



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

File Number: S43/2022  
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Registry: Sydney  
Document filed: Form 27F - Appellant's Outline of oral argument  
Filing party: Appellant  
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#### Important Information

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BETWEEN:

**KINGDOM OF SPAIN**

Appellant

and

**INFRASTRUCTURE SERVICES LUXEMBOURG S.À.R.L**

First respondent

**ENERGIA TERMOSOLAR B. V**

Second respondent

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**APPELLANT'S OUTLINE OF ORAL SUBMISSIONS**

## Part I: Certification

1. This outline of oral submissions is in a form suitable for publication on the internet.

## Part II: Outline of Propositions

**The proper construction of s10 of the Immunities Act, as well as relevant customary international law, require express, clear and unambiguous words in a treaty to waive foreign State immunity.**

2. The proper construction of the Immunities Act: s3, 9, 10, 17 (JBA 1/22); AS [42]-[47]:
  - (a) Section 10(2) was intended to reflect a requirement for “express” written agreements: ALRC 24 [78], [79], [13] (JBA 10/2983-2984, 2972);
  - (b) Section 17(2), AS [45]-[46]; ALRC 24 [107] (JBA 10/3002); *Firebird* [205] (JBA 3/288);
  - (c) the Immunities Act ought to be construed, so far as language permits, in conformity with customary international law: *Firebird* [44], [80], [134]; cf RS [29].
3. A treaty or treaties said to give rise to a submission by agreement must be interpreted consistently with Art 31, *Vienna Convention on the Law of Treaties (VCLT)* (JBA 10/2934).
4. Art 31(3)(c) of the VCLT requires regard to be had to the rules of customary international law as a part of the mandatory rule of construction.
5. VCLT Art 31(3)(c) is a rule of systemic integration requiring the interpretation of the terms of ICSID in the context of the customary international law of foreign state immunity at the present time: App Reply [12], *Basfar v Wong* [2022] UKSC 20; [2022] 3 WLR 208 [67] (JBA 4/493); C McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 54(2) ICLQ 279, 282-284 (JBA 10/3069-3073), Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, 433 (JBA 10/3213); AS Reply [12].
6. In any event the rule of customary international law has existed at all relevant times: AS Reply [12]; ILA *Draft Articles* (1983), Art III.A.1 (JBA 9/2468); Institute de Droit International (1892) *Draft Regulations* etc, Art 4(4) (JBA Supp 2/ 290).
7. Express words are required to waive foreign State immunity:
  - (a) States are not taken to have waived rules of customary international law in the absence of express words: (*ELSI*) (*US v Italy*) [1989] ICJ Rep 15, [50]; (JBA 5/961); AS [26].
  - (b) waiver of state immunity requires express (but not explicit) words: AS [27]-[41]; cf RS [18]; *Li v Zhou* (2014) 87 NSWLR 20 [37]-[38] (JBA 6/1333);
  - (c) *European Convention on State Immunity* 1972 Art 2(b) (JBA 9/2370); Explanatory Report [21] (JBA 9/2402); State Immunity Act 1978 (UK), ss1 and 2(2) (JBA 2/179-

180); *Pinochet No 3* [2000] 1 AC 147 at 216-217, 223 (Lord Goff) 268C (Lord Millet) JBA 7/1808-1816);

(d) *UN Convention on Jurisdictional Immunities 2004*, Arts 7, 17 (JBA 9/2485); Crawford, *Brownlie's Principles* 472-473 (JBA 10/3157-3158); *Sodexo Pass International v Hungary* [2021] NZHC 371 at [39] (obiter) (JBA 7/1936-1937);

(e) Other immunities, and the institutional immunity of the UN, require express words of waiver: AS [31]-[32]; *Vienna Convention on Diplomatic Relations 1961* (JBA10/2916); *Convention on the Privileges and Immunities of the UN 1946*, Art II, s2 (JBA 9/2343).

**Any 'agreement' to submit must be found both in the ECT and the ICSID Convention**

10 8. The primary judge and Full Court analysed the "agreement" (consistently with the Investors' case) for the purpose of section 10 of the Immunities Act by reference to both ECT Art 26, and ICSID Convention Art 54: PJ [42], [56], [179]-[180], [184]-[185] CAB 22, 25, 54, 56; FFC [13] CAB 77-78.

9. The ICSID Convention acknowledges that "consent in writing" must be found outside the terms of ICSID: Arts 25 (Jurisdiction and consent in writing), 26 (exclusive remedy). Any alleged agreement only exists at the time the investor submits to arbitration under the ECT and thereby confirms ICSID as the exclusive remedy.

10. ICSID Art 27: the consequence of non-compliance with an award by a State is provided for by re-enlivening diplomatic protection: Art 28 (as it then was) of the Draft ICSID  
20 Convention 11 Sept 1964 Doc 43, and summary of proceedings of Legal Committee meeting 2 Dec 1964 (*History* Vol II 610-611, 763-764, JBA 10/3027-3028, 3055-3056).

**Art 54 of ICSID contains no waiver of foreign State immunity.**

11. Art 54 does not refer to immunity in terms, or at all. It does not use express words of waiver, and in any event is expressly limited to the topic of enforcement by a Contracting State (Spain) "*within its territory*": AS [66]-[75]; cf PJ [182] CAB 55 "*inevitably consented... and waived*".

12. Section 35 of the Arbitration Act gives effect to Art 54 of the ICSID Convention, and applies in different circumstances: against (i) investors; (ii) Australia, or (iii) foreign States.

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**Adjudicative immunity is preserved by Arts 53, 54, 55 of ICSID and the Arbitration Act**

13. Sections 8, 35(2) and (4) of the Arbitration Act are consistent with characterising the Investors' application as one of recognition and enforcement: PJ [90]-[94] CAB 34-35; cf Perram J FFC [23], [96] CAB 81-82, 100; AS [82].

14. But the Full Court was correct to construe Art 54 and the immunity preserved by Art 55 as referring to enforcement: FFC [87] CAB 97-98; AS [76]-[81].
15. Article 53, given force of law by section 32 of the Arbitration Act, limits the obligation to abide by an Award if “enforcement” is stayed. That necessarily precludes any attempt to enliven the Art 54 recognition and enforcement process if a tribunal has stayed an award (PJ [23] CAB 18).
16. Articles 53, 54 and 55 use the terms recognition, enforcement, execution without precision. Properly construed “execution” in Art 54(3) and Art 55 was intended to qualify the process set out in Art 54 – lest it would have a strict effect precluding local court rules in respect of service etc. Art 55 preserves State immunity from the process in Art 54.
17. That is also consistent with the Perram J’s reconciliation of “enforcement”, in the equally authoritative French and Spanish texts FFC [79]-[80], [87] CAB 96-98.

**Alternatively, any “agreement” is at best ambiguous in light of *Komstroy***

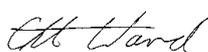
18. When identifying the source of the agreement to submit to the Australian courts (s10 of Immunities Act) this Court would take cognisance of international law decisions interpreting ECT Art 26 as being in conflict with other treaty obligations, and incapable of giving rise to an agreement to arbitrate on the part of Spain in respect of investors from the EU: *Republic of Moldova v Komstroy LLC* [2021] 4 WLR 132 [66] (JBA 7/1906).

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**The Notice of Contention must fail**

19. Success on the appeal means Ground 1 of the Notice would be dismissed.
20. As to Ground 2, the argument based on VCLT Art 33(4) elevates the object and purpose of ICSID to subordinate the French and Spanish texts to the English in a way that does not give proper effect to those texts. The object and purpose of the ICSID does not require the outcome asserted in NOC 2(d). Art 54 operates against Contracting States within their own territory, and Art 27 re-enlivens the possibility of diplomatic protection for non-compliance with an award by a State.
21. Contrary to Ground 3, the Immunities Act is not a law relating to recognition and enforcement of arbitral awards: PJ [202]-[203] CAB 60.
22. Contrary to Ground 4 there is no implied repeal for the reasons given at PJ [206]-[208] CAB 61.

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**C S Ward SC**



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**P F Santucci**

8 November 2022