FEDERAL COURT OF AUSTRALIA

Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. [2021] FCAFC 3

Appeal from:	*Eiser Infrastructure Ltd v Kingdom of Spain* [2020] FCA 157
File number:	NSD 329 of 2020
Judgment of:	**ALLSOP CJ, PERRAM AND MOSHINSKY JJ**
Date of judgment:	1 February 2021
Catchwords:	**ARBITRATION** – international arbitration – applications for recognition and enforcement of awards of the International Centre for Settlement of Investment Disputes (ICSID) under s 35(4) of the *International Arbitration Act 1974* (Cth) ('*Arbitration Act*')
	PRIVATE INTERNATIONAL LAW – foreign state immunity – where foreign state respondent asserts sovereign immunity – interaction between s 9 of the *Foreign States Immunities Act 1985* (Cth) ('*Immunities Act'*) and the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (the ICSID Convention) which is given the force of law by s 32 of the *Arbitration Act* – where s 9 of the *Immunities Act* provides that a foreign state is immune from the jurisdiction of the courts of Australia in a proceeding – where s 10 of the *Immunities Act* provides that a foreign state is not immune in a proceeding in which it has submitted to jurisdiction whether by agreement or otherwise – whether by Art 54(2) of the ICSID Convention the foreign state respondent has agreed to submit itself to the jurisdiction within the meaning of s 10 of the *Immunities Act*
	PUBLIC INTERNATIONAL LAW – foreign state immunity – interpretation of the ICSID Convention – whether the ICSID Convention excludes any claim for foreign state immunity in proceedings for the recognition and enforcement of an award – meaning of recognition and enforcement in Art 54 and execution in Art 55 – where Art 55 provides that nothing in Art 54 shall be construed as derogating from the law in force in any Contracting State in relation to immunity from execution

Legislation:	*Foreign States Immunities Act 1985* (Cth) Pts II, IV; ss 3, 7, 9, 10
	International Arbitration Act 1974 (Cth) Pt IV; ss 32, 34, 35
	Judiciary Act 1903 (Cth) s 39B
	Federal Court Rules 2011 (Cth) r 36.32
	Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Opened for signature 10 June 1958. 330 UNTS 3 (entered into force 7 June 1959)
	Convention on the Settlement of Disputes between States and Nationals of Other States. Opened for signature 18 March 1965. 575 UNTS 159 art 50, 51, 54, 55, 64. (entered into force 14 October 1966)
	The Energy Charter Treaty. Opened for signature 17 December 1994. 2080 UNTS 95 art 26. (entered into force 16 April 1998)
	UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended on 7 July 2006)
	Vienna Convention on the Law of Treaties. Opened for signature 23 May 1969. 1155 UNTS 331 arts 4, 33. (entered into force 27 January 1980)
Cases cited:	*Benvenuti & Bonfant v People's Republic of the Congo* (Cour d'appel, Paris, 26 June 1981) 1 ICSID Reports 368; 108 Journal du Droit International 843
	Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd [2001] FCA 1833; 117 FCR 424
	Coulton v Holcombe [1986] HCA 33; 162 CLR 1
	Lahoud v The Democratic Republic of Congo [2017] FCA 982
	Liberian Eastern Timber Corporation (LETCO) v Liberia, (United States District Court for the Southern District of New York, 12 December 1986) 2 ICSID Reports 383
	Micula v Romania [2020] UKSC 5; 1 WLR 1033
	O'Brien v Komensaroff [1982] HCA 33; 150 CLR 310
	Plaintiff S157/2002 v Commonwealth of Australia [2003] HCA 2; 211 CLR 476
	PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission [2012] HCA 33; 247 CLR 240
	Re McBain; Ex parte Australian Catholic Bishops Conference [2002] HCA 16; 209 CLR 372
	Société Ouest Africaine des Bétons Industriels (SOABI) v Senegal (Cour de cassation, 11 June 1991) 2 ICSID Reports

341; 118 Journal du Droit International 1005

TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia [2013] HCA 5; 251 CLR 533

Thiel v Federal Commissioner of Taxation [1990] HCA 37; 171 CLR 338

Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2) [2012] FCA 276; 201 FCR 535

University of Wollongong v Metwally (No 2) [1985] HCA 28; 60 ALR 68

Kronke H, Nacimiento P, Otto D, Port NC (Eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International, 2010)

Schreuer CH, *The ICSID Convention: A Commentary* (2nd ed, Cambridge University Press, 2009)

van den Berg AJ, *The New York Arbitration Convention of 1958* (Kluwer 1981)

Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	International Commercial Arbitration
Number of paragraphs:	118
Date of hearing:	24 August 2020
Counsel for the Appellant:	Mr I M Jackman SC with Mr M R Tyson
Solicitor for the Appellant:	Squire Patton Boggs
Counsel for the Respondents:	Mr B Walker SC with Mr J Hogan-Doran and Mr C Brown
Solicitor for the Respondents:	Norton Rose Fulbright
Counsel for the Intervener:	Mr K Dharmananda SC with Mr L Firios
Solicitor for the Intervener:	Lipman Karas

ORDERS

NSD 329 of 2020

BETWEEN:	**KINGDOM OF SPAIN** Appellant
AND:	**INFRASTRUCTURE SERVICES LUXEMBOURG S.A.R.L.** First Respondent
	ENERGIA TERMOSOLAR B.V. Second Respondent

ORDER MADE BY:	**ALLSOP CJ, PERRAM AND MOSHINSKY JJ**
DATE OF ORDER:	**1 FEBRUARY 2021**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. Orders 1, 2, 3 and 4 of the orders made on 24 February 2020 are set aside.
3. The appeal is stood over to a date to be fixed for further argument on the form of order for the recognition of the award and otherwise for the disposition of the appeal including on the question of costs.
4. The parties should confer and formulate draft orders providing for the delivery of written submissions on these issues with a page limit of 10 pages per submission.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

ALLSOP CJ:

1 I have read the reasons for judgment to be published of Perram J. I agree with the orders that his Honour proposes. Subject to the following largely by way of elaboration, I agree with his Honour's reasons. The orders to which the applicant was entitled were those that properly reflected the outcome of a recognition proceeding and that did not involve any form of execution contemplated by Arts 54(3) and 55 of the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (the **ICSID Convention**) and Part IV of the *Foreign States Immunities Act 1985* (Cth). I agree that the parties should be heard on the proper form of the order to be made to achieve that outcome.

2 As the reasons of the learned primary judge and of Perram J make clear the principal difficulty at the centre of the debate is linguistic or semantic. That is not to minimise the importance of the question: far from it. The ICSID Convention is not only an important international convention underpinning and supporting the flow of investment capital around the world, but it is also a law of the Parliament by force of s 32 of the *International Arbitration Act 1974* (Cth). The confusion and difficulty capable of being generated by attempts to agree upon legal procedure amongst different nations with different legal systems was evident in the negotiation and creation of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its twenty-fourth meeting (the **New York Convention**) only a handful of years before the ICSID Convention. That negotiation was well known to the negotiators and drafters of the ICSID Convention. The distinguished commentator and practitioner Albert Jan van den Berg has remarked that various of the proposals for the enforcement procedure for article III of the New York Convention created "a Babel-like confusion at the Conference": van den Berg, *The New York Arbitration Convention of 1958* (Kluwer 1981) at 235. Justice Perram refers to the "interpretive carnage" of the discussion dealt with deftly by Professor Schreuer as referred to in Perram J's reasons at [93].

3 Recognition and enforcement of an arbitral award are distinct, but related concepts. The linguistic debate as to whether execution is synonymous with enforcement or is a concept within it need not, it seems to me, be debated or resolved as a question of fixed content, for all purposes. We are dealing here with Arts 54 and 55 of the ICSID Convention. As

Professor Schreuer's authoritative work (*The ICSID Convention: A Commentary* (Cambridge University Press, Second Edition)) makes clear, the related aims of Arts 54 and 55 were clear.

4 Article 54 was intended to be available against both a State and an investor. The inclusion of enforcement in article 54 was to give recourse against the defaulting investor: Schreuer *op cit* at p 1119 [7]. Professor Schreuer says that it "was considered highly unlikely that the State party to the Convention would not carry out its treaty obligations … to comply with an award": *ibid*. Nevertheless, articles 54(1) and (2) and the drafts thereof refer and referred to recognition and enforcement against the parties in equal terms: *ibid*.

5 The preservation of State immunity from execution was taken for granted, though non-compliance by a State with an award was regarded as extremely unlikely: Schreuer *op cit* p 1152 [3]. Article 55 left the matter to the place of attempted execution or enforcement in that sense.

6 The obligation to recognise an award under article 54 was unequivocal and unaffected by questions of immunity from execution. As the reasons of Perram J and as the discussion of Professor Schreuer (*op cit* pp 1128–1134) both show, sovereign immunity from execution (Arts 54(3) and 55) does not arise at the point of recognition.

7 If a proceeding is commenced in a competent court seeking a form of order that will permit or facilitate enforcement of, or execution procedures for, pecuniary obligations imposed by an award as if the award were a final judgment of the court, to the extent they are lawfully available, is that proceeding to be characterised as enforcement or execution (if there be a difference) or as recognition?

8 I do not see that it can be other than a species of recognition and that it cannot be execution. The order (whether in terms of that made by the United States District Court in *Liberian Eastern Timber Corporation (LETCO) v Liberia,* United States District Court for the Southern District of New York (12 December 1986) 2 ICSID Reports 383 or by Foster J in *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276; 201 FCR 535) is one which gives the required recognised status to the award in the domestic firmament: It is to be seen as (recognised as) equivalent to a domestic judgment and is to be enforceable as such. This is a procedure for making the award operative within the domestic legal system. In many countries this is referred to as *exequatur*. It enables steps thereafter to be taken to obtain satisfaction of the pecuniary obligations under the award whether by seizure or sale or sequestration of

property, or appointment of a receiver to property, or otherwise. It is logically and practically anterior to such later steps which can only be characterised as execution. That (as a matter of language) an *exequatur* order, or an order that the award be enforceable as if it were a judgment of the court, or an order that judgment be entered in an amount of the award, could meaningfully be described in a particular context as an order being part of the process of enforcement (at its commencement, or as its point of commencement) does not mean that it is to be characterised as execution, or as a step or a procedure to which Arts 54(3) and 55 speak.

9 The relationship between recognition and enforcement can be seen by the wording of the ICSID Convention itself and the *International Arbitration Act*. Whether the French and Spanish languages have a penumbra or range of meaning in the words *exécution* and *ejecutar* to encompass a non-execution procedure of enforcement would be a matter of evidence. I am unconvinced that the question of resolution of the meaning of the English, French and Spanish texts can be done in ignorance of the content by way of evidence of two of the three languages. But it does not matter. The proceeding which this Court has before it, which is untouched by foreign State immunity from execution, is one to obtain an order equivalent to *exequatur*: a form of recognition of the status of the award as a judgment of the Court or as equivalent to a judgment of the Court so that it may be, henceforth, enforced by way of pecuniary obligations as if it were such a judgment, subject to the Kingdom of Spain's rights of immunity as to execution recognised by Arts 54(3) and 55, as part of the *International Arbitration Act*. In point of characterisation that is a proceeding to recognise the award in respect of which proceeding Spain has, by acceding to the ICSID Convention, submitted to the jurisdiction of the Court and waived immunity under s 10 of the *Foreign States Immunities Act 1985* (Cth).

10 I agree with Perram J that the orders made at first instance may go beyond what is an appropriate reflection of the substantive rights of the applicant under Art 54.

I certify that the preceding ten (10) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Chief Justice Allsop.

Associate:

Dated: 1 February 2021

REASONS FOR JUDGMENT

PERRAM J:

I. INTRODUCTION

11 The Respondents obtained an award against the Appellant Kingdom under the provisions of an international treaty to which Spain and Australia are both Contracting States, the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*. Opened for signature 18 March 1965. 575 UNTS 159 (entered into force 14 October 1966) ('the ICSID Convention'). The dispute between them related to the investment by the Respondents of EUR139,500,000 into solar power generation projects within the territorial confines of Spain. They had been encouraged to do so by a subsidy program put in place by Spain which was subsequently withdrawn. The Respondents alleged that the withdrawal of the subsidy program was a contravention of another treaty, *The Energy Charter Treaty*. Opened for signature 17 December 1994. 2080 UNTS 95 (entered into force 16 April 1998) ('the ECT'). Pursuant to Art 26(3)(a) of the ECT Spain agreed with the other Contracting States to that treaty that it gave its unconditional consent to the submission of the dispute to international arbitration and, by Art 26(4)(a) it agreed to an international arbitration under the auspices of the ICSID Convention.

12 The arbitrators eventually awarded the Respondents EUR101,000,000 with interest. The Respondents then applied to this Court at first instance for a number of orders including an order that Spain pay it that amount with interest. Spain filed a notice contesting the jurisdiction of the Federal Court of Australia on the basis that it was immune from suit as a foreign state under s 9 of the *Foreign States Immunities Act 1985* (Cth) ('the Immunities Act'). It was accepted by both parties that the Immunities Act is the sole basis for foreign state immunity in this country and as such exhausts the common law: *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* [2012] HCA 33; 247 CLR 240 at [8] per French CJ, Gummow, Hayne and Crennan JJ.

13 There is an exception to that immunity where a foreign state has agreed by treaty to submit itself to jurisdiction. The Respondents argued that by acceding to Art 26 of the ECT and, more particularly, to the ICSID Convention, Spain had agreed with the Contracting States to the ICSID Convention (including Australia) to submit itself to the jurisdiction of this Court. The

issues in this appeal really only concern the operation of the ICSID Convention and little reference will be made to the ECT in the reasons which follow.

14 At first instance, it was common ground between the parties that the question of whether Spain had agreed to submit itself to the jurisdiction of this Court was the only substantive issue and would determine the outcome of the application. The primary judge accepted that Spain's accession to the ICSID Convention constituted an agreement by treaty to submit itself to the Court's jurisdiction and his Honour therefore rejected Spain's plea of foreign state immunity. His Honour made the following orders:

(1) The applicants have leave under s 35(4) of the *International Arbitration Act 1974* (Cth) to enforce the award of the International Centre for Settlement of Investment Disputes dated 15 June 2018 as rectified by the award dated 29 January 2019 in Case No. ARB/13/31 against the respondent;

(2) The respondent pay the applicants €101,000,000;

(3) The respondent pay the applicants interest on €101,000,000 from 20 June 2014 to 15 June 2018 at the rate of 2.07%, compounded monthly, and from 16 June 2018 to the date of payment at the rate of 2.50%, compounded monthly;

(4) The respondent pay the applicants US$635,431.70 and £2,447,008.61;

(5) The respondent pay the applicants' costs of the proceeding, save that if any party wishes to vary this order 5 it may apply to do so by filing an interlocutory application to that effect with written submissions of no more than three pages within 14 days of the making of these orders.

15 Spain now appeals from those orders. As in the Court below, the principal question is whether Spain's accession to the ICSID Convention constitutes a submission to the jurisdiction of the Federal Court. Despite that, Spain submitted that Art 26 of the ECT was unlawful under European law. However, this orphan submission does not appear connected to any question relating to foreign state immunity. Spain did not advance an argument at trial or on appeal that this Court should refuse to recognise the Respondents' award on such a jurisdictional basis. I therefore disregard this submission.

16 Returning to the actual issue – foreign state immunity – this turns on the operation of the Immunities Act and is a question of federal statute law. The relevant provisions are s 9 (which

confers the immunity), s 10(1) and (2) (which create exceptions to the immunity) and s 3 (which contains two relevant definitions). They are as follows:

> **3 Interpretation**
>
> (1) In this Act, unless the contrary intention appears:
>
> ***agreement*** means an agreement in writing and includes:
>
> (a) a treaty or other international agreement in writing; and
>
> (b) a contract or other agreement in writing.
>
> …
>
> ***proceeding*** means a proceeding in a court but does not include a prosecution for an offence or an appeal or other proceeding in the nature of an appeal in relation to such a prosecution.
>
> …
>
> **9 General immunity from jurisdiction**
>
> Except as provided by or under this Act, a foreign State is immune from the jurisdiction of the courts of Australia in a proceeding.
>
> **10 Submission to jurisdiction**
>
> (1) A foreign State is not immune in a proceeding in which it has submitted to the jurisdiction in accordance with this section.
>
> (2) A foreign State may submit to the jurisdiction at any time, whether by agreement or otherwise, but a foreign State shall not be taken to have so submitted by reason only that it is a party to an agreement the proper law of which is the law of Australia…

17 The proceeding at first instance was a 'proceeding' within the meaning of the definition in s 3 so the prima facie position was that s 9 afforded Spain the immunity it asserts. Section 9, however, is expressed to be subject to this Act which makes the existence of the immunity defeasible to any exception elsewhere provided for in the Immunities Act. One such exception appears in s 10(1) which extinguishes the immunity of a foreign state where it has submitted itself to jurisdiction. Section 10(2) expands upon that concept by stipulating that a foreign state's submission to jurisdiction may be evidenced by an 'agreement'. The definition of 'agreement' in s 3 clarifies what would otherwise be obvious in the case of a nation state *viz* that its agreement may be evidenced by a treaty to which it has acceded.

18 It is in the light of these provisions that the Respondents submitted below and submit again in this Court that the ICSID Convention is an agreement within the meaning of s 10(2). Two

articles of the ICSID Convention are principally relevant, Art 54 and Art 55. They are (in the English version of the text) as follows:

> **Article 54**
>
> (1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.
>
> (2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.
>
> (3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.
>
> **Article 55**
>
> Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.

19 The Respondents contend that the effect of Art 54(2) is that Spain has expressly agreed that a party with the benefit of an award under the ICSID Convention may apply to a 'competent court' for the recognition of the award and that the Federal Court is such a court. They submit that the maintenance by Spain of an entitlement to rely upon foreign state immunity in a recognition proceeding before a 'competent court' is incompatible with its agreement to Art 54(2). As such, so the argument runs, Spain must be taken to have agreed by treaty to submit itself to the jurisdiction of this Court within the meaning of s 10(2).

20 Spain does not dispute that the Federal Court is a 'competent court' within the meaning of Art 54(2), a path altogether foreclosed to it by s 35(3) of the *International Arbitration Act 1974* (Cth) ('the International Arbitration Act') ('The Federal Court of Australia is designated for the purposes of Article 54'). However, Spain does maintain that it is entitled to rely on the immunity conferred by s 9. Why? There are several steps in this, Spain's principal argument. The first is the contention that the Respondents' proceeding is to be understood as a proceeding to 'enforce' the Respondents' award within the meaning of Art 54(2). Next Spain submits that the word 'execution', where it appears in Art 55, must be understood as including a proceeding

to ‘enforce’ an award (the reasons for this are, to an extent, complex and discussion of this issue may be postponed for now). In any event, it matters because if Spain be correct, it has the consequence that Art 54(2) must be read so that it does not derogate from any Australian law relating to the immunity of Spain from enforcement in that sense. So construed, Spain submits that Art 54(2) cannot evidence any agreement on its part that it will not rely upon its immunity under s 9. Since Art 54(2) should not be construed as amounting to such an agreement in the case of a proceeding to enforce an award, it must follow – says Spain – that it cannot have agreed either to waive its immunity by accession to Art 54(2) or, consequently, to have submitted itself to jurisdiction within the meaning of s 10(1) and (2). Since that exception is not engaged it must therefore remain entitled to rely upon the immunity conferred by s 9.

21 Alternatively, as its secondary argument, Spain submits that even if this Court concludes that ‘execution’ in Art 54(3) and Art 55 does not mean ‘enforcement’, nevertheless, the question of the proper construction of Art 55 can only be definitively resolved by the International Court of Justice. Until it is so determined by that court, Spain submits that its own interpretation of ‘execution’ is at least arguable so that its accession to Art 54 and Art 55 cannot represent its clear agreement to submit to jurisdiction.

22 I would reject Spain’s principal argument for two cumulative reasons. The first relates to the proper construction of Art 54(2). It distinguishes recognition proceedings from enforcement proceedings and, further, does so in a way which is dichotomous. Whether Art 55 applies to proceedings for execution only (as the Respondents submit) or enforcement as well (as Spain submits), it has no application to recognition proceedings. In the context of such a proceeding Spain has agreed with Australia that the Respondents may apply to the Federal Court for recognition of their award. In proceedings of that kind, it must necessarily be taken to have agreed not to rely upon the immunity from suit it would otherwise have as a foreign state. In recognition proceedings there is necessarily therefore an ‘agreement’ by Spain to submit to jurisdiction within the meaning of s 10(2); the exception to s 9 provided for by s 10(1) is consequently engaged; and the immunity conferred by s 9 can no longer be extant.

23 The second reason for rejecting Spain’s principal argument relates to the correct characterisation of the Respondents’ proceeding in the Court below. The proceeding in the Court below was a recognition proceeding. Once it is so characterised, the dichotomy in Art 54(2) observed in the preceding paragraph necessitates the conclusion, contrary to Spain’s

submission, that the proceeding in the Court below could not be a proceeding to enforce the award within the meaning of Art 54(2). Being one it could not be the other. Since Art 55 has no application to recognition proceedings, Art 54(2) operates in accordance with its tenor as an agreement by Spain to submit to the jurisdiction of this Court as a competent court under Art 54(2) in a recognition proceeding.

24 It is true that some of the relief sought by the Respondents at first instance was not in the nature of recognition, but even so the primary judge granted relief on the basis that the Court was recognising the award. There is no basis, therefore, upon which one may conclude that the primary judge erred in declining to accept Spain's plea of foreign state immunity in relation to a recognition proceeding, although there may be an issue as to whether the relief granted achieved that outcome.

25 It is implicit in that conclusion that the question of whether 'execution' includes 'enforcement' in Art 54 and Art 55 is, whilst interesting, irrelevant. Regardless of what execution and enforcement mean in Art 54 and Art 55 they are both distinct from recognition.

II. ARTICLE 55 DOES NOT APPLY TO RECOGNITION PROCEEDINGS

26 Recognition, enforcement and execution are concepts which predate and exist outside of the ICSID Convention. Simplistically, recognition refers to the formal confirmation by a municipal court that an arbitral award is authentic and has legal consequences under municipal law. Enforcement goes a step further. It refers to the process by which a successful party seeks the municipal court's assistance in ensuring compliance with the award (as recognised) and obtaining the redress to which it is entitled. Execution refers to the formal process by which enforcement is carried out. Importantly, these concepts are not hermetically sealed from one another. See generally Kronke H, Nacimiento P, Otto D, Port NC (Eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International, 2010) pp 7-8.

27 However, those general concepts do not decide the issue before the Court which turns instead on the text of the ICSID Convention. What does it say? Art 54(1) requires Contracting States to recognise an award. Art 54(2) permits a party having the benefit of an award to apply to a competent court for its recognition. It also permits a party to apply for the enforcement of the award by application to a competent court. As such the article explicitly contemplates two distinct applications to the competent court (or other authority). If enforcement in Art 54(2) were synonymous with recognition this distinction would appear to be pointless. The article

therefore recognises the distinction between the two applications and requires applications for both to be made to the 'competent court'. For completeness, I note that Spain did not submit, in response to the Respondents' contention that theirs was an application for recognition, that Art 54(2) did not contemplate such an application on its own.

28 The distinction between the two applications is also reflected in the substantive provisions of Art 54(1). Article 54(1) imposes two obligations on a Contracting State, first, recognition of the award as binding and, secondly, implicitly in relation to an award which has been recognised, enforcement of the pecuniary obligations imposed by the award 'as if' it were a final judgment of a domestic court. (The curiosity that the federal part of Art 54(1) appears not to be limited to the enforcement of pecuniary obligations may be noted but is irrelevant in this case since only enforcement of pecuniary obligations was granted.)

29 Article 54(1) and (2) show that a party may seek recognition of an award without seeking its enforcement. It is also possible, as Art 54(2) shows, for a party to apply for enforcement of the award without applying for its recognition. In such a case, however, it will be implicit in any enforcement step thereafter approved by the court that the award will have been recognised or, to put it another way, whilst a party seeking recognition need not formally seek enforcement under Art 54(2), any application for enforcement, if granted, will necessarily entail recognition. Article 54 does not contemplate the enforcement of awards which have not been recognised.

30 It is in light of that distinction therefore that one then turns to Art 55. Focus on Art 55 is appropriate because it is the keystone of Spain's argument. It is only the status of that article as a non-derogation provision which equips Spain to submit that Art 54(2) does not necessarily involve a submission to jurisdiction.

31 Spain's contentions about Art 55 turn on the meaning of the word 'execution' which it says includes the concept of 'enforcement'. I explain below why I accept this submission and reject the Respondents' contention that the concepts of execution and enforcement in Art 54 and Art 55 are distinct. However, the fact that 'execution' includes 'enforcement' is of no assistance to Spain in a proceeding which seeks recognition. Because recognition is necessarily distinct from enforcement or execution, the distinction between execution and enforcement is irrelevant in the present litigation.

32 What does matter is that Art 55 does not refer to recognition and there can be no warrant for reading it as if it did. To the contrary, were it read as applying to a recognition proceeding the

exception in Art 55 would consume in its plenitude the entirety of Art 54, at least where an award *against* a Contracting State is concerned. Why? Amongst other things, Art 54(1) requires each Contracting State to recognise an award as binding. But the recognition required by Art 54(1) is not immediately self-executing, except perhaps in the case where enforcement is sought in the territory of a Contracting State which is one of the parties to the award. Apart perhaps from that case – which is of no present relevance – Art 54(1) is instead contingent on the making of the application referred to in Art 54(2), which is to say, only on the production of the certified copy of the award to a competent court (or other authority) does the binding effect of Art 54(1) come into play. Their combined effect is that a Contracting State is required to recognise an award when a certified copy of the award is furnished to the competent court (or other authority).

33 If 'execution' were construed to include 'recognition' in Art 55 there could be no circumstance in which the recognition application expressly contemplated by Art 54(2) could ever be made against a Contracting State. This would render the recognition procedure in Art 54(2) perpetually unavailable against a Contracting State and would have the consequence that the obligation to recognise an award in Art 54(1) as binding could never be engaged. In every case against a Contracting State, the competent court in Art 54(2) would be met with a plea of foreign state immunity and recognition would be unavailable. Such a construction of Art 54(2) and Art 55 would be perverse.

34 For completeness, two matters should be noted. First, this problem does not arise where a Contracting State seeks to enforce an award against an investor. In such a case, no question of foreign state immunity ever arises. However, whilst this may be accepted, it does not provide any plausible justification for reading Art 54(2) and Art 55 so as to have the otherwise empty operation implied for them by Spain's construction. Secondly, it may be noted that the fact that recognition is wholly distinct from enforcement (including, if necessary, execution) is also reflected in the heading to Section 6: 'Recognition and Enforcement of the Award' where Art 54 and Art 55 are contained.

35 For those reasons, Art 55 does not apply to recognition proceedings and is unavailable to modify the meaning of Art 54(1) and (2) in relation to such proceedings. It is true, as Spain correctly points out, that there are some parts of the ICSID Convention where 'enforcement' must include 'recognition'. For example, Art 50 (which is contained in Section 5 of Chapter IV) provides a mechanism by which the parties may submit a request for interpretation

of an award to the Tribunal which rendered it via the Secretary-General of ICSID. Art 50(2) allows the Tribunal considering that request to 'stay enforcement of the award'. I accept the submission, in this context, that 'enforcement' would include an application for recognition. A similar jurisdiction is conferred by Art 51 in relation to the discovery of facts after the award which are thought decisively to affect the outcome. Article 51(4) gives the Tribunal an analogous power to stay the award pending resolution of that issue. Again, I would accept that in that context 'enforcement' must extend to recognition.

36 However, relevantly both those provisions occur in Section 5 whereas Art 54 and Art 55 occur in Section 6. Section 5 is entitled 'Interpretation, Revision and Annulment of the Award' and deals with the powers and functions of the Tribunal in relation to those matters. The powers and functions of the Tribunal in relation to awards rendered is clearly a matter entirely distinct from the recognition and enforcement of such awards by a Contracting State. In the latter context, it is clear from the text of Art 54 that 'enforcement' cannot include 'recognition' for the reasons I have already given. Admittedly this conclusion results in the word 'enforcement' having a broader meaning in Section 5 than it has in Section 6 but this construction fits comfortably with the respective subject matter of each Section and is, by far, a preferable outcome to a construction of 'enforcement' in Section 6 which neuters the central obligation imposed on Contracting States to recognise an award as binding.

III. HAS SPAIN SUBMITTED TO JURISDICTION BY ACCESSION TO ART 54?

37 The question then arises whether Art 54(1) and (2) constitute Spain's agreement to submit to the jurisdiction of the Federal Court in a recognition proceeding. The answer is that they do. Art 54(2) is in terms Spain's agreement with Australia that the Respondents may apply to a competent court for recognition and, as noted above, the Federal Court has been designated as a competent court for the purposes of Art 54. Spain has therefore agreed to submit to the jurisdiction of this Court in relation to a recognition proceeding. Article 55 can have no impact on that conclusion because it has no application to recognition proceedings.

38 The view that a plea of immunity is not available in recognition proceedings is well-established and Spain's contentions are notable for their heterodoxy: *Benvenuti & Bonfant v People's Republic of the Congo,* Cour d'appel, Paris (26 June 1981) 1 ICSID Reports 368 at 371; 108 Journal du Droit International 843 at 845 ('*Benvenuti*'); *Société Ouest Africaine des Bétons Industriels (SOABI) v Senegal*, Cour de cassation (11 June 1991) 2 ICSID Reports 341; 118 Journal du Droit International 1005 ('*SOABI*'); *Liberian Eastern Timber Corporation*

(LETCO) v Liberia, United States District Court for the Southern District of New York (12 December 1986) 2 ICSID Reports 383 at 387-388 ('*LETCO*'); *Lahoud v The Democratic Republic of Congo* [2017] FCA 982 at [20] per Gleeson J ('*Lahoud*').

The proceeding at first instance was a recognition proceeding

39 The preceding conclusion will lack utility unless the proceeding at first instance was relevantly a recognition proceeding. What is a recognition proceeding? Art 54(2) does not stipulate how an application for recognition is to be made and the question is therefore governed by the relevant domestic law of the Contracting State in which recognition is sought. Procedures differ between jurisdictions.

40 Many civilian jurisdictions have a procedure known as exequatur where a foreign judgment or arbitral award is recognised by a domestic court. After the grant of an exequatur a party may subsequently seek execution. It is established in relation to the ICSID Convention that recognition under Art 54(2) may be afforded by the grant of an exequatur: *Benvenuti* at 845.

41 In the United States the practice which appears to have been adopted by the United States District Court for the Southern District of New York in relation to recognition under Art 54(2) involves an order in this form (*LETCO* at 384):

> …it is ORDERED that the annexed arbitration award, as rectified, in favour of LETCO be docketed and filed by the Clerk of this Court in the same manner and with the same force and effect as if it were a final judgment of this Court…

42 In Australia, the position is not entirely clear. However, it appears that the recognition under Art 54(2) may be afforded by entry of judgment on the award or by making an order granting leave to enforce the award 'as if it were a final judgment' of this Court. This emerges from the domestic legislation governing ICSID awards. In Australia the ICSID Convention is given effect to by ss 31 to 38 of the International Arbitration Act which between them constitute all of Part IV of that Act. Section 35 provides:

> **35 Recognition of awards**
>
> (1) The Supreme Court of each State and Territory is designated for the purposes of Article 54.
>
> (2) An award may be enforced in the Supreme Court of a State or Territory with the leave of that court as if the award were a judgment or order of that court.
>
> (3) The Federal Court of Australia is designated for the purposes of Article 54.

(4) An award may be enforced in the Federal Court of Australia with the leave of that court as if the award were a judgment or order of that court.

43 The interpretation of this provision is not altogether without difficulty. It does not, in terms, confer an entitlement on a party to seek recognition of an award but instead refers only to enforcement. On the other hand, it is headed 'Recognition of awards' so that there is a degree of tension between the heading and what the provision appears to say.

44 Other provisions in Part IV are relevant to the ascertainment of the meaning of s 35(4). Section 34 proceeds on the assumption that s 35 deals with both the recognition and enforcement of an award. It operates to make Part IV an exhaustive code in relation to the recognition and enforcement of an ICSID award. It provides:

34 Investment Convention awards to prevail over other laws

Other laws relating to the recognition and enforcement of arbitral awards, including the provisions of Parts II and III, do not apply to:

(a) a dispute within the jurisdiction of the Centre; or

(b) an award under this Part.

45 If s 35 does not apply to recognition proceedings under Art 54(2) then the effect of s 34 will be to prevent the possibility of recognition of the award as an award to which the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*. Opened for signature 10 June 1958. 330 UNTS 3 (entered into force 7 June 1959) ('*New York Convention*') or the *UNCITRAL Model Law on International Commercial Arbitration* (as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended on 7 July 2006) ('*UNCITRAL Model Law*') (which are also given effect by the International Arbitration Act) might otherwise apply.

46 So construed, s 35 would appear to achieve an outcome contrary to the plain words of Art 54(2). Article 54(2) requires Australia to provide a mechanism for a party to apply to a competent court for recognition of an award. This is relevant because, in general, a construction of the International Arbitration Act which gives effect to Australia's international obligations should, if possible, be preferred. As Gleeson CJ stated in *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2; 211 CLR 476 at 492 [29]:

> where legislation has been enacted pursuant to, or in contemplation of, the assumption of international obligations under a treaty or international convention, in cases of

> ambiguity a court should favour a construction which accords with Australia's obligations.

47 This is particularly so in light of s 32 which gives the ICSID Convention the force of law in Australia:

> **32 Application of Investment Convention to Australia**
>
> Subject to this Part, Chapters II to VII (inclusive) of the Investment Convention have the force of law in Australia.

48 If the word 'enforced' is not construed to include 'recognised' then s 35(4) will not give effect to the recognition procedure required by Art 54(2). The heading to s 35 and the specification by s 34 that Part IV is a code with respect to the recognition of awards under the ICSID Convention strongly suggest that Parliament intended s 35 to include an entitlement to apply for recognition. Such a conclusion would involve reading 'enforced' in s 35(4) as including 'recognised', a meaning which it can in my opinion comfortably accommodate.

49 On the other hand, having concluded that 'recognise' and 'enforce' are distinct concepts in Art 54 there is perhaps something anomalous about concluding that they are not distinct for the purposes of s 35, particularly where Part IV is evidently intended to give effect to the ICSID Convention. This consideration may tend in the opposite direction to suggest that 'enforced' should not include 'recognised'.

50 However, if that were correct, it would leave the recognition procedure unaccountably missing from the provisions which itself would infringe Australia's obligations under Art 54. On balance, it seems to me that the preferable construction of s 35(4) is one in which 'enforced' includes 'recognised'.

51 That conclusion makes it unnecessary to consider whether the Court would, in any event, have jurisdiction arising from the conferral on this Court of jurisdiction in matters arising under a law of the Parliament by s 39B(1A)(c) of the *Judiciary Act 1903* (Cth). Here the thinking would be that s 32 gives the force of federal statute law to Art 54(2) itself which thereby becomes a surrogate federal law under which a federal matter may directly arise. The same reasoning supports this Court's jurisdiction in the recognition of arbitral awards under the *UNCITRAL Model Law*: *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* [2013] HCA 5; 251 CLR 533 ('*TCL*') at 543 [2] per French CJ and Gageler

J and 561 [52] per Hayne, Crennan, Kiefel and Bell JJ. There would appear to be no relevant distinction insofar as federal jurisdiction is concerned between the position of this Court under the *UNCITRAL Model Law* as explained in *TCL* and under the ICSID Convention.

52 There may, however, be a difficulty with this approach which relates to s 34. To the extent that s 39B(1A)(c) confers a jurisdiction on this Court to entertain a recognition proceeding, it may be arguable that it is one of the 'other laws' referred to in s 34. If so, it may not be an available source of jurisdiction. In light of the manner in which I would construe s 35(4), however, it is not necessary to form a view on that issue.

53 I therefore conclude that the Court has jurisdiction to entertain a recognition proceeding under s 35(4). So to conclude does not, however, assist in identifying the procedural features of a recognition application. The question of procedure will be governed by the domestic law of the Contracting State in whose territory recognition is sought. Nevertheless, Art 54 and Art 55 provide some guidance on the legal consequences of recognition and from these consequences some guidance, limited perhaps, may be gleaned as to its procedural features.

54 The purpose of recognition is to give effect to the stipulation of Art 54(1) that each Contracting State (here, relevantly, Australia) will recognise the award as binding. Because it is binding, a party may seek to enforce its pecuniary obligations as if they were a final judgment of a court of that State: Art 54(1). But the binding effect of an award may also be asserted by other non-pecuniary methods which include, as French CJ and Gageler J observed in *TCL* at 552 [23], a plea of former recovery or the assertion of a res judicata or issue estoppel. Further, the binding effect extends not only to the pecuniary obligations imposed by the award but also to its non-pecuniary terms.

55 What Art 54(2) requires of a Contracting State is a procedure which will result in relief which, if granted, will have those kinds of effects. Furthermore, the procedure must be such as to enliven in a party with the benefit of an award an entitlement to apply for the kind of 'execution' referred to in Art 54(3). As the primary judge, with respect, correctly observed the expression 'the laws concerning the execution of judgments' can only refer to judgments which exist (for completeness, I reject out of hand Spain's submission that an application for a pre-trial asset seizure order can be described as a form of execution). But this does not mean that Art 54 requires that recognition should be afforded only by means of the entry of a judgment. It is instead merely to be understood as a reference to a body of law.

56 What Art 54(1) does require, however, is that the enforcement of an award's pecuniary obligations will proceed 'as if it were a final judgment'. So viewed, Art 54(3) then furthers this fiction. The award-cum-as-if-judgment is to be executed (or enforced – it really does not matter) by applying to the award the law which ordinarily applies to the execution (or, on Spain's submissions, enforcement) of judgments.

57 So whatever recognition constitutes as a matter of local procedure it nevertheless must be sufficient to enliven the execution (or, as Spain submits, enforcement) procedures which Art 54(3) expressly contemplates. And, as noted, it must also be sufficient to enable the entry of pleas of res judicata and the like.

58 As a matter of Australian law, it is possible that one way of achieving these outcomes is to enter judgment in the amount of the pecuniary obligations imposed by the award. Such a judgment has all the procedural qualities just described. It can give rise to a plea of res judicata, it can be used by way of a plea of prior satisfaction and its existence fits tidily into a legal framework that contains the 'laws concerning the execution of judgments' referred to in Art 54(3). If execution is available against the other party to the award it will be a straightforward procedural matter to apply for it if a judgment has been entered.

59 The statutory framework governing arbitral awards under the *New York Convention* is contained in Part II of the International Arbitration Act and is materially different to the provisions dealing with the ICSID Convention under Part IV. Nevertheless, it seems well-established in relation to such awards that recognition is afforded by the entry of a judgment: *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276; 201 FCR 535 at [71]-[72] per Foster J (and the cases there collected). It seems difficult to identify any point of principle which would justify a departure from that practice in the case of ICSID awards.

60 On the other hand, it is also possible that recognition may also be granted by means of an order that the award be recognised 'as if' it were a judgment of the Federal Court. This was the approach of French CJ and Gageler J in *TCL* at 551 [21] in relation to awards under the *UNCITRAL Model Law* although their Honours were clear that this was not the only procedure available ('An appropriate order, although not necessarily the only appropriate order … would be an order that the arbitral award be enforced as if the arbitral award were a judgment or order of the Federal Court': at [24]). Gleeson J used this 'as if' form of order in *Lahoud* which is the same procedure adopted by the United States District Court for the Southern District of New York in *LETCO*.

61 In my view, either approach may be procedurally open and, if that is the case both would be essentially equivalent to an exequatur. My tentative preference would be for the former procedure. The process of relying upon an award in another court for the purpose of establishing a res judicata is likely to be more straightforward, at least from a practical perspective, if recognition takes the form of a Federal Court judgment rather than the possibly more perplexing order for non-initiates that the award has the effect as if it were a judgment of the Federal Court. Similar practical considerations may suggest that an application to this Court's registry for enforcement remedies such as a writ of execution may run more smoothly if what is entered is an actual judgment.

62 The relief which was sought by the Respondents at first instance was as follows (figures in points 4 and 5 as they appear in the original):

> **Orders sought**
>
> The Applicants, being parties to an arbitral proceeding, apply to the Court to enforce an award under section 35(4) of the *International Arbitration Act 1974*.
>
> The Applicants seek the following orders:
>
> 1. Pursuant to s 35(4) of the *International Arbitration Act 1974* (Cth), the Applicants have leave to have the award of the International Centre for Settlement of Investment Disputes in Case No. ARB/13/31 against the Respondent dated 15 June 2018 as rectified by the Award dated 29 January 2019 enforced as if it were a judgement of the Court.
> 2. A declaration that the Respondent has breached Article 10(1) of the Energy Charter Treaty by failing to accord fair and equitable treatment to the Applicants' investments.
> 3. The Respondent pay the Applicants EUR101,000,000.00.
> 4. The Respondent pay the Applicants interest on the amount of EUR101,000,000.00 from 20 June 2014 to 15 June 2018 at the rate of 2.07%, compounded monthly, and interest from 16 June 2018 to the date of payment at the rate of 2.07%, compounded monthly.
> 5. The Respondent pay the Applicants USD635,431.70 as a contribution to the payment of their share of the costs of the proceedings and GBP2,447,008.61 as a contribution to the payment of their legal representation costs and expenses.
> 6. Pursuant to s 43(1) of the *Federal Court of Australia Act 1976* (Cth), the Respondent is to pay the Applicants' costs of this proceeding as agreed or assessed.

63 Some of this relief seems not to have been pressed, although elements of prayers 1, 3, 4, 5 and 6 can be seen in the orders eventually made by the trial judge set out at [14] above. In any event, the primary judge reasoned that the appropriate way to recognise an award was to enter

judgment on it: [78]. Despite that conclusion, this was not the order his Honour in fact made. Instead, by order 1 his Honour granted the Respondents leave under s 35(4) of the International Arbitration Act to enforce the award against Spain and by order 2 ordered it to pay EUR101,000,000 rather than entering judgment in that sum (together with ancillary orders). There are problems, with respect, with both of these orders although it is difficult to see that the trial judge could have been expected to apprehend what they were, given the way the case was presented.

64 Although the grant of leave under s 35(4) in order 1 partially tracks the language of that provision, it omits the words 'as if the award were a judgment' of the Federal Court. Further, on its face it leaves open the possibility that enforcement may now proceed without any further consideration of the issues arising under Art 55. It is plain from the trial judge's reasons that he intended no such operation for the order but it is an operation it appears to have.

65 The requirement of order 2 that Spain pay the Respondents EUR101,000,000 may also be seen as an order requiring Spain to do something, whereas under the process of recognition what occurs is that the award is put on the same footing as if it were a final judgment, no more and no less.

66 In my view, orders 1 and 2 should be set aside as they do not reflect a correct approach to recognition. It is possible that order 2 should have been in the form of a judgment for EUR101,000,000 or the 'as if' order contemplated in *TCL*. I would set aside order 3 and order 4 (which relate to interest and the costs of the arbitral proceeding) for the same reason.

67 I would hear the parties further on what form recognition should take. There was no argument before this Court on appeal on this issue and I apprehend the same was true before the trial judge. This has the procedural consequence that the appeal must be allowed to permit the correction of the form of recognition although the substantive conclusion of the trial judge that Spain was not entitled to rely upon a plea of foreign state immunity stands vindicated.

68 On appeal, Spain submitted in writing that the Respondents had not put their case below as being one purely concerned with recognition but had instead characterised the application as one for recognition and enforcement. It submitted that it was too late for the Respondents now to submit that it was purely a case of recognition. Spain did not seek to elaborate on how the trial was conducted. The Respondents claim that a submission was made to the trial judge at T66.1ff that the relief sought was in the nature of recognition. There it was said:

> And coming back to your Honour's question about the "or", there's nothing in even the French or Spanish version that talks of immunity from recognition.
>
> One way in which this court recognises international law as being – as having the status of a judgment of this court is by making a declaration that it does have that status, and the question is what flows from that.

69 I incline to the view that this was not sufficient to raise the point. However, it makes no difference. The issue is directly raised by ground 3 of the Respondents' amended notice of contention and was addressed in their written submissions in the Full Court. Although Spain submitted that it was too late for the matter to be raised it did not point to any species of procedural prejudice occasioned to it by the alleged late raising of the matter. Further, it did not make any substantive submission as to why the proceeding could not be characterised as a recognition proceeding although it had an abundant opportunity to do so in this Court.

70 Generally speaking a party is bound on appeal by the way their case was put at trial which reflects the public interest in the finality of litigation: *University of Wollongong v Metwally (No 2)* [1985] HCA 28; 60 ALR 68 ('*Metwally (No 2)*') at 70 per the Court. Nevertheless, it has also been accepted that where a question of law is raised for the first time on appeal but proceeds on the same proven or admitted facts, it may nevertheless be expedient in the interests of justice to entertain it: *O'Brien v Komesaroff* [1982] HCA 33; 150 CLR 310 ('*O'Brien*') at 319 per Mason J. *O'Brien* initially confined the principle's application to ultimate appellate courts but it is now accepted that it extends to intermediate courts of appeal as well: *Coulton v Holcombe* [1986] HCA 33; 162 CLR 1 at 8 per Gibbs CJ, Wilson, Brennan and Dawson JJ. Further, as *Metwally (No 2)* shows at 71, in some cases it may appear that a decision was made not to run a point at trial in which case the party will be held to their election save perhaps in 'exceptional circumstances'.

71 In this case, the point is not so much the raising of a fresh ground but rather the narrowing of a ground pursued at trial. On the assumption that the Respondents did not squarely put their case at trial as one only of recognition, it is clear nevertheless that they did put it as one of recognition and enforcement. What they now wish to say is, therefore, not by way of supplement but rather in the nature of a subtraction. On the assumption that such a narrowing is governed by the principles in cases such as *Coulton v Holcombe* (a proposition I doubt), nevertheless I would still grant leave if necessary to pursue the matter in that fashion. The issue is solely whether the relief granted by the primary judge can be legally characterised as recognition within the meaning of Art 54(2). This involves no evidence and is purely a question

of law. Further, it is a question of law decisive of this appeal and of considerable importance for the operation of the ICSID Convention. The ground also reflects the way the self-same issue has been approached by other courts considering the operation of Art 54(2): *Benvenuti*, *SOABI*, *LETCO* and *Lahoud*.

72 The conclusion that the proceeding was a recognition proceeding means that Art 55 has no application. Consequently, for the reasons I have already given, Art 54(2) operates as an agreement by Spain not to raise any immunity it would otherwise have and hence to submit itself to the jurisdiction of the competent court referred to in that article. There is therefore an agreement within the meaning of s 10(1) and (2) and immunity is not available under s 9. However, for the reasons I have given, the appeal must be allowed on a limited basis so as to hear further argument on the form that recognition should take.

IV. SPAIN'S SUBSIDIARY ARGUMENT: MEANING OF ART 55 NOT CLEAR UNTIL DECLARED BY THE INTERNATIONAL COURT OF JUSTICE

73 I have explained above that the dispute as to whether 'execution' in Art 55 includes the concept of enforcement is beside the point because the proceeding was a recognition proceeding to which Art 55 does not apply. Whether, in that circumstance, 'execution' includes 'enforcement' in Art 55 is presently therefore of no moment. The opinion of the International Court of Justice on the issue, whilst definitive, would be definitive on an issue which does not matter. Spain's secondary argument therefore passes wide of the mark.

74 However, out of deference both to the submissions of the parties on the issue as well as the careful, detailed and cogently reasoned analysis of the primary judge, it is appropriate to make some short remarks about it.

75 Both the primary judge and I arrive at the same ultimate forensic destination which is the proposition that Art 55 has no application to Art 54(2) in relation to the proceeding which is actually before the Court. However, the journeys which we take to get there differ, although they are each no less scenic.

76 As I have explained, I see Art 54(2) as drawing a distinction between recognition, on the one hand, and enforcement and execution, on the other and read Art 55 as not applying to the former. Since I characterise the present proceeding as a recognition proceeding this leads me to conclude that Art 55 has no application to the proceeding.

77 The trial judge perceived a different dichotomy, that between recognition and enforcement, on the one hand, and execution, on the other. His Honour construed Art 55 as only applying to execution. Since he characterised the proceeding as one for recognition and enforcement this led him to the same conclusion that Art 55 did not apply to the present proceeding.

78 The central proposition underpinning his Honour's conclusion was that 'execution' could only refer to steps which took place after judgment. This followed from the reference in Art 54(3) to 'the laws concerning the execution of judgments'. That law took as its point of departure its application to judgments which necessarily existed. In that sense, 'execution' had to involve a reference to procedural steps which in domestic law post-dated judgment. In his Honour's view, the current proceeding was a proceeding for recognition and enforcement of the award and what was sought in it necessarily antedated the existence of a judgment. Consequently, because 'execution' in Art 55 was only concerned with post-judgment procedural steps it necessarily followed that it could not apply to pre-judgment steps such as, and including, an application for recognition and enforcement. Since it could not apply to the present proceeding, it followed that Spain had submitted itself to jurisdiction by Art 54(2).

79 Had it been necessary to address this issue, I would have respectfully differed from the primary judge although only with considerable diffidence. I would have done so because I accept Spain's submission that 'execution' and 'enforcement' are essentially synonymous in Art 54 and Art 55 and conclude, further, that they both bear the broader meaning of 'enforcement'. Spain's reasons for this turned on the French and Spanish texts of the treaty which are equally authoritative. The problem in a nutshell is this: wherever the word 'execution' appears in the English text, the French word 'l'execution' appears in the French text and the Spanish word 'ejecutar' (or variants of that word) appear in the Spanish text. By itself this does not cause a problem. What does cause a problem, however, is that wherever the word 'enforce' (or 'enforcement') appears in the English text, the self-same words - 'l'execution' and 'ejecutar' - appear in the French and Spanish texts.

80 Contrary to the Respondents' submissions, one does not need to know what these words mean to see the nature of the problem to which they give rise. The English text observes a distinction between 'execution' and 'enforcement' because the words are different but this distinction is not extant in the French and Spanish texts.

81 The rules applicable to the interpretation of the ICSID Convention are, in substance, to be found in the *Vienna Convention on the Law of Treaties*. Opened for signature 23 May 1969.

1155 UNTS 331 (entered into force 27 January 1980) ('Vienna Convention'). Although as a matter of treaty law the Vienna Convention does not apply to the interpretation of the ICSID Convention (the conclusion of the ICSID Convention having preceded the inception of the Vienna Convention and the Vienna Convention having no retrospective application: see Art 4), it makes no difference as the treaty is 'no more than an indorsement or confirmation of existing practice': *Thiel v Federal Commissioner of Taxation* [1990] HCA 37; 171 CLR 338 at 349 per Dawson J and 'the interpretation provisions of the Vienna Convention reflect the customary rules for the interpretation of treaties' (at 356 per McHugh J).

82 There was no dispute between the parties that the ICSID Convention had been done in English, Spanish and French. The Convention's testimonium records this fact: 'DONE at Washington, in the English, French and Spanish languages, all three texts being equally authentic…'. Article 33(1) of the Vienna Convention provides that where 'a treaty has been authenticated in two or more languages, the text is equally authoritative in each language'. Article 33(3) then provides that the 'terms of the treaty are presumed to have the same meaning in each authentic text' which is to an extent in tension with the linguistic imperatives of Art 33(1). This tension is resolved in Art 33(4) which requires that where a difference in meaning emerges which cannot otherwise be resolved by ordinary principles of interpretation 'the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.'

83 The disjunct between the Spanish and French texts, on the one hand, and the English text, on the other, can be resolved in only one of two ways. Either the English text can control the French and Spanish texts or they can control the English text. If the English text is to control then one must import into the French and Spanish texts the distinction observed in the English. In the French text, this would require giving 'l'execution' the meaning of 'enforce' or 'enforcement' where those words appear in the English text. But where the word 'execution' appears in the English text, the word 'l'execution' would need to bear the meaning of 'execution'. A similar approach would need to be taken to the word 'ejecutar' in the Spanish text.

84 The upshot is that the meaning of 'l'execution' and 'ejecutar' would, on this construction, vary by reference to their location within Art 54 and Art 55 and to the corresponding wording of the English text.

85 If, on the other hand, the Spanish and French texts control the English text then this necessitates eliding the difference between 'execution' and 'enforcement' and, in effect, making them

synonymous. On this reading, the meaning of both 'execution' and 'enforcement' become a single concept which corresponds with 'l'execution' and 'ejecutar'. Since 'execution' is narrower in meaning than enforcement (which can, as a matter of ordinary language, include 'execution') the upshot is that 'execution' should be expanded in meaning to encompass 'enforcement'.

86 The problem may now be seen. If 'execution' in Art 55 means 'enforcement' in this broad sense, then Art 55 applies to any proceeding for enforcement in that sense. Of course, the primary judge characterised the present proceeding as a proceeding for recognition and enforcement. To avoid the conclusion, therefore, that Art 55 applied to the present proceeding (so characterised) his Honour therefore had to reject the second construction (where the French and Spanish texts control the English text) and embrace the first (where they do not).

87 This is Spain's complaint. It submits that this is not a construction which, as a matter of interpretation, should be preferred. I agree. It is much more likely that 'execution' and 'enforcement' should be given the same meaning to bring them into line with the Spanish and French texts than it is that the words 'l'execution' and 'ejecutar' fluctuate in meaning depending on where they appear. The linguistic violence involved in the former approach is much less than that involved in the latter.

88 This is also the view of Professor Schreuer in *The ICSID Convention: A Commentary* (2nd ed, Cambridge University Press, 2009) at pp 1134-1135 (citations omitted):

> Art. 54(1) uses the word "enforce" twice. Art. 54(2) also refers to "enforcement". By contrast, Art.54(3) uses the word "execution" twice. This would suggest that the words "enforcement" and "execution" stand for different concepts. But a look at the equally authentic French and Spanish texts of the Convention yields a different picture. The French text consistently uses "l'exécution" five times in paras. 1, 2 and 3 of Art. 54. Similarly, the Spanish text is consistent in using "ejecutar" and "ejecuten" in Art. 54(1), "ejecución" in Art. 54(2) and "ejecutará" and "ejecución" in Art. 54(3). This means that a distinction between enforcement and execution cannot be sustained on the basis of the French and Spanish texts.
>
> The three texts are equally authoritative and must be reconciled. Under Art. 33(4) of the 1969 Vienna Convention on the Law of Treaties, when a comparison of the authentic texts discloses a difference of meaning which cannot be reconciled by the Convention's other rules on interpretation, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted. In the case of Art. 54 of the ICSID Convention, the interpretation that best reconciles the three texts would appear to be that the words "enforcement" and "execution" are identical in meaning. This is more plausible than the alternative of giving different meanings to the same French and Spanish words in paras. 1 and 2 on the one hand and in para. 3 on the other.

> The Convention's drafting history yields no information that would explain this inconsistency. The answer may simply lie in the circumstances of the work on this Article which took place under great time pressure and is described by *Broches* as being characterized by great fluidity, sometimes bordering on confusion.

89 Although Professor Schreuer refers here to the Vienna Convention, at footnote 65 to the second of these paragraphs he observes 'The Vienna Convention on the Law of Treaties is not, technically, applicable to the ICSID Convention but reflects customary international law on this point.' An essential part of the view expressed in the passage above turns on the application of the rules of treaty interpretation applicable to inconsistent multilingual treaties. However, as Professor Schreuer also noted there is a lively academic debate about the distinctions which may exist between enforcement and execution in Art 54. Professor Schreuer collects this commentary in footnotes 70 and 71 at p 1135. Whilst he thought that none of these uses of 'enforcement' and 'execution' were inherently incorrect, he thought it best to stay away from this issue and focus on their shared distinction from recognition. This is a view, with respect, which I share.

90 The primary judge analysed the material in these two footnotes closely and concluded that they supported a distinction in Art 54 between execution and enforcement: [156]-[161]. I agree with his Honour that this material supports that distinction. However, none of the articles in question deals with the problem identified by Professor Schreuer that the Spanish and French texts are incapable of supporting any such distinction. Although I can see in English plain differences between the concepts enforcement and execution, this Court is bound to apply the customary rules reflected in the Vienna Convention to the interpretation of a treaty in three different languages. If the material in the two footnotes had addressed itself to the tri-lingual problem identified by Professor Schreuer then I might take a different view. However, none does and they do not therefore seem to engage with the point he made.

91 The primary judge apprehended at [150]-[152] that there was a tension with Professor Schreuer's view that execution and enforcement are interchangeable for the purposes of Art 54 but that Art 55 only applies to the immunity from execution. At p 1153 Professor Schreuer said this:

> Art. 55 only applies to immunity from execution. It does not apply to immunity from jurisdiction. The question of immunity from jurisdiction does not arise in the context of the Convention.
>
> …

> Therefore, State immunity cannot be used to thwart proceedings for the recognition of an award.

92 The primary judge expressed the tension in these terms (at [152]):

> This view stands in tension with Professor Schreuer's view, articulated in respect of Art 54, that enforcement and execution are the same and interchangeable. If they were, then Art 55 would not have the limited scope that he gives to it, unless execution has different meanings in Arts 54 and 55. That is not a satisfactory solution.

93 I respectfully differ from this. At p 1136, having surveyed the interpretative carnage to which the words 'enforce' and 'execute' have given rise Professor Schreuer said this:

> The best that can be suggested at this stage is that great caution should be exercised when using the word "enforcement" in the context of Art. 54. This Commentary uses "enforcement" as meaning the same as "execution" unless indicated otherwise.

94 In light of that observation, I do not see that the tension the primary judge perceived arises. The principal reason for this is the caution urged in the first sentence. The Professor's view is that insofar as Art 54 is concerned one should exercise great care in the use of the word 'enforcement'. The second sentence is a more general statement ('This Commentary') and contrasts with the first sentence ('in the context of Art 54'). I do not think that Professor Schreuer was suggesting anything so straightforward as the statement that enforcement and execution were synonymous in Art 54.

95 That having been said, one can well understand why the primary judge was driven to his approach of giving the different meanings to 'execution' and 'enforcement'. Since his Honour had characterised the proceeding as being for recognition and enforcement it followed that to have concluded otherwise would have resulted in Art 55 applying to the proceeding and his Honour thereafter being forced to accept Spain's dyspeptic plea of foreign state immunity. Having surveyed the background to the ICSID Convention and the *travaux préparatoires* his Honour was abundantly satisfied that such an outcome could not be fairly said to have been contemplated by anyone. His Honour's thorough analysis of that material is unanswerable and indeed Spain did not attempt to submit to the contrary. I agree with his Honour's conclusions to which I have nothing useful to add.

96 But I do not think that the interpretative pressure his Honour felt was real. In fact, what really mattered about the proceeding was that it was a recognition proceeding to which, on no view,

could Art 55 apply. So viewed, the flawed outcome which his Honour correctly perceived flowed from Spain's submission could be evaded even if 'enforcement' and 'execution' were treated synonymously in the English text.

97 So in that way I differ respectfully from the primary judge. However, as I have already explained, it leads me to the same conclusion which his Honour reached.

98 A number of matters should be noted for completeness. First, I reject the Respondents' submission that what Professor Schreurer said about this problem was inconsistent with what he had said about Art 55. As I have explained, there is no contradiction. The Professor was of the view that Art 55 did not apply to proceedings for recognition. That is this case. Secondly, it is not necessary to consider Spain's submission that the UK Supreme Court's decision in *Micula v Romania* [2020] UKSC 5; 1 WLR 1033 (*'Micula*') assists it on the construction question. Had it been necessary, I would have seen considerable force in the Respondents' submission that whilst the Supreme Court did make remarks supportive of Professor Schreuer's view as to the equivalence of enforcement and execution in Art 54(3), this was in quite a different context and without a focus on the issue in the present appeal.

99 In those circumstances, I accept that Spain's construction of 'execution' and 'enforcement' is correct. Consequently, the primary premise on which its subsidiary argument rests – ambiguity – is not established.

100 In any event, even if I had arrived at the contrary view that the English text should control the French and Spanish texts I would have arrived at that conclusion by applying the principles of treaty interpretation reflected in the Vienna Convention. Having done so, there would be no remaining ambiguity so far as this Court is concerned. It is possible, I accept, that the International Court of Justice could render an opinion on the meaning of Art 54 and Art 55 for Art 64 of the ICSID Convention allows Contracting Parties to submit to that court any question of interpretation they have been unable to resolve. Its opinion would, no doubt, be more definitive than this Court's opinion. But that does not mean that this Court's opinion is not definitive in the meantime. The Court has determined what Spain agreed to. There is simply no room after that conclusion for a contention that somehow it can be said that it has not agreed.

V. OTHER MATTERS

101 The appellate jurisdiction of this Court to review the primary judge's conclusion that Spain was not entitled to rely upon s 9 turns upon the identification of error in the trial judge's reasons:

Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd [2001] FCA 1833; 117 FCR 424 at [30] per Allsop J. I do not think the primary judge erred in his conclusion that Spain was not entitled to rely upon a plea of foreign state immunity. Whilst I differ from the primary judge on the issue of the meaning of 'execution' in Art 55, I do not think the difference is material to the outcome of the appeal. I do think, however, that error is shown in the form of recognition granted by the primary judge.

102 Apart from the central issues, Spain's written and oral submissions in this Court identified a cacophony of other errors claimed to have been committed by the primary judge. Leaving aside those which deal with the question of foreign state immunity, these submissions (and the two omnibus grounds of appeal with which, from time to time, they occasionally intersected) have no relevance. Even if the Court accepted that the errors were established so that the Court's review jurisdiction was enlivened, his Honour did not err in his ultimate conclusion that foreign state immunity was not available in the current proceeding. There is no formal utility therefore in assessing their merit.

103 However, I would make the following brief remarks:

104 I do not accept that his Honour erred in the sequencing with which he approached the ICSID Convention and the Immunities Act. It is plain that his Honour began with the Immunities Act and then turned to the ICSID Convention. But even if he had not done that I fail to see why this could matter. Both the Act and the Convention had to be interpreted. As the Respondents correctly submitted, the order in which one does this is immaterial.

105 I do not accept Spain's submission that his Honour had created a new exception to foreign state immunity beyond the exceptions set out in s 10. The primary judge asked himself the question in s 9, posed for himself the question of whether there was an exception in s 10, correctly apprehended that this turned on whether there was an 'agreement' and then assessed whether the ICSID Convention constituted such an agreement.

106 I do not accept that Part IV of the Immunities Act has any relevance to the questions presently before the Court. Part IV is entitled 'Part IV Enforcement'. Part IV does not apply until a Court has concluded that a foreign state has no immunity from jurisdiction. So much is clear from s 7(4):

> Part IV only applies where, by virtue of a provision of Part II, the foreign State is not immune from the jurisdiction of the courts of Australia in the proceeding concerned.

107 In this case, the question is whether the exception in s 10(1) (which is in Part II) has been established. Until that question has been answered Part IV has no legal consequences since it is incapable of application by reason of s 7(4). As a matter of logic, it is impossible for Part IV to have any impact on the question of whether an exception in Part II has been engaged since its application necessarily post-dates any determination that an exception applies. Accordingly, Part IV is irrelevant to any issue presently before the Court.

108 The question of whether the reference to the laws relating to immunity from execution in Art 55 is a reference to Part IV of the Immunities Act or the whole of the Immunities Act is, likewise, an irrelevant question. Since Art 55 has no application to a recognition proceeding the question does not arise in the present case. If and when the Respondents seek to execute their award, then Art 55 will be relevant.

109 The Respondents pursued an argument that s 34 of the International Arbitration Act (above at [44]) excluded the operation of the Immunities Act. This was on the basis that the Immunities Act fell within the expression 'Other laws relating to the recognition and enforcement of arbitral awards' which are declared by s 34 not to apply to an ICSID award. The primary judge rejected this argument. In my view, the issue does not arise since Spain is not entitled to rely on the immunity conferred by s 9 of the Immunities Act under that Act's own provisions. The implications of the Respondents' submissions are not necessarily fully manifest in the current appeal. For example, if the Immunities Act is one of the laws referred to in s 34, this may have serious consequences when the time comes to consider how the Respondents' judgment might be enforced under Part IV. This Part provides for an immunity from execution against the diplomatic and military assets of a foreign state which, if this argument be correct, will be lost. Australia may well have international obligations in that regard which would be necessary inputs into the interpretative task. In that circumstance, I would prefer to express no view on the issue until such time as the question actually arises. For the same reason, I prefer to express no opinion on the question of whether the International Arbitration Act impliedly repeals the Immunities Act.

110 I do not accept Spain's contention that it is assisted by the words 'as if' in Art 54(1). Here the argument was that Art 54(1) requires the pecuniary obligations imposed by the award to be enforced 'as if' they were a final judgment of a domestic court. Spain submits that it would then have been open to it to raise foreign state immunity as a reason why the judgment should

be vacated and if the judgment could be vacated on that basis it must therefore be open to resist its initial entry on the same basis. Spain cited *Micula* to show that a stay of a judgment resulting from an ICSID award may, in principle, be obtained. Whilst I accept the internal logic of this submission when considered strictly in a vacuum, the argument of course must prosper, if at all, in the hostile atmosphere of Art 54. It shows clearly that foreign state immunity is not available in a recognition proceeding. Once it is accepted, as it must be, that the Respondents are entitled recognition under domestic law and that that domestic law is itself merely the instantiation of the recognition procedure to which Spain itself has explicitly agreed by means of the solemn public act of acceding to a treaty, it follows for the reasons already given that there can be no plea of foreign state immunity available to it whether before judgment or, even on the approach in *Micula*, after judgment. The problem it has is that the immunity has been lost by reason of an agreement within the meaning of s 10(2) of the Immunities Act.

111 I do not accept that there is any substance in Spain's submission that the mere fact that Spain had agreed to an arbitration in Art 26 of the ECT did not entail that it had waived its foreign state immunity. The correctness of the submission need not be assayed for the question is not whether Art 26 of the ECT effects a submission to jurisdiction; it is whether Art 54(2) of the ICSID Convention does.

VI. APPLICATION FOR LEAVE TO INTERVENE

112 At the hearing of the appeal the European Commission sought leave to intervene in the proceeding. The Court dismissed the application for intervention at that time and said that it would provide reasons for this in due course. My reasons for refusing leave to the European Commission's application to intervene are as follows:

113 The arbitration which took place between Spain and the Respondents under the ICSID Convention occurred because Spain is a party to the ECT and because by Art 26 of the ECT Spain agreed to arbitrate disputes with residents of other Contracting Parties. The Respondents are residents of Luxembourg and the Netherlands, both of which are also Contracting Parties under the ECT. Spain, the Netherlands and Luxembourg are also members of the European Union. The European Commission wishes to contend that Art 26 properly construed does not constitute an offer to arbitrate and that, if to the contrary it does, it is unlawful as between members of the EU as a result of European constitutional law.

114 These are, without doubt, most interesting questions. Leave to intervene should, however, be refused for two reasons. First, it is irrelevant to the question before this Court which is whether

Spain is entitled to rely on a plea for foreign state immunity. No doubt the issues which the Commission wishes to ventilate are relevant to the jurisdiction of the arbitral tribunal but its jurisdiction (or perhaps more precisely the absence of its jurisdiction) is not a matter which the Court can consider under s 35(4) of the International Arbitration Act. The sole issue for the competent court under Art 54(2) is whether the party seeking the recognition of the award has presented a certified copy of it. This Court has also had to consider the additional legal question of whether a plea of foreign state immunity may be maintained in such a proceeding. Neither of those issues is affected by the meaning of Art 26 of the ECT or whether Art 26 is lawful under EU law.

115 Secondly, even if that were not so, the present argument was not advanced by Spain to the trial judge and is not advanced by it on appeal. The Court would therefore be called on to resolve an issue which does not form part of the matter between the parties and consequently is not within the jurisdiction of the Court: *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16; 209 CLR 372 at [22], [27] per Gleeson CJ, [72] per Gaudron and Gummow JJ, [249] per Hayne J.

116 In terms of the intervention rule, r 36.32(2)(a) of the *Federal Court Rules 2011* (Cth), I do not therefore accept that the European Commission's contribution would be 'useful'.

VII. ORDERS

117 I propose the following orders:

(1) The appeal be allowed.

(2) Orders 1, 2, 3 and 4 of the orders made on 24 February 2020 are set aside.

(3) The appeal is stood over to a date to be fixed for further argument on the form of order for the recognition of the award and otherwise for the disposition of the appeal including on the question of costs.

(4) The parties should confer and formulate draft orders providing for the delivery of written submissions on these issues with a page limit of 10 pages per submission.

I certify that the preceding one hundred and seven (107) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Perram.

Associate:

Dated: 1 February 2021

REASONS FOR JUDGMENT

MOSHINSKY J:

118 I have had the considerable benefit of reading in draft the reasons for judgment of the Chief Justice and of Perram J. I agree with the orders proposed by Perram J. I agree with Perram J's reasons, subject to the point made by the Chief Justice in [9] of his reasons: whether the French and Spanish languages have a penumbra or range of meanings would be a matter of evidence. I also agree with the additional reasons given by the Chief Justice.

I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment of the Honourable Justice Moshinsky.

Associate:

Dated: 1 February 2021