assuming, we say, that recognition and enforcement are one topic and that immunity in relation to that is either an aspect of immunity from execution or, more likely, a quite independent topic as to which there has been no waiver, unless the waiver can be found to be express.

Could I ask your Honours to turn to the decision of this Court in *Firebird v Republic of Nauru?* That is *Firebird Global Master Fund II Ltd v Republic of Nauru and Another* 258 CLR 31. It is extracted in

volume 3 of the joint book, tab 10, and the relevant passage is at page 247. At least, it is the first of the passages to which I wish to draw attention.

STEWARD J: Could you give the Commonwealth Law Report page number, please?

MR WARD: Yes, your Honour, it is 258 CLR 31.

STEWARD J: And the page number?

MR WARD: I am now at page 50.

STEWARD J: Thank you.

MR WARD: Thank you, your Honour. At paragraph 44, in the first third of the page, page 50, or page 247 of the joint book, the Chief Justice and Justice Kiefel, as she then was, say this:

> The construction contended for by Firebird –

And this was a case about, of course, a different type of sovereign immunity:

> The construction contended for by Firebird suffers from the additional disadvantage that it does not give full effect to the jurisdictional immunity of a foreign State which is recognised by international law.

So, we say that in a number of passages in this judgment this Court has quite correctly recognised the influence of international law on the interpretative task of sections 9 and 10:

> Especially this is so where the statute implements or codifies Australia's obligations under international law.

At paragraph 79, which is extracted at page 256 of this volume, page 59 of the Commonwealth Law Reports, their Honours expressly advert to:

> *Jurisdictional Immunities of the State* -

a decision of the International Court of Justice, that being a decision of the ICJ in 2012. That is, the Court is recognising the need for consistency in the interpretation of this statute with the international law upon which it was founded. Your Honour Justice Gageler said at paragraph 134, page 267, page 70 of the Commonwealth Law Reports:

To the extent that there are competing constructions which are equally consistent with the purpose of the Immunities Act, a construction which conforms to customary international law as now explained in *Jurisdictional Immunities of the State* is to be preferred to a construction which would place Australia in breach of customary international law.

Agreeing with the Chief Justice and Justice Kiefel. Now, the reference to the purpose of the Immunities Act is important because the Immunities Act is not intended to detract from the general immunity of a State other than in the restricted ways recognised by the legislature in the natural and ordinary meaning of the text of the Act, consistently with underlying customary international law. International law presumes the immunity. It does not likely find an exception to immunity, and we say, in this case, that means that the section 10 agreement must be one that is clear and not ambiguous.

Could I just ask your Honours to have some regard to what is said at page 91 of the Commonwealth Law Reports, page 288 of the volume, where their Honours Justice Nettle and Justice Gordon make some passing comments about section 17(1) and section 17(2). I do not want to say anything about them but I think it is important your Honours are aware of that passage. It is not inconsistent with anything that I have put.

There is a dispute, I think, between the parties as to what I will call the "inter-temporal problem" – that is, whether rules of international law are to be treated only at the time of entry into the statute – or passage of the statute – or, possibly, at an earlier time of the entry into the treaty – the ICSID Convention. The statutory task, in our submission, requires attention to be directed to customary international law today, but nothing turns on it because the rule of custom has been so well-established for so long – and I will come to the materials – that the requirement of express words has always existed. If anything, the changes have been to the exceptions, not to the underlying rule.

In that regard, could I ask your Honours to turn, briefly, to a very recent decision of the United Kingdom Supreme Court in *Basfar v Wong* [2022] 3 WLR 208. It is in the joint bundle of authorities in volume 4.

EDELMAN J: Tab 13.

MR WARD: I am sorry?

EDELMAN J: Tab 13.

MR WARD: Tab 13, thank you, your Honour, at page 470. I am going to ask your Honours to turn to page 493.

GORDON J: Mr Ward, I do not seek to dissuade you from your course, but I just want to make sure that I understand – this is directed at how we are to read section 10(2)?

MR WARD: Yes.

GORDON J: It is by agreement, or otherwise, is the waiver and you identify, as I understand it, that it is not sufficient – they have been submitted . . . . . knowing that it is party to an agreement. Is, as I understand the way in which you put it, the agreement being the treaty? Is that the way you put it?

MR WARD: I have no difficulty with there being a State being a party to a treaty. The question is, what is the clarity required of the terms of that treaty to fit within section 10.

GORDON J: So, I think that is why - - -

MR WARD: I am sorry, your Honour, the difficulty is, what is required of the clarity of the terms of the treaty to fit within the definition of a section 10 agreement?

GORDON J: I accept that.

MR WARD: Yes.

GORDON J: So, why are we not focusing in the ICSID itself and the adoption into the law of Australia of those relevant articles and the clarity of the language of those articles?

MR WARD: Because – we will spend some time doing that but it is important, in our submission, that your Honours understand the basis upon which the legislature was moving when it recommended passage of the Act in this form and the international law which applies to both the section 10 construction task and, by reason of Article 31(3)(c) of the Vienna Convention, the task of interpreting those provisions of the treaty. Without that customary international law background, one is interpreting the texts and the words of Articles 54 and 55 in, essentially, a legal vacuum, in our submission.

EDELMAN J: Not really. One could do it without any of the authorities that you have referred to and just ask the question of, when something as important as an immunity is to be given up, does one usually expect reasonably clear words to be used?

MR WARD: Yes, your Honour, but if international law – particularly, customary international law – requires that clear words, express words, no uncertain terms are to be used, that is a proposition that affects – and, perhaps, directs – the manner in which the conclusion from the words will be drawn.

GORDON J: We could accept that proposition, and then the question that comes is, do Articles 53 to 55 of ICSID rise to that height?

MR WARD: Yes. If my learned friends want to stand up now and say that that is accepted, that express words are required, I can - - -

GORDON J: Well, it is not express words. It is about certainty. You have just made the proposition.

MR WARD: I used the word "certainty", your Honour , because the International Law Commission uses that phrase as a collection – or the conclusion following its collection of State practice leading up to the preparation of the draft articles.

EDELMAN J: But "certainty" is itself a term of ambiguity, because we would not be here if things were certain.

MR WARD: And that, your Honour, might be the answer, in favour of Spain, to the problem. That is, if it was certain, we would not be here. If it is uncertain, it cannot possibly be said that there is a waiver of immunity in what the International Law Commission describes as "no uncertain terms".

GAGELER J: Mr Ward, you were taking us to *Basfar v Wong*.

MR WARD: Yes, your Honour.

GAGELER J: Is that in the context of expounding the operation of Article 31 of the Vienna Convention, or for some other purpose?

MR WARD: It is for that purpose, your Honour, yes. Very briefly, at paragraph 67, page 493 of the joint appeal book:

> article 31 progresses from terms to context, through any agreements at the time of conclusion of a treaty, to subsequent agreements, subsequent practice, and thence to relevant rules of international law.

Can I draw your Honours' attention to what is said by the Supreme Court in (c):

> "any relevant rules of international law applicable in the relations between the parties" logically indicates that developments in international law subsequent to the conclusion of the treaty are included –

That is the point upon which we seek to draw attention in that passage. That is, it is rules of international law not frozen in time at the point of entry into the ICSID Convention, but rules of international law relevant to the interpretative task at the point of this dispute. That is all I wish to say about *Basfar*.

GAGELER J: But nothing turns on the temporal - - -

MR WARD: We say nothing turns on it. I think my learned friends have a different view.

GAGELER J: Very well.

MR WARD: We are now – I think I have worked my way through to paragraph 5 of the outline. That is, that, as we have said in the outline, Article 31(3)(c) of the Vienna Convention is a rule of systematic integration, that is, it seeks to integrate the terms of a treaty with the customary international of foreign State immunity. We have extracted, your Honours, a very useful and lucid article by Professor Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*. I think, rather than taking your Honours to that text, could I invite your Honours to have regard to the passages that we have extracted, in the interests of time.

JAGOT J: Sorry, what tab was that?

MR WARD: That is in volume 10.

EDELMAN J: Tab 67.

JAGOT J: Tab 67.

MR WARD: Tab 67, page 3069.

GAGELER J: Without going into it, can you put it in a nutshell, what the point is?

MR WARD: Yes, that Article 31(3)(c) is intended to avoid the problem of fragmentation between superior courts and ensure consistency, so far as it is possible, of the rules of particular treaties with the commonly understood basis upon which those treaties would be applied and interpreted.

GAGELER J: I mean, that is really the basis upon which we decided *Firebird*, is it not?

MR WARD: It is. Yes. Your Honours, in our outline, at point 6, I have some material in relation to the rule as it existed historically. I will deal with that in reply if I have to.

Could I turn to point 7 and I will deal with this as briefly as I can. We say that express words – the rule of customary international law – which informs also the Law Reform Commission's use of the word "express" – is that express words are required to waive a foreign State immunity. We have drawn attention to the decision of *Elettronica Sicula SpA (US v Italy)* in the International Court of Justice in which the ICJ said that rules of customary international law, generally – not just immunity – would not ordinarily be taken to have been waived without express words.

We then though draw attention to the decision of the New South Wales Court of Appeal in *Li v Zhou* (2014) 87 NSWLR 20 – it is in volume 6 of the joint book, tab 25.

GAGELER J: Is this to say there is something wrong about this decision?

MR WARD: No. This is one of the various cases dealing with assertions that torture – or systematic torture – by reason of the terms of the Torture Convention itself are inconsistent with an assertion of head of State immunity – in respect of – or other forms of foreign State immunity involving individuals said to have engaged in acts of torture. Your Honour asked, do we take issue with the decision. The answer is yes and no, but only in part.

Could I ask your Honours to turn to page 1333 of the bundle, that is page - - -

GORDON J: Do you accept that in this authority they acknowledge that you would have implied waiver in some circumstances?

MR WARD: In some circumstances, yes, and I will deal with that if I can. First, at the foot of 1333, his Honour Justice Basten at paragraph 37 – relying in part on Justice Charlesworth and Professor Chinkin's well-known article – says that:

> The application of this principle 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.

We say, however the case against us is put, it is in one of those three categories. The assertion against us – and I am going to spend some time with the reasoning of the Full Court and the primary judge, respectfully – but the assertion that is made against the Kingdom of Spain is that there is something in Articles 54 or 55 which does not expressly – certainly does not use explicit words in the way the Law Reform Commission uses the word "explicit" – which waives something as powerful as immunity from the adjudicative processes of Australian courts and, on the analysis, every other court – every other State party to ICSID – wherever those courts may be found. That is, in our submission, either based on ambiguity or uncertain inference. It certainly is not based on anything that is clear. Now, at the top of the next page, his Honour Justice Basten says:

> That is not to say that the absence of express acceptance . . . is fatal: language and context may give rise to a necessary implication –

First, the word "necessary" has work to do, even if his Honour is correct, and we say, with respect, his Honour cites no authority for the proposition there cited. And, to the extent that his Honour has found that there is a possibility of an implication, it can only arise where the words of a treaty leave no other reasonable alternative. So, this is where - - -

GORDON J: I think that is why I raised with you this idea of looking directly at Articles 53 to 55.

MR WARD: I sense your Honour's impatience. I promise - - -

GORDON J: I am not impatient. It just reinforces the importance of looking at the text.

MR WARD: Yes. And, of course, we will look at the text, and I will do it as swiftly as I can. There is probably one more topic to do before I can get to it.

EDELMAN J: You can take us to as many authorities as you like on questions of implication, but, at least for my part, I find it extremely difficult to accept the proposition that words can ever be read or understood without some degree of necessary implication. Every sentence that is spoken, there are implications being drawn by inference in the process of understanding.

MR WARD: Yes. We completely agree, your Honour. Of course, there must be implications that surround every textual passage. The question is: what are those implications, and what level of clarity about the implication is required? We say that that question – which your Honour has quite precisely identified – is a question informed by the surrounding matrix that I have been trying to develop.

GAGELER J: Mr Ward, what are we trying to get out of Justice Basten's judgment?

MR WARD: I am trying to focus on the foot of the page 1333 of the bundle – that is page 30 of the report.

GAGELER J: We have done that.

MR WARD: We have done that. And I am taking some issue with the concept of implication, unless the implication is one that arises with essentially no other possible or plausible result from the treaty, noting that in this case his Honour Justice Basten found no relevant implication in the Torture Convention. Now, we spent some time in our outline considering what Lord Goff says in *Pinochet (No. 3)*. We have done because Lord Goff's treatment of the question of waiver of immunity ultimately is consistent with the position that we seek to advance in relation to the need for either explicit words or words that give rise to no authority by way of implication.

GAGELER J: So, have I understood that Lord Goff expresses the principle of international law correctly, from your perspective?

MR WARD: Yes.

GAGELER J: Where will we find what he said?

MR WARD: Page 1808 of the bundle, that is at volume 7, tab 33, and it is page 215 of the decision. Lord Goff extracts *Oppenheim's International Law* to support his conclusion that waiver of immunity by treaty must be express. Halfway through point C, he correctly notes that the only examples of implication in *Oppenheim's International Law* are those relating:

> to actual submission –
>
> in a practical sense:
>
> to the jurisdiction of a court or tribunal by instituting or intervening in proceedings, or by taking a step in proceedings –

Your Honours might recall I started with that a while ago. Then, there is a reference to the:

> Report of the International Law Commission on the Jurisdictional Immunities of States –

in which Article 7 of the draft articles is extracted – accurately, I might say:

> "A state cannot invoke immunity from jurisdiction in a proceeding before a court of another state . . . if it has expressly consented to the exercise of jurisdiction –

Again, emphasis on "express":

> by international agreement –

or the other examples, which do not concern us.

EDELMAN J: Do the articles on State responsibility contain a provision now to the same effect as the draft articles?

MR WARD: Yes, because what happened, your Honour, is that the draft articles became the UN Convention on jurisdictional immunities – and I am going to turn to that next.

GAGELER J: So, what are we getting from Lord Goff, specifically?

MR WARD: That Lord Goff accepts the need for express; that where implication arises as a concept, it is by way of State practice in a particular dispute – not by the inadvertent or ambiguous use of text. At the top of page 1809, at about point B, when dealing with:

> consent given in advance by international agreement. In respect of the latter, reference is made, in paragraph (10) –

of the commentary of the draft articles:

> to such consent being *expressed* –

with an emphasis:

> in a provision of a treaty concluded by states; there is no reference to such consent being implied.

> The general effect of these passages is . . . consent by a state party to the exercise of jurisdiction against it must . . . be express.

At page 1861 of the bundle, page 268 of the decision, Lord Millett says, in emphatic terms, that the immunity:

> may be asserted or waived by the state, but where it is waived by treaty or convention the waiver must be express. So much is not in dispute.

Of course, that decision was delivered before the decision of the International Court of Justice in jurisdictional immunities and subsequent domestic decisions have taken that approach as well – that is, the approach of Lord Goff and Lord Millett – that one must look for an express waiver of immunity.

Could I then go to the UN Convention, which is what was derived from the draft articles. Your Honours, I am now at point 7(d) of the speaking notes of the outline and I have moved over but do not resile from our references to the European Convention on Immunities as well – and the references there given. This is in volume 9 - - -

GORDON J: Tab 56.

MR WARD: - - - tab 56. Thank you, your Honour. Page 2485, Article 7 of the UN Convention is in, what I hope, is now familiar terms:

> 1. A State cannot invoke immunity . . . if it has expressly consented to the exercise of jurisdiction . . .
>
> (a) by international agreement –

Could I then turn to the commentary of the International Law Commission on what were previously the draft articles, starting at page 2540 of the bundle.

JAGOT J: Sorry, what page was that? I just missed it.

MR WARD: I am sorry. Page 2540 of the bundle, your Honour. At the top of the page, your Honours will see that the commentary is dealing with the various forms of consent dealt with in Articles 7, 8 and 9 of the Part, under the heading, "The relevance of consent and its consequences":

> Paragraph 1 deals exclusively with express consent by a State in the manner –

set out, including:

in an international agreement –

Importantly, we say, under paragraph (3), in the middle of the paragraph:

> the absence of lack of consent on the part of the State against which the court of another State has been asked to exercise jurisdiction is presumed.

I opened on that and we maintain it, that the law – international law – presumes the absence of waiver. Turning next to, if I could, page 2543, which is at paragraph (8) of the commentary dealing with the question of, again, expression of consent. The second sentence of paragraph (8):

> In this particular connection, the consent should not be taken for granted, nor readily implied.

Further down the page:

> There is therefore no room for implying the consent of an unwilling State which has not expressed its consent in a clear and recognizable manner, including in the means provided in article 8.

I have used this phrase a couple of times, but I will now take your Honours to it. At 2547, at the top of the page:

> Customary international law or international usage recognizes the exercisability of jurisdiction by the court against another State which has expressed its consent in no uncertain terms –

That is the distillation of State practice at the time the ILC was working its way through the draft articles which became the UN Convention. Although the UN Convention has not been widely accepted, it has been recognised, including by Professor Crawford in the last edition of Brownlie that he prepared, as representing international law – customary international law.

We have given the reference to that, your Honours, at paragraph 7(d) of our speaking outline. It is at joint book of authorities volume 10, pages 3157 to 3158. Professor Crawford, in those passages, makes reference to some decisions of domestic courts which also now make that proposition clear; that is, that the UN Convention represents a distillation of customary international law. We invite your Honours to have reference, if need be, to the authorities extracted in those passages of *Brownlie's Principles of Public International Law*.

There is a recent decision of the New Zealand High Court in a case which I am sure we will become familiar with before I sit down and when my learned friend sits down, called *Sodexo Pass International SAS v Hungary*. I do not want to talk about *Sodexo* now. It is simply to draw to your Honours' attention that it also assumes and accepts that the UN Convention principles represent a distillation of customary international law. *Sodexo* otherwise found against us on the question of interpretation of 54 and 55, so I will deal with it in that context if I can.

GAGELER J: Where would we find the strongest statement of the interpretive principle that you say emerges from all this material?

MR WARD: In two places, your Honour. Most conveniently, Lord Goff's decision that I took your Honours to. The outcome of *Pinochet (No. 3)* was convoluted, because of the differing approaches by the various members of the Court. But, we say, Lord Goff's principles in that regard is the distillation of international law. And in the passage I last took your Honours to, in the International Law Commission at 2547 of the joint books.

GAGELER J: The reference to "no uncertain terms"?

MR WARD: "No uncertain terms".

GORDON J: It is the next passage over – I am glad you taken us to this. It is the next page which is actually I think the one that:

> The Act's inclusion of waiver by prior written agreement is a change from the common law, which required an unequivocal submission –

MR WARD: I am just not following that, your Honour. Where is your Honour reading from?

GORDON J: On the very next page, 487 – the top of 3172.

MR WARD: I see, yes.

GORDON J: Which reinforces what Justice Edelman put to you.

MR WARD: Yes.

GORDON J: We are really looking to see and construe what Articles 53 to 55 do.

MR WARD: Could I now turn to the provisions, after that lengthy background. I am sorry, before I do that, there is one more set of material that I should go to, which is the history of the ICSID Convention. So, I am now going to deal with the provisions of the Convention. Could I start with Article 28 of what was then the draft Convention under the auspices of the World Bank, which is found in volume 10, page 3027; tab 65.

Could I ask your Honours to start with page 3027 in this volume, which is what was then draft Article 28 of what has become the ICSID Convention – it has now become Article 27. This is a provision to which little attention was given below, but it is significant. Article 28 as it then was – now Article 27 – provides that:

> No Contracting State shall give diplomatic protection or bring an international claim in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration –

but then there is a proviso, "unless":

> unless such other Contracting State shall have failed to abide by and comply with the award –

So, "diplomatic protection" in the conventional sense – that is, the right of one State to make an international claim of diplomatic protection on behalf of one of its nationals is expressly preserved in the circumstance in which a State losing an arbitration – unsuccessfully resisting an arbitration award – fails to comply with an award.

In answer to what your Honour Justice Gageler might want to know, where is this going, this is ultimately going to the proposition that the ICSID Convention recognises – and the drafters of the ICSID Convention understood it as recognising – an inequality between States and investors – that is, it is not something – and the purpose of the Convention is not to have created some level playing field between States and investors whereby investors somehow magically wave a wand and all of the history of the law of foreign State immunity evaporated. It was understood that States were in a privileged position – in international law, and as part of this Convention. I will take your Honours, if I can, through some of these steps to make good the understanding.

So, Article 27 now – then Article 28 – was explicitly, expressly included in the draft Convention. If your Honours then turn to page 3042 – perhaps, I am sorry, I will take your Honours to page 3041 – I apologise – because that is – your Honours will there find what was then Article 57,

which has now become essentially Article 53 – sorry, Article 56 became Article 53, and parts of Article 57 became parts of Article 54.

GAGELER J: Is there a reason why we are going to the drafts?

MR WARD: Yes, because there is no significant change between the drafts and the Convention as enacted, and I am coming to the commentary – and the commentary deals with the drafts, that is why. If your Honours then turn to page 3042, we find Article 58, which is now Article 55:

> Nothing in Article 57 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.

Can I just make clear that Article 57 as it then stood, on page 3041, refers in terms to "enforcement" and "recognition" interchangeably – or at least together – and the language at this point of the negotiation in what was then Article 58 refers to:

> Nothing in Article 57 –

which must, we say, include all references in Article 57, however described, to the processes envisaged by Article 57.

GORDON J: Is that right, because Article 57(3), as it once was, dealt with its execution?

MR WARD: Certainly Article 57, as it then was – now Article 54 – used terms "enforcement" and "execution" within it, but Article 58 preserves, we say, immunity in relation to all of those concepts. The reason we get to that conclusion – leaping ahead in the submissions – is for the very reason that his Honour Justice Perram identified as to the equally authoritative language of the French and Spanish texts with the English text, which do not have the equivalent language in Article 58 – what was then Article 58, now Article 55 – but used the terms "execution" and "enforcement" interchangeably.

Your Honour Justice Gordon, some light will be shed on this by reference to the debates, which I will now come to briefly. Can I ask your Honours to turn to page 3055.

JAGOT J: Is that in the same tab?

MR WARD: Still in the same tab, I think. Now, just to make clear what is happening here, at the footnote on the previous page, page 3054, you will see there is reference to the draft Convention of 11 September, 1964 – that

is the document we were just in. So, now the commentary is about those draft articles. Now, there is a debate on page 3055, which is important, about what was then Article 28 in relation to the right of diplomatic protection that I spoke about. In particular – just over halfway down the page, Mr Broches, the chairman, said the articles, that is:

> Article 28 should be read in conjunction with Article 56 which declares that the parties shall abide by and comply with an award.

So far, so good. But then, significantly for our case:

> In response to a further question from Mr. TSAI, he reiterated that the obligation to comply with an award was a separate question from that relating to the inability of a private investor to enforce through the courts a decision against an unwilling Sovereign State.

So, there is a clear understanding, in our submission, that the parties were acutely aware of the inequality of positions between States and investors, and that, as Mr Broches makes clear, the Article 28 diplomatic protection procedure – which was to be read with the obligation to comply with an award – anticipated that sometimes the State might not. And if a State might not, or did not comply with an award, that did not in any way influence the question of whether the domestic courts were in some way empowered to enforce a decision. And can I stress the use of the word "enforce", not "execute", in that passage of the debates.

Can I then ask your Honours to turn to page 3056. At about halfway down the page, Mr Lopez from Panama raised a different problem, that is, what happens if an investor failed to comply with the award. Mr Broches gave this very enlightening answer:

> the Convention provided means by which non-State parties could be forced through courts to comply with the award –

So, investors who do not comply can be forced to comply, whilst there was no such possibility of enforcement against States. It does not use the word "execution", and plainly recognises the inequality of the position between State and investor. Could I now turn to the provisions of ICSID itself? That is usefully found, or most easily found, in part A, volume 1.

GAGELER J: You had earlier you mention the commentary, you meant this debate?

MR WARD: I meant that. Yes, your Honour. Tab 4, your Honours. So, this is Schedule 3 to the *International Arbitration Act*. Could I ask your Honours first to go to page 135 of the bundle? I will start by drawing

attention to Article 25 of the ICSID Convention. Article 25 directs attention – bearing in mind that I should make clear we are searching for the agreement that section 10 of our Immunities Act is asking us to find. So, we are looking for an agreement, and you find it - - -

STEWARD J: Are we confined to an agreement?

MR WARD: Or a treaty, because treaties are - - -

STEWARD J: Or otherwise?

MR WARD: Or otherwise. Yes.

STEWARD J: So, it is both?

MR WARD: Yes. But I think we have been proceeding on the basis that the only option presently alive is agreement by treaty.

STEWARD J: All right.

MR WARD: I do not think anyone has said anything differently to that against us yet in the case.

Article 25 invites attention to be drawn to the need for there to be a prior agreement or another agreement that is, ICSID itself is not the source of jurisdiction. You are looking for the agreement which the parties to the dispute consent in writing to submit to the Centre, in the middle of Article 25(1). And in this case, that is said to be the *Energy Charter Treaty*, which gave a number of disputes settlement options at the election of the investors, only one of which was an ICSID dispute settlement procedure. Article 27 is what we saw in the draft as Article 28, draft Article 28, the preservation of diplomatic protection remedies, in cases in which States did not comply with the awards.

Could I then ask your Honours to turn to the meat of the dispute, which is at page 145, Article 53, 54 and 55. First, could I invite your Honours to accept this proposition? Article 53, which has always been correctly relied upon by all as the source of the binding nature of the award, does more than that. Because Article 53(1) provides a mechanism for the stay of enforcement proceedings, and if enforcement is stayed pursuant to the appeal or annulment provisions within the Convention itself, Article 53(1) recognises that enforcement is stayed in the sense that it is no longer an obligation of the parties to abide by, or comply with, the terms of that award.

Could I indicate that his Honour the primary judge, we say correctly, adopted the approach that where in this case the award was stayed, the enforcement of the award was stayed for a period of time, the recognition proceedings – as they have now been characterised by the Full Court – could not proceed. That is, the proceedings before the primary judge were unable to proceed because the Article 53(1) procedure had been triggered at some stage and was then lifted. We say that that is a correct understanding of the recognition that the enforcement process in its entirety is essentially inseparable within Articles 53, 54 and 55, it is but one process.

GORDON J: I am sure you are going to take us to this, Mr Ward, but there is a very helpful commentary by Mr Schreuer which would treat, as I understand the commentary, Article 53 in a different way.

MR WARD: Yes.

GORDON J: Do you propose to address that?

MR WARD: I am going to address it. We accept that he has a different view of the effect of Article 54, but what we say about Professor Schreuer's commentary - - -

GORDON J: It is really about Article 53, which is what you are addressing now.

MR WARD: I do not know that his commentary on Article 53 differs from what I have just put. Could I take that in a little while, your Honour, if I may?

GORDON J: Yes, of course.

GAGELER J: While we are on Article 53 and the words that you are stressing, what are the relevant provisions of the Convention being referred to at the end of Article 53(1)?

MR WARD: There are annulment provisions, your Honour, in Articles 50, 51 and 52. There is no appeal as such, so there is annulment and rectification anticipated in Articles 50 through to 52. So, Article 50 is an interpretation provision, parties can request interpretation of the award. Article 51 permits requests for revision of the award on the basis of some new fact that decisively affects the award.

GAGELER J: So, each of these provisions allow for the tribunal to order a stay?

MR WARD: That is right.

GAGELER J: That is what is being referred to at the end?

MR WARD: That is what is being referred to. I do not want to belabour the point but we say it is consistent with what we say is the scheme of the Convention. Now, our first construction point, which is independent of the Article 55 argument, is that the text of Article 54, in light of what we have identified as the history surrounding this provision, does not itself give rise to any statement of waiver of immunity.

So, self-evidently, and I think without dispute, Article 54 does not expressly deal with a topic of waiver. If it arises at all, in our submission, it arises only by reason of what can be the implication said to arise from the purpose of the Convention as a whole or, alternatively, the reference in it to each contracting State recognising as binding and agreeing to enforce the pecuniary obligations.

There is a couple of things to say about that. The first is, we say, that is an obligation upon States positively to recognise as binding and to enforce pecuniary obligations, but it is not an agreement in any sense by States that they waive their entitlement to assert a sovereign immunity before the courts of any other State.

GLEESON J: That is an obligation imposed on Australia, relevantly.

MR WARD: Yes. In this case it would be relevantly an obligation imposed on Australia. If Spain had somebody approach Spain with an award, it would be an obligation upon Spain. That is precisely the construction that we put on Article 54. That is, we say, consistent with the inequality of the playing field that I earlier draw attention to, in the sense that investors, if they approach a State and seek enforcement of the award, the State is obliged to recognise that award, but subject to immunity. If a State approaches another State with an award, identifying the inequality very frankly, no question of sovereign immunity or foreign State immunity would arise and the State in whose hands enforcement was sought would be obliged to enforce – I am sorry, if an investor – against an investor, that is right.

Could I ask your Honours to have reference to the way Justice Perram treated this in the Full Court. That appears at paragraph 22 of the judgment. Can I say first about paragraph 22, with respect to his Honour, that Article 54(2), in our submission, does not distinguish recognition proceedings from enforcement proceedings, and certainly does not do so "in a way which is dichotomous". In our submission, what Article 54 does is to recognise that there is one obligation upon States to

whom an award is presented. That is, to recognise the award as binding and to enforce the pecuniary obligations.

Now, I said at the beginning, in my opening lines, that the obligation to recognise, which arises either in Article 53, "The award shall be binding on the parties", or as part of the process envisaged by Article 54, which is one process, is an obligation which is met by a recognition that an award conclusively determines a dispute between the parties on the merits. That sounds in a res judicata. It sounds in an issue estoppel. If a party approached Australia and sought to set up a case against, for example, the investors in this case that was inconsistent with the merits of the dispute, the courts of this country would have to recognise as binding the determination on the merits of the dispute. So much flows, not from just the interpretation of this Act – of this treaty – but also by section 33 of the Arbitration Act, to which attention must be paid.

EDELMAN J: Res judicata is a consequence of - - -

MR WARD: I am sorry, your Honour, I missed - - -

EDELMAN J: Res judicata is a consequence of recognition. It does not need to be a consequence of anything more than that.

MR WARD: That is exactly right, that is the point I seek to make. That recognition on its own, if there is such a thing as a standalone concept of recognition – and for the reasons that I will go to in the primary judge, we say that the two in this field are combined or blurred. But if it is capable of being hived off as a recognition-alone concept, then recognition is simply that the award is binding between the parties and determines the dispute on the merits. The moment you step beyond that and seek the enforcement, or a step towards the enforcement of the pecuniary obligations of the judgment as here, and as anticipated in 54(1) of the Convention, you are in the language of enforcement or execution but not recognition alone, if that be a thing.

STEWARD J: Can I ask you a question? I meant to ask this about Article 53. In light of your contention that you have immunity from recognition here, what is the quality, in Article 53 of that which is binding on the parties?

MR WARD: I would answer that, your Honour, in the sense that I just answered Justice Edelman, that is, in the sense of a recognition, the inability to set up as a counterfactual anything inconsistent with the determination of the disputes on the merits.

STEWARD J: But at this stage, you are asserting that we cannot even have the award recognised?

MR WARD: Yes.

STEWARD J: So, that is just the award. How is it binding on your client?

MR WARD: It binds, your Honour, at the very least as a matter of the operation of section 33 of the *Arbitration Act* as between the parties to the arbitration.

STEWARD J: And what follows from that, in your view?

MR WARD: That, at the very least, a res judicata would arise.

STEWARD J: Even though there is no judgment entered into?

MR WARD: Exactly, yes.

STEWARD J: So, a res judicata without a judgment being entered into?

MR WARD: Yes.

STEWARD J: I see, all right.

GLEESON J: Do you accept as one possible interpretation of enforcement in this context that the conversion of the award into a judgment that orders an award debtor to comply with the award?

MR WARD: I - - -

GLEESON J: Converting the award into a judgment that orders an award debtor to comply with the award?

MR WARD: That is enforcement.

GLEESON J: That is enforcement.

MR WARD: That is enforcement, your Honour, yes. And then, we – to be very clear, lest there been doubt about the way we put this, our first argument is that Article 54 – either 54(1) or 54(2) – does not contain within those provisions the language of waiver. And nothing, we say, follows from the text of 54(1) and (2) that can be said to be either expressed, or by obvious and necessary implication, a waiver of immunity. But our second proposition - - -

GORDON J: It depends what you are talking about, waiver of immunity. If you are limited to execution, then that is understandable, because 55 deals with it. So, what are we talking about here in relation to immunity – immunity from recognition?

MR WARD: Yes, we are talking – because what your Honour just put in relation to Article 55, we do not accept in the – we say that the - - -

GORDON J: I see, you have two propositions. You say when it says in Article 55 that:

> Nothing in Article 54 shall be construed as derogating from the law in force . . . relating to immunity . . . from execution.

MR WARD: That extends immunity from enforcement.

GORDON J: And recognition.

MR WARD: And recognition, because recognition - - -

GORDON J: So, I really need that clear, so I just - - -

MR WARD: Yes, that is why I was just trying - - -

GORDON J: One proposition? One proposition.

MR WARD: I was trying to make that very clear. I was trying to do it in these terms. We say that recognition and enforcement are one related concept for the purposes of these articles. It is possible to identify, as a process of characterisation of a particular proceeding, something that might be recognition alone, but recognition would be something that does not proceed to the stage of involvement of a local court.

GORDON J: So, just so I am clear.

MR WARD: Yes.

GORDON J: Article 55, immunity, reference to "execution" includes recognition and enforcement?

MR WARD: Yes, on our case.

GORDON J: That you can have recognition, but whatever it is – whatever that concept is – it does not involve a court?

MR WARD: To the extent that recognition involves a court, it is caught up in enforcement, and enforcement, at least, is caught by the terms of Article 55.

GORDON J: Is that how the argument was put below?

MR WARD: I think so. I did not take the case below, and so I am working on the transcript, but I think that is consistent with the way it was put below.

STEWARD J: So, just so that I understand it; you say there is an element of recognition before you get to court?

MR WARD: There is, if only by the terms of section 33 of our Act. There is a statutory recognition process which does not involve the steps of a court.

GLEESON J: I see. So, you are saying that it is section 33 that gives rise – no. I am not clear on what you are saying is giving rise to a res judicata.

MR WARD: The award gives rise to a res judicata because of the terms of section 33.

GLEESON J: But is a res judicata not a judicially decided matter?

MR WARD: There would be an obligation on an Australian court to recognise, for the purposes of a res judicata defence, the existence and binding quality of an award.

GLEESON J: Because of section 33.

MR WARD: Because of section 33. That would be satisfaction of Australia's obligation to recognise, and it would not trespass on Australia's obligation to recognise the immunity as to enforcement, including recognition that goes beyond that bare fact of recognition of the binding effect of an award.

EDELMAN J: Can I just ask you to be a little bit more precise? I mean, you keep talking about an immunity from enforcement or an immunity from recognition.

MR WARD: Yes.

EDELMAN J: I think what you mean is an immunity from suit. It is an immunity from suit where the suit might involve recognition or recognition

and enforcement, or recognition, enforcement, execution. But it is the process or the suit that you say the immunity attaches.

MR WARD: Exactly, yes. Here the orders that were sought in the suit were orders that we say are in the character of orders for enforcement, and the orders that were ultimately made – certainly by the primary judge but also by the Full Court – also trespass into the language – into the territory of enforcement because they convert the award to a pecuniary judgment enforceable as a judgment of the court that goes beyond what I will describe as bare recognition.

GORDON J: And what is bare recognition?

MR WARD: Bare recognition is the - - -

GORDON J: Bare recognition at two levels - - -

MR WARD: The obligation - - -

GORDON J: Sorry, just – we have two levels. The before court and after suit.

MR WARD: Sorry, before court and after?

GORDON J: Well, you said that there was recognition that did not involve a court and you said there was recognition that did involve a court, and I would like to know what the bare recognition is in both aspects.

MR WARD: Two species of the same thing. An award is binding by reason of section 33 of the Arbitration Act.

GORDON J: Yes.

MR WARD: That is, a statutory recognition by the Commonwealth of Australia of the binding effect of the award, and if a party sought to advance a case before an Australian court that was inconsistent with the merits of the dispute that had been found to be so binding, the fact of the award could be tended - - -

STEWARD J: But that is never going to happen here between these parties, because any claim would be immune from jurisdiction.

MR WARD: Yes.

STEWARD J: So, this so-called pre-court "recognition" is just theory, is it?

MR WARD: It is not theory, your Honour, with respect. It - - -

STEWARD J: It will never happen though; you will never need it.

MR WARD: Well, that may be, but the immunity from - - -

STEWARD J: So, it goes back to what I asked you before: what does "binding" mean, here, in the context of this Convention?

MR WARD: Binding means that the merits of the dispute have been conclusively determined as between the parties.

STEWARD J: And the orders of the tribunal?

MR WARD: I am sorry?

STEWARD J: And what the tribunal directs should happen as a result of the merits being determined?

MR WARD: Yes. Subject to the enforcement immunity then being available to a country in the position of Spain.

STEWARD J: All right.

GAGELER J: Mr Ward, can I just ask, what do you say is the affirmative content of the obligation in Article 54(1) insofar as it refers to the enforcement of pecuniary obligations?

MR WARD: Could I answer that by reference to a decision of the British Virgin Islands' High Court in the case of *Tethyan Copper v Islamic Republic of Pakistan*. It is in volume 7, tab 39, page 1954, paragraph [51]. The answer to your Honour's question is that Article 54(1) imposes on, in that case, Pakistan, as a contracting State, an obligation to allow recognition and enforcement of the award before its own courts. So, here Spain would be obliged, if somebody presented that award to the courts of Spain, it would be obliged to recognise the award subject to whatever Spanish law might say about immunities or otherwise. As the British Virgin High Court found:

> 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.

We self-evidently embrace that passage and its conclusion.

GAGELER J: Well, actually I am not quite sure, then, what you are saying. Here Australia is the contracting State, correct?

MR WARD: Yes.

GAGELER J: What is the obligation imposed upon Australia by Article 54 in respect of the pecuniary obligations imposed by the award?

MR WARD: To recognise awards, your Honour, against Australia.

GAGELER J: To what?

MR WARD: To recognise awards in which Australia is an unsuccessful defendant, and to recognise awards given against investors but not subject to a waiver of sovereign immunity in a particular case to recognise without consideration of immunity questions awards given against foreign States.

GORDON J: Sorry, I am lost. Can you just answer two aspects to me. Is your submission that Article 54 is limited to awards in which Australia is a party?

MR WARD: No. The obligation would be upon Australia to recognise for all purposes as binding an award in which it was a defendant. It is to operate as well to recognise awards that are brought to Australia where a foreign State has unsuccessfully been a defendant, subject to the law of foreign State immunity, and to recognise for all purposes, because immunity does not arise, awards in which investors have been unsuccessful, where there is an award against an investor.

GORDON J: Right. So, to answer Justice Gageler's question, what does Australia have to do? Let us just take the last two examples.

MR WARD: Yes. It has to recognise an award against an investor because no question of immunity arises, and it has to enforce the pecuniary obligations of such awards because no question of immunity arises, but it does not have to proceed to the enforcement of a pecuniary award in relation to an award given against a foreign State; first, because there is no express waiver on our case in Article 54(1) or (2), but secondly, as the second and quite independent part of our analysis, because the Article 55 exception to execution attaches to all of Article 54, and perhaps it is to that that I should now turn.

In relation to – and I am still dealing – for avoidance of debt, I am still dealing with the construction arguments, not the characterisation of the proceedings point which comes later, but could I do this now by reference to the judgments below. Could I start with the judgment of the primary

judge, which is at page 34 of the core appeal book. At paragraph 90, his Honour Justice Stewart deals with the concepts of recognition and enforcement and we say correctly, with respect, identifies that the topics are "closely linked".

His Honour relies upon the work by Professor Briggs in *The Conflict of Laws* and also extracts the decision of the House of Lords in *Clarke v Fennoscandia Ltd* [2007], and we invite your Honours to have regard to what the House of Lords said in the passages there extracted in relation to the relationship between recognition and enforcement. As his Honour identifies – and this is perhaps what I have been ineloquently trying to get to – an award might be capable of recognition without being enforced. So much is made clear by your Honours in *TCL Air Conditioner*.

GLEESON J: So, just stop there. Does that mean that your argument about Article 55 has to overcome that? Is that decision wrong in that respect?

MR WARD: No.

GLEESON J: I see.

MR WARD: We adopt and embrace what his Honour the primary judge says in this paragraph.

GLEESON J: Are you distinguishing between recognition under the statute and recognition by a court?

MR WARD: Yes:

> An award may be recognised without being "enforced" by a court . . . Examples would be where an award is recognised as giving rise to res judicata, issue estoppel, cause of action estoppel or set-off, or –

his Honour gives the example:

> as a claim in an insolvent estate.

I do not know that I would go that far but, as to the earlier propositions, we would have no particular difficulty. His Honour then, at paragraph 91, correctly says that:

> An arbitral award is enforced through the means of the entering of a judgment on the award –

Again, his Honour the primary judge, we say, is completely correct. In fact, we think that our learned friends in their first ground of the notice of contention also assert this proposition that what we are dealing here with, as a process of at least characterisation, is a process of enforcement of the award and we are therefore in the territory of enforcement, not pure recognition.

It is not easy to draw a bright line, we accept, between the concepts of recognition and enforcement. In the decision that his Honour cited, *Clarke v Fennoscandia Ltd,* the House of Lords described the process as treating the claim which was adjudicated as having been determined once and for all. We say that is a correct characterisation of what is meant by recognition and that, as his Honour has said, carries with it legal consequences, some of them quite significant.

Could I then ask your Honours to turn to what the Full Court did, starting at paragraph 22 of his Honour Justice Perram's decision which is at page 81 of the bundle? I am sorry, turn to paragraph 23 at the foot of the page. His Honour Justice Perram, with whom the other members of the Court agreed, describes the second reason for rejecting the principal argument of the Kingdom of Spain as one of characterisation of the proceedings below. The proceedings below were a recognition proceeding. And his Honour then found that:

> Once it was so characterised –
>
> as a recognition proceeding, the dichotomy that his Honour had identified at 54(2) between recognition and enforcement; that is, some bright line between recognition and enforcement proceedings which, we agree with the primary judge in the House of Lords, does not exist. That dichotomy meant that:
>
> > the proceeding in the Court below could not be a proceeding to enforce the award –
>
> but was instead just a proceeding to recognise. And that led his Honour Justice Perram in the Full Court to conclude that Article 55 had no application to recognition proceedings although, for reasons that I will come to, Justice Perram held – and in this we agree with Justice Perram – that the use of the foreign languages and the different terminology of the equally authoritative texts necessarily means that Article 55 applies at least to enforcement and execution, not merely to execution alone. Could I take your Honours to paragraph 95 of Justice Perram's judgment.

EDELMAN J: Just before you do, can I just ask you about 70, 71 and 72. The passage that you have just taken us to where Justice Perram says that

the proceeding was one that was for recognition – as I understand it, to be recognition in contrast with recognition and enforcement and execution.

MR WARD: That is right. Yes.

EDELMAN J: Are 69, 70, 71 and 72 making the same point, or a different point? Is that saying the proceedings – because on one reading of that, it is saying that the proceedings were proceedings just for recognition and – sorry, the proceedings were for recognition and enforcement, but can be now re-characterised as proceedings for recognition.

MR WARD: Yes. So far as I can determine from the transcript, not having appeared below, it appears that the argument was to the effect that the respondent – that is, the investors – had characterised the case – the application – as one for recognition and enforcement jointly. That is something which we think is re-enlivened now on the notice of contention, although I will deal with that once I have heard how it is put.

GORDON J: In relation to that, Mr Ward, it seems, as I read it, that it says at the end of 69 that Spain did not contend that:

> the proceeding could not be characterised as a recognition proceeding –

Is that right? Because that is important for the characterisation question.

MR WARD: Your Honour, we undoubtedly accept without reservation, on our characterisation, that these are proceedings for recognition and enforcement, but not recognition alone, as the Full Court has – the Full Court draws a bright line between something called recognition, something called enforcement and execution on the other hand, and says that Article 55 applies to enforcement and execution, but not to something called recognition.

GAGELER J: Does recognition, in your submission, involve any formal Act?

MR WARD: It need not, but it can in the sense of recognition of the award as having binding effect on the merits.

GAGELER J: And what form could that Act take?

MR WARD: The example that I would give is the defensive use of the award in a sense of being binding and determinative on the merits by way of a res judicata or issue estoppel arising, for the reasons the primary judge gave in the earlier paragraph.

GORDON J: I know you will come to this tomorrow, but in that context will you address the sure analysis of what is recognition and what recognition can constitute as a preliminary step even in a court, which appears at paragraphs 42 and following of the commentary?

MR WARD: Yes, I will do that. Your Honours, there is more to say. I note the time is only just after 4.00, but would that be a convenient time for this afternoon so that I can take on board some of the questions that have flowed today and address them more succinctly tomorrow morning?

GAGELER J: Mr Ward, how much time do you want tomorrow morning?

MR WARD: From where I am now, I will not need more than 30 minutes, maybe 45.

GAGELER J: If you confine it to 45 minutes, then you will be within your - - -

MR WARD: That is what I thought.

GAGELER J: - - - three-hour time estimate.

MR WARD: Yes, yes, I will.

GAGELER J: So, if this is a convenient time for you to pause - - -

MR WARD: It is, your Honour. Yes, thank you.

EDELMAN J: Just before we conclude - - -

MR WARD: Yes, your Honour.

EDELMAN J: Feel free to defer the answer until tomorrow, but my question was actually slightly narrower than the one that you answered, and that was whether or not the Full Court was saying that proceedings before the primary judge were proceedings only for recognition, or whether the Full Court was saying the proceedings before the primary judge were proceedings for recognition and enforcement, but we, on appeal, can now re-characterise them and narrow the case so that it can fit within the dichotomy as proceedings just for recognition.

The reason why the distinction may be important is because if there is an immunity from the whole of the process, and that the process is not a process that is just confined to recognition – in other words, that there is no

immunity from just recognition – then there may be a question as to whether or not that immunity can disappear by the re-characterisation of the case on appeal, if there was, in fact, an immunity that existed all the way through the proceeding.

MR WARD: Yes, yes, I understand the point, your Honour. I do not think the answer is the former, but I would like the check the transcript before I answer. Thank you.

GAGELER J: Very well. The Court will adjourn until 9.15 tomorrow for the pronouncements of orders and otherwise to 10.00 am tomorrow.

AT 4.03 PM THE MATTER WAS ADJOURNED UNTIL THURSDAY, 10 NOVEMBER 2022