HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY S43/2022

BETWEEN: **KINGDOM OF SPAIN**

Appellant

and

INFRASTRUCTURE SERVICES LUXEMBOURG S.À.R.L

First Respondent

ENERGIA TERMOSOLAR B. V

Second Respondent

APPELLANT'S FURTHER SUBMISSIONS

AFTER ORAL ARGUMENT

PART I: CERTIFICATION

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

PART II: FURTHER SUBMISSIONS

A Overview

2. On 11 November 2022, the Court requested that the parties prepare a further supplementary joint book of authorities (**FSJBA**) consisting of authorities relied upon by the primary judge at PJ [89]-[176] (CAB 34-54), and invited the parties to prepare further written submissions addressing in particular the meaning of Art 55 of the ICSID Convention, and the extent to which those authorities shed light on that meaning. These submissions are prepared in answer to that invitation.

3. Nothing in these submissions is intended to derogate from Spain's earlier arguments in its written submission, outline of oral argument, or oral address at the hearing. Those arguments concern *first* the proper interpretation of s10(2) of the Immunities Act (read with the statutory definition of "agreement") which requires express words of waiver or submission (Appellant's Outline of Oral Argument (**App Outline**) [2]). That interpretation of s10(2) of the Immunities Act follows from both the legislative intention demonstrated by the ALRC at the time of enactment (App Outline [2(a)], and by reading the Immunities Act consistently with customary international law of foreign State immunity (App Outline [2(c)]).

4. *Second*, the proper interpretation of the ICSID convention (consistently with VCLT Art 31(3)(c)) also requires reference to customary international law (App Outline [3]-[7]). Spain's case is that Art 54(1) of the ICSID Convention contains no words of waiver or submission to the Australian Courts, or alternatively no express words that would allow this Court to draw the conclusion (as a matter of customary international law) that the effect of the words amounts to any waiver of foreign State immunity (App Outline [11]-[12], read with [10]).

5. *Third*, Spain's case is that the interpretation of Art 53-55 requires the Court to undertake two related steps (in any order): the proper *construction* of Art 53-55 and relatedly the *characterisation* of an application under s35 of the Arbitration Act, as was here made by the Investors (App Outline [13], [17]).

6. Spain considers that the submissions requested by the Court are principally relevant to that *third* part of Spain's argument, and in particular the proper construction of Art 55.

7. In summary, Spain's case is that the primary judge was correct to *characterise* any application (or at least the application in this case ABFM 7) pursuant to s35 of the Arbitration Act, as an application for both "recognition and enforcement" of an ICSID

award (PJ [78], [89]-[94] CAB 30, 34-35): App Outline [13]. That is supported by the authorities to which his Honour referred.

8. However, Spain's case is that the primary judge erred in interpreting Art 55 by failing to find that the immunity from 'execution' preserved by Art 55 was intended to provide a foreign State immunity from the whole process contemplated in Art 54: see e.g PJ [153], [161] (CAB 49, 51).

9. Spain's case in respect of Art 55 immunity has two central parts. The English text itself contains an intertextual reference by which Art 55 applies to Art 54. That is to say, "*Nothing in Article 54"* means the whole of Art 54 and not just Art 54(3) concerning the preservation of forum rules in respect of the "*execution of judgments*". Spain's construction of Art 55 also refers to the overlapping use of "enforcement" and "execution" in the French and Spanish text in Art 53-55, as explained by Perram J at FFC [87]-[88] (CAB 33-34) by reference to Prof Schreuer (App Outline [14]-[17], Transcript 2165-2174, 2326-2331; 2441-2453)

B The authorities referred to by the primary judge confirm the primary's characterisation of the proceedings as involving 'recognition and enforcement'.

10. At PJ [90]-[91] (CAB 34) the primary judge correctly characterised the proceedings as involving recognition and enforcement. As the Primary Judge made clear, that was consistent with this Court's approach in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 (FSJBA 40)

11. In *TCL* French CJ and Gageler J at [23] (FSJBA 59) identified s8(1) of the Arbitration Act as the means by which the requirement in Art 35 of the Model Law that an arbitral award "*shall be recognised as binding"* had been translated into Australian law. That reasoning applies analogously to s33 of the Arbitration Act, giving effect to the acknowledgement in Art 53 that an ICSID award is binding on the parties.

12. Their Honours continued in *TCL* to explain that the purposes for which an arbitral award might be "recognised as binding" included "*reliance on the award in legal proceedings in ways that do not involve enforcement, such as founding a plea of former recovery or as giving rise to a res judicata or issue estoppel*": [23] (FSJBA 59) (emphasis added, citations omitted)

13. Next at *TCL* [24] (FSJBA 59) their Honours identified s8(2) of the Arbitration Act, as the means of enforcement of a relevant (non-ICSID) award in a State Court.[1] Their Honours explained at [24]:

> An appropriate order, although not necessarily the only appropriate order, for the Federal Court to make under s 23 of the Federal Court Act would be an order that the arbitral award be enforced as if the arbitral award were a judgment or order of the Federal Court.

14. Again, that reasoning can be applied by analogy to the context of enforcement of an ICSID award. Section 35 of the Arbitration Act is the enactment of Art 54 of ICSID. Section 35(1), and (3) of the Arbitration Act make clear they are designating Courts for the purpose of Art 54. Sections 35(2) and (4) are enacting the obligation on Australia to *enforce* awards, expressly providing that it be *"enforced in the Federal Court of Australia … as if the award were a judgment or order of that Court"*.

15. Importantly though in *TCL* at [29]-[30] (FSJBA 61), French CJ and Gageler J considered that the difference between the judicial power of the Commonwealth and the authority of the arbitral tribunal required differentiation between recognition of the award as binding pursuant to Art 35 of the Model Law (that is binding in a sense anterior to the invocation of the judicial power of the Commonwealth), and "*enforcement of an arbitral award by a competent court, on application*".

16. French CJ and Gageler J referred (with respect correctly) to the involvement of a competent court as an aspect of enforcement, saying at *TCL* [32] (FSJBA 62):

> The enforcement of an arbitral award by a competent court, on application, under Art 35 of the Model Law is an exercise of the judicial power of the Commonwealth. That is because the determination of an application under Art 35 is always to occur in accordance with judicial process and necessarily involves a determination of questions of legal right or legal obligation at least as to the existence of, and parties to, an arbitral award. Where a request is made under Art 36, determination of an application under Art 35 must also involve a question of whether the party making the request has furnished proof of a ground for refusal. An order of the competent court determining the application on the merits then operates of its own force as a court order to create a new charter by reference to which those questions are in future to be decided as between the parties to the application. That is so for an order dismissing the application just as it is for one ordering that the arbitral award be enforced.

17. That reasoning is equally relevant to the circumstances of an arbitral tribunal convened under the auspices of ICSID. The existence and scope of the authority to make an ICSID award is founded on the agreement of parties, and remains binding on the parties to the

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[1] See also *Uganda v Hi-Tech* (2011) 277 ALR 415, 418 [9] (FSJBA 275), decribing s8(3) as applying in "proceedings to enforce a foreign award" in the Federal Court.

dispute at international law by virtue of Art 53 of ICSID. That is an international law consequence that does not require the invocation of a Court process.

18. But, on Spain's primary case, any application to an Australian court pursuant to s35 of the Arbitration Act seeking to invoke the judicial power of the Commonwealth must amount to enforcement. Any orders made determining the application in respect of a s35 application then, in the words of their Honours in *TCL* "operate of their own force".

19. On Spain's primary case, that is so even if the application only sought declarations of binding effect (what was described in oral argument as "*bare recognition*"). That is because, as this Court explained in *TCL* at [32] (FSJBA 62) the judicial power of the Commonwealth would be invoked even on an application for 'bare recognition' and would still need to be exercised "*in accordance with judicial process and necessarily involves a determination of questions of legal right or legal obligation at least as to the existence of, and parties to, an arbitral award*".

20. That point is made by the decision of the Privy Council (referred to at PJ [90]) in *AEGIS Ltd v European Re* [2003] UKPC 11; 1 WLR 1041 (FSJBA 101). In *AEGIS* the Privy Council was concerned with something akin to a "*bare recognition"* application. In that case, the same parties were subject to two arbitrations with two separate tribunals. *AEGIS* had tried to rely upon the terms of a confidentiality undertaking in respect of the first arbitration to injunct European Re from relying on the first award in the later arbitration. Lord Hobhouse giving judgment for the Privy Council at [9] (WLR 1046B, FSJBA 106) observed a similar distinction to that drawn in *TCL.* That distinction was between on the one hand, the "*function of arbitrators"* stemming from their contractual authority "*given to the arbitrators by the parties' agreed submission to arbitration"*, that required them to *"declare what were the rights and liabilities of the parties and bind the parties by that declaration."* On the other hand, as Lord Hobhouse observed *"Enforcement lay with the Courts"*, that is to say by means of the exercise of judicial power. His Lordship then considered both common law and statutes and internationals conventions that have since facilitated the "*direct enforcement of awards with a minimum of formality but still ultimately requiring the assistance of the judicial system*."

21. In that case his Lordship explained at [13] (WLR 1048A, FSJBA 108) that the result of arbitration is embodied in the award, and "*If the winner is precluded from referring to the award, he cannot <u>enforce it whether as a declaration of his rights or as a monetary award</u>*". That is to say, any application to a Court either for a declaration (a 'bare recognition') or a monetary award, would entail enforcement. Again more emphatically, when accepting the submissions of European Re at [15] (WLR 1048A, FSJBA 108) *"The*

Boyd award has conferred upon them a right which is enforceable by later pleading an issue estoppel. It is a species of enforcement of the rights given by the award just as would be a cause of action estoppel." (emphasis added)

22. Thus his Lordship is expressly alive to the possibility of a Court being asked to recognise a judgment only for its effect as an issue estoppel (and not for any monetary sum), but considers that to be a species of curial *enforcement*.

23. Spain's primary case remains that any like application under s35 of the Arbitration Act to an Australian Court will be one that necessarily involves enforcement even if, as in *AEGIS* mere declaratory relief is sought as one species of enforcement.

24. Spain's case is that Perram J was in error to characterise an application under s35 of the Arbitration Act, as one which at the same time (i) asked a court to adjudicate on application to give a money judgment to reflect pecuniary obligations in the award (see the final form of orders at CAB 111), but (ii) involved recognition only and not enforcement: FFC [23], [96] (CAB 81-82, 100).

25. First, the use of recognition alone to describe the enforcement of pecuniary obligations appears contrary to the express text of Art 54(1) that uses both the words recognition and enforcement, and couples enforcement to the pecuniary obligation. Second, Prof Schreuer's commentary is useful for the construction of Art 53-55, but is not helpful for the subsequent characterisation exercise, as the author was not undertaking the characterisation exercise this Court must by reference to s35 of the Arbitration Act but was instead looking at a high level of abstraction across civil and common law examples.

26. Finally, at very least, the use of "recognition" by the Full Court to describe the process by which a Court gives a money judgment after adjudicating on the existence of, and parties to, an award is at best unsupported by common law authority, and at worst inconsistent with *TCL, AEGIS,* and *Clarke v Fennoscandia* [2007] UKHL 56, [21]-[22] (FSJBA 131)

27. But even if that primary submission is not accepted by this Court, as was explained in argument, Spain's alternative argument is that if this Court were to characterise the proceedings as recognition alone (as the Full Court did) then nevertheless the orders of the Full Court (CAB 111) would need to be set aside to the extent those orders went further than a bare declaration that the award was binding (Transcript 2539-2564).

C The proper construction of Art 55 preserves foreign State immunity from the whole process in Art 54

28. Spain's case is that, even in the English text, Art 55 is couched in terms that apply to the whole of the Art 54 process, and not merely to Art 54(3). Spain's case is that the

English text must be reconciled with the equally authentic French and Spanish texts of the ICSID Convention, as is required by VCLT Art 33(3) and (4) (see FFC [82] CAB 96). The French and Spanish texts should control the meaning of "execution" in Art 55 as overlapping with the equivalent French and Spanish terms for "enforcement" in Art 53 and 54. Perram J reached that conclusion at [87]-[88] (CAB 97-98) by reference to Prof Schreuer's commentary extracted at FFC [88] (CAB 98). That passage of Prof Schreuer is now also extracted at FSJBA 1133-1134.

29. The primary judge reached the opposing view and held that Art 55 refers only to execution in the sense of post-judgment execution against assets (PJ [144] CAB 47).

30. The primary judge at PJ [153] CAB 49 directly rejected Prof Schreuer's reconciliation of the French and Spanish texts. That conclusion was anchored in the perceived "tension" between Prof Schreuer's view that Art 55 cannot be used to thwart proceedings for the recognition of the award PJ [150]-[151] (CAB 48). The primary judge's reason for rejecting that conclusion was that it would mean "*execution has different meanings in Art 54 and Art 55*".

31. But a difference of meaning was not an outcome mandated by the VCLT Art 33(4) analysis. Prof Schreuer's commentary (extracted at FFC [88] CAB 98) concluded that the best reconciliation of the texts was that "'*enforcement' and 'execution' are identical in meaning".* Execution in Art 54(3), and in Art 55 should each be read as referring to the same process (ie enforcement) set out in Art 54. Art 54(3) should be read as applying to Art 54(2), lest Art 54(2) would create a strict and automatic regime that would not enable the operation of local court rules of service, or, for example, a duty of candour on ex parte applications. Art 55 should be read as referring to the Art 54(2) process as it relates to a foreign State. It is the first and only time in Art 53-55 that the words "foreign State" are used. Article 54(1) is only directed to enforcement against either an investor, or against a Contracting State "*within its territories".*

32. The primary judge was confirmed in his view by both the travaux and a number of articles (some of which are footnoted in Schreuer), and the foreign cases.

33. Spain accepts that the conclusions drawn in those authorities are contrary to the construction of Art 55 advocated by Spain in the present case. However, those authorities do not, as commanded by the customary rule embodied in VCLT Art 33(4), try to reconcile the equally authentic foreign texts. Where, as here, "*a comparison of*

the authentic texts discloses a difference of meaning" it is necessary to reconcile those texts.

34. It is clear that none of *LETCO, SOABI* (although admittedly a French language decision), *Benvenuti*, or *Blue Ridge* engage in the VCLT Art 33(4) reconciliation. Those authorities were the subject of written submissions in respect of waiver at AS[91]-[94]; cf PJ[162]-[170]. Caution must be exercised in adopting the reasoning of the US cases, insofar as the legislation in s1605(a)(1) expressly permits "implied waiver" of immunity, and s1605(a)(6) contains an express exception for enforcement of arbitral awards (contrary to s17(2) of the Immunities Act). *Blue Ridge* makes the point of difference obvious (at FSJBA 123-124). The US Court of Appeals, Second Circuit Court's construction of Art 54 is premised upon the implicit waiver of immunity that is the focus of 28 USC 1605(a)(1); the Court was further of the view (at FSJBA 125) that immunity was waived by the "arbitral award exception" in s1605(a)(6) - that being the exception expressly rejected by the ALRC in this country and the topic addressed by s17 of the Immunities Act.

35. As to the *travaux***,** Spain accepts that the primary judge accurately summarises the *travaux* to the extent his Honour referred to it at PJ [118]-[135] (CAB 40-45). However his Honour did not refer to the discussion of Art 27 (then Art 28) and the significance of preservation of diplomatic protection in the event of non-compliance (App Outline [10], Transcript 1241-1363, but especially at 1351-1360). As Smutney makes clear (at FSJBA 361) the continuing role of diplomatic protection was understood as being of great significance to the overall structure of the enforcement provisions. The primary judge noted at PJ [121] (CAB 41) the "*conflicting indications*" as to the preservation of immunity in the *travaux*. Spain's case is that the travaux relating to the drafting of Art 27 most clearly resolves that issue. The primary judge relied principally on the Executive Directors Report at PJ[132] (CAB 44) – which is more akin to commentary after the event with hindsight rather than a record of the preparatory debates.

36. As to the academic commentary, the primary judge was correct to identify that both Australian law and international law recognise a distinction between immunity from jurisdiction (or process) and immunity from execution (against identified property):

see PJ [109], [113] CAB 38-39, and the authorities there referred to, and *Jurisdictional Immunities* [93],[113] JBA 1179, 1185-1186.

37. However, the relevant question is whether as a matter of construction of the ICSID Convention the immunity preserved in Art 55 (in English described as "execution"), is synonymous with the process in Art 54(1) of "enforcement" (in English but *'l'execution'* in French and '*ejecucion'* in Spanish).

38. The Investors appeared, in argument, to retreat to a position of arguing simply that provided the application is not "execution" (Transcript 3516-3535) in the sense of execution against property contemplated by Part IV of the Immunities Act, then the Investors must succeed.

39. Whilst it is certainly true that immunity in relation to execution against particular types of sovereign property is an immunity uniformly accepted (see for eample the discussion in Fox & Webb; FSJBA 1400 and following) that is not an answer to the question of construction posed by Article 55. As was explained at FFC [88] CAB 98, execution is used in a sense that overlaps with enforcement, in the French and Spanish texts, and the immunity that is preserved is to the entirety of the Art 54 process, not merely Art 54(3).

40. The primary judge's reliance on *Dicey, Morris & Collins* [16-189] FSJBA 1697 in support of his Honour's construction of Art 55 is, with respect, misplaced. The statement is only one of generality that the ICSID Convention does not *"affect the law in relation to state immunity from execution*". But that commentary is not grappling with the construction issue as to the interplay between Art 54 and Art 55 at the earlier point of giving judgment on the award. Moreover, the learned authors at footnote 539 cite *AIG Capital v Kazakstan* [2006] 1 All ER 284 (Supplementary JBA 7). But *AIG Capital* at [5] and [7] (Supplementary JBA 11) only records, without reasoning, what had happened in an earlier court to "register" the award, and then the judgment addresses the later (undisputed) form of immunity from execution. It is not an authority addressing whether Art 55 preserved immunity from the more general Art 54 process. In any event, some caution should be exercised about reliance on English cases that are usually enforced (in the sense of the award is "registered") by reference to the exception from foreign State Immunity for matters that relate to the arbitration in s9 of the State Immunities Act (UK). That express exception is in direct contrast to the

legislative choice made in Australian in s17(2) of the Immunities Act- upon the recommendation of the ALRC.

41. Notably, on the question of characterisation, *Dicey & Morris* would seem to support the proposition that any application to a court, whether or not preparatory to pecuniary execution, is an aspect of enforcement (FSJBA 1662 at [16-114]). The learned authors also refer to a species of "recognition otherwise than by enforcement" in what seems to be defensive use of the award as a *res judicata* (FSJBA 1663 at [16-117]).

42. Juratowitch, 'Waiver of State Immunity and Enforcement of Arbitral Awards' (2016) 6 AJIL 199 (FSJBA 1078), undertakes a comprehensive survey of the topic generally, including the relevance of the UN Convention on State Immunity (at 212-216, FSJBA 1091-1095) and other municipal immunities regimes. Juratowitch (at 216, 217 FSJBA 1095-1096) notes the existence of confusion that arises from the use of the terms confirmation, recognition, enforcement, and execution, including internal confusion by authors of academic commentary and legislation alike (ie s35 of the Arbitration Act). He notes at footnote 90 that AJ Van den Berg's 1989 article attempts to reconcile the correct use of terms, but that such attempts are not always consistent. Juratowitch concludes that confirmation and recognition will always relate to immunity from jurisdiction, and execution will always be execution against property. But "[e]*nforcement might relate to either, or both, depending on how the word is being used*" (at 219, FSJBA 1098). At 230 (FSJBA 1109) Juratowitch concludes by reference to *LETCO, SOABI,* and *AIG v Kazaktstan*, that Art 55 has prevented execution against property, and then reasons that the "*specific preservation of immunity from execution does not change the fact, and indeed confirms, that in consenting to ICSID arbitration, states will property be regarded as having waived their immunity from jurisdiction*". With respect, the interpretation that Juratowitch perceived to be "confirmed" is not anchored in a reconciliation of the equally authentic texts as it required by VCLT Art 33(4). It has started from the assumption that execution is being used in singular sense, and not by reference to the French or Spanish terms that overlap with enforcement. The fact that Art 55 has been treated as preserving immunity from execution does not of its own answer Spain's preferred construction in this case.

43. AJ Van Den Berg, 'Recent Enforcement Problems under the New York and ICSID Conventions*'* (1989) 5 Arb Intl 2, 14 (FSJBA 1053) acknowledges that because Art 55 preserves immunity (on the author's case from execution alone) it is necessary

when acting for a private party *"to insist on including a clause explicitly waiving immunity from execution in a contract with a State."* He then records the terms of the ICSID model clause. Importantly, however, the drafters of that clause clearly felt it was necessary to waive not only in relation to execution, but to also include an express waiver in respect of jurisdiction "*hereby irrevocably waives any claim to immunity in regard to any proceedings to enforce any arbitral award rendered by a Tribunal constituted pursuant to this Agreement, including, without limitation, immunity from service of process, immunity from jurisdiction of any court and immunity of any of its property from execution."* That points against the conclusion that Art 54 had already supplied a waiver from jurisdictional immunity, or that Art 55 was only preserving immunity from execution.

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