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**[2022] HCATrans 195**

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Sydney

No S43 of 2022

B e t w e e n -

KINGDOM OF SPAIN

Appellant

and

INFRASTRUCTURE SERVICES LUXEMBOURG S.À.R.L

First Respondent

ENERGIA TERMOSOLAR B.V.

Second Respondent

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

TRANSCRIPT OF PROCEEDINGS

AT CANBERRA ON THURSDAY, 10 NOVEMBER 2022, AT 10.00 AM

(Continued from 9/11/22)

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**GAGELER J:** Mr Ward.

**MR WARD:** May it please the Court. Your Honour, at the outset, may I say that the parties have agreed that your Honours should have copies of some of the text of Professor Schreuer's work, and so I think handouts have been prepared, which can be handed up. I think your Honour Justice Gordon may have had access to the second edition, so we are handing both the second edition and a very recent third edition. There is no material difference in the relevant parts of the text, save that in the third edition there is a reference to an additional recent decision involving Total Petroleum, but otherwise the text and the conclusions are relevantly the same. We are arranging an electronic copy as well as the hard copies we are handing up.

Could I start by inviting the Court, please, to turn to the text of the articles of ICSID at page 145, tab 3, volume 1. Your Honour Justice Gageler yesterday asked me a question in relation to what we say the affirmative content of Article 54 is. Could I first note that, and I will return to it, that his Honour Justice Perram in the Full Court focusses primarily on Article 54(2) as the source of implication. In our submission, with respect, that cannot be right, because Article 54(2) is a procedural or mechanistic provision.

If there is an implication said to arise anywhere, we say it must arise in Article 54(1), and so we just highlight that difficulty – and I will come back to the reasons of the Full Court in a moment. Your Honour Justice Gageler, though, asked me the question as to what do we say is the affirmative content of Article 54(1). And I gave the answer, but I will try to explain it again. We say that Article 54(1) operates in three distinct ways.

The first, if I might use Australia, perhaps as an example of the relevant State, if an investor in any contracting State approached the Australian courts with an award – I am sorry, if any other State approached Australia with an award against an investor, that is, a State had been successful in ICSID proceedings against an investor, Australia would be obliged to both recognise and enforce the pecuniary obligations of that award to the extent that there were any, because no question of foreign State immunity could arise. That is a positive obligation upon Australia as a contracting State to enforce within its territory an award against an investor.

Secondly, if an investor had been engaged in arbitration proceedings against Australia, as a defendant State, and had succeeded, the investor could approach the courts of Australia for recognition and enforcement of the pecuniary obligations of that award and no foreign State immunity issues would arise because, of course, Australia could not claim foreign State immunity before its own courts.



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The third possibility is the one that we are presently dealing with, in which an investor from a third State approaches the Australian courts in relation to an award against a third State. There, Australia's obligation is to recognise and enforce, but subject to the obligations to recognise foreign State immunity which we say are not waived, either in clear terms or express terms, nor by any relevantly necessary implication.

**EDELMAN J:** Just so I am very clear on that final aspect of the submission, if the investor approached the Australian courts and asked for a declaration that the award against the foreign State was valid and binding, would there be an immunity from a proceeding seeking nothing more than a declaration that the award was valid and binding?

**MR WARD:** Yes. Your Honour, we say yes because the terms – in our submission, recognition, enforcement and execution are so intertwined that the answer must be yes – and because it is a procedural bar to the processes of the Australian courts in their entirety. If we be wrong about that, then there is something we can say about the form of orders at the end of – and the nature of the characterisation of these proceedings, and the orders that were made.

**EDELMAN J:** So, your alternative submission, then, is that an order that might be characterised as bare recognition might not attract the immunity, but your primary submission is that the immunity attracts everything.

**MR WARD:** Precisely, yes. Your Honours, we say that there is no waiver contained – certainly not in Article 54(2), which appears to have been the focus of attention by the Full Court, nor by any implication in Article 54(1), because one must ask what is the nature of the obligation upon a contracting State within its territory – that is the focus of operation of Article 54(1), not whether there has been a waiver by some implication in what are undoubtedly unclear words as to foreign State immunity with the status that that principle has for the purpose of international law.

**GORDON J:** Can I just ask one question about that?

**MR WARD:** Yes, your Honour.

**GORDON J:** In Article 54(1), Schreuer draws this distinction in the English version between the two concepts that appear in Article 54(1). What he says is that Article 51 has:

> recognize an award –

as one concept.



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**MR WARD:** Yes.

**GORDON J:** And then the second concept is, in the second line:

> and enforce the pecuniary obligations –

and that they are different concepts.

**MR WARD:** Yes.

**GORDON J:** Recognition on one side – being recognition of the award – and enforcement of the pecuniary obligations – and they are distinct concepts. Do you propose to address the way in which Article 54 draws, on its language, a distinction between those two ideas?

**MR WARD:** I do, and I will do it when I turn to Professor Schreuer's work. I have not at all forgotten - - -

**GORDON J:** I am not talking about Schreuer's work. He draws it, but absent what he says about it, do you have a view or submission about why we should not read it that way?

**MR WARD:** Yes, the answer is because what I am describing as a bare recognition may sound in a res judicata, which we think is consistent with Professor Schreuer's approach, but the moment you move beyond something into a positive step which is preparatory to or part of the process of enforcement of a pecuniary award you are in the territory of enforcement. We do say that the concepts are slippery, they are intertwined, and it is very difficult to draw any bright line between the three terms.
Professor Schreuer finds it difficult, the Full Court found it difficult, the primary judge found it difficult. They are very ambiguous terms that are not easily leading to a bright dividing line being drawn between them.

We accept that an award is binding upon the States involved, or the State involved, as a matter of international law by reason of Article 53 of the ICSID and that that is given some attention in Australia as a statutory matter by section 33. We think the primary judge at paragraphs 78, 90 and 94 was, respectfully, correct when finding that recognition and enforcement proceedings are relevantly intertwined such that there should be no distinction drawn between the two concepts, and that it was at that point that the Full Court departed for the reasons his Honour Justice Perram gave.

His Honour said, well, the French and Spanish texts are equally authoritative, as Professor Schreuer also finds. Those texts are at least



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equally authoritative, if not controlling. They do not draw a distinction between execution and enforcement such that where enforcement in the English language version is used in Article 54, it must also be a reference to execution. I will return to what we say about Articles 54 and 55 and the Full Court in a moment, and I will say something, your Honour Justice Gordon, about Professor Schreuer's work as well, in a few moments, because there are some things that we draw from it.

**GORDON J:** Can I just ask one other question?

**MR WARD:** Yes, please.

**GORDON J:** Yesterday we were talking about what constitutes recognition. You have addressed the fact that, as I understand your submission, you say recognition as a matter of – absent court process, is brought about by section 33.

**MR WARD:** I did say that yesterday. It is certainly brought about, internationally, by Article 53. Section 33, domestically, must have some work to do but it is – as I think I said in answer to Justice Steward's question yesterday – it would still be subject. The operation of section 33 would still be subject to the potential application of foreign State immunity before the courts of this country.

**GORDON J:** So, I am drawing a really sharp line at the moment between absent court action - - -

**MR WARD:** Yes.

**GORDON J:** - - - and I understood yesterday, you to say it was met – recognition was met by Article 53 and, possibly, part of Article 54, read with section 33.

**MR WARD:** I think that I would – yes, I say that – that there is a level of automatic binding force given to ICSID awards, by reason of Article 53 and that section 33 of the *International Arbitration Act* must have some work to do. It cannot mean nothing and what it means is that the legislature of this Parliament – of the Commonwealth Parliament – has decided that, for the purposes of Australian law, an apparently-valid ICSID award is binding as between the parties to that award within Australia. But that says nothing about foreign State immunity.

**GORDON J:** And then I come to the court process, if I might?

**MR WARD:** Yes.



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**GORDON J:** At section 35, which is recognition of awards by a court.

**MR WARD:** Yes.

**GORDON J:** Do you propose to identify, at all, what is possible for there to be – is it possible, on your argument, for there to be recognition under section 35, of itself, of an award against a foreign State?

**MR WARD:** Can I say this about section 35? The first is, it is itself, with respect to the draft, internally confused because its heading was recognition of awards but then it speaks only of enforcement which tends to support the proposition that the two concepts run together.

**GORDON J:** My question is quite direct, though, Mr Ward. I would be very interested to know, on your thesis, is it possible for there to be an application for recognition to a court of an award against a foreign State, and that is all that is asked for? In other words, without meeting and contravening Article 55, and, if so, what does that look like?

**MR WARD:** Your Honour, we would say that there remains a procedural bar to any attempt to implead the foreign State, in any sense, before an Australian court.

**GORDON J:** I see.

**MR WARD:** And we make that submission plainly and clearly, but if we be wrong about that, the only alternative would be what your Honour has put to me. That is, that there be an application which seeks nothing more than bare declaration of binding force.

**GORDON J:** Thank you.

**MR WARD:** Could I just say this in relation to - - -

**EDELMAN J:** Well, a proceeding can be brought, but the question is whether an immunity is claimed. If the immunity is not claimed - - -

**MR WARD:** I am sorry, yes.

**EDELMAN J:** - - - then the matter just goes ahead. But your primary submission is that the immunity can be claimed for any suit, whether it be for recognition, enforcement, execution or all of them. And the alternative submission is that the immunity cannot be claimed if the suit is for bare recognition, but it can be claimed if it is for more than bare recognition.



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**MR WARD:** Yes. Yes, and of course it is always open to a foreign State to waive the immunity by actual conduct or express words, at any point.

**EDELMAN J:** If your alternative submission were accepted, but not your primary submission, would there be any obstacle to this Court making orders for bare recognition? Admitting, admittedly, there may scope for debate about amounts to bare recognition.

**MR WARD:** I think my answer is no, your Honour, but could I take that on notice for a few moments? I was going to then just add to the propositions we seek to make about Article 54(1) – just the following point. For the reasons that I gave yesterday, the ICSID Convention alone is not the source of any agreement to waive. Ordinarily, if one was looking for clear words of waiver, in our submission, you would look to the agreement by which dispute settlement was referred to the ICSID – in this case, the *Energy Charter Treaty*.

So, one could, for example, hypothesise an oil concession which contained words of express waiver: the State agrees it will not, in any enforcement proceedings or dispute settlement proceedings, take any point or claim any immunity from enforcement – as to enforcement of the underlying award. Now those would be clear words. They would be found in the underlying agreement to arbitrate and, of course, here there are no words of that type or anything like them in the *Energy Charter Treaty*.

I did take your Honours yesterday to the decision of the High Court of the Virgin Islands in *Tethyan Copper* which, in the passage that I took your Honours to, accepted, on behalf of the State of Pakistan, there making these similar arguments, more or less precisely the proposition which I have put about Article 54(1).

There is a relatively recent decision called *Sodexo Pass International v Hungary* in 2021 of a single judge of the New Zealand High Court, Justice Cook. In that decision, his Honour disagreed with the reasoning in *Tethyan Copper*. The decision is extracted in the materials at volume 7. The relevant passage is at tab 38, page 1931 of the bundle. We think there are a number of issues with *Sodexo* and we have dealt with most of them in writing. But can we just draw your Honours' attention to this problem with paragraph [28]? His Honour says that he does not agree with the analysis in *Tethyan*. In the third sentence, his Honour says:

> But it is not a matter of identifying whether the state who is a party to the award itself has an obligation under art 54(1) of the ICSID Convention or not. It is a matter of identifying what that state has agreed are the obligations of other states, implemented in their judicial systems.



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That passage, we say, asks the wrong question, and *Tethyan* asks the correct question in precisely the way we have put it. That is, it is in fact a matter of identifying whether the State who is a party to the award itself has an obligation under 54(1). The answer to that, for the reasons we have endeavoured to give, is in the negative.

Could I then turn to, briefly, what Professor Schreuer has had to say about this? We have handed up both the second edition and third edition. I will refer to the second edition if I may, because it is slightly more readily available and I think, perhaps, because Justice Gordon has had access to it, but not the third.

It is the bundle which does not have a heading. It starts with Article 54. Could I say first about the commentary, Professor Schreuer is, although detailed and learned, in our submission, it identifies the complexity and ambiguity inherent in the questions currently before this Court. It makes clear that there is no simple answer to any of this, which we say of course, is consistent with our proposition that there is relevant ambiguity or uncertainty in what is said to be, by implication, a waiver.

Secondly, Professor Schreuer is expressly proceeding – Justice Perram extracts the relevant passage at paragraph 93 of the Full Court judgment. He is expressly proceeding on the basis that the French and Spanish words have the effect of controlling such that execution and enforcement should be read interchangeably in Articles 55 and 54 unless otherwise clearly stated.

**GAGELER J:** You are asking us to look at the document. Perhaps you could just point to the relevant parts as you make these propositions?

**MR WARD:** Yes. Could you then turn to paragraph 42 at 1128. At paragraph 42, the Professor Schreuer starts by stating that the:

> Recognition of an award is the formal confirmation that the award is authentic, and that it has the legal consequences provided by the law.

Now, in one sense, that is achieved by section 33 of the *Arbitration Act*, with nothing further required for domestic purposes in this country.

**STEWARD J:** Perhaps not quite. Section 33 does not tell you whether the award is authentic. Someone has look at it to do that.

**MR WARD:** True. True.



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**STEWARD J:** I would have thought that is a court.

**MR WARD:** Or a competent authority.

**STEWARD J:** Yes.

**MR WARD:** But in this country, a court. The problem then arises because Professor Schreuer sees in paragraph 43 that, as he considers the concept:

> Recognition has two possible effects. One is the confirmation as the award as binding or *res judicata*. The other is a step preliminary to enforcement –

And he says that:

> In a particular case, both effects may arise simultaneously.

Then at 46, over the page at 1129 - - -

**GORDON J:** Just before you get there, 45, I think, is the – it seems to be the flip side of what Justice Steward just put to you; that it recognises that you need recognition by a competent court before you can plead res judicata.

**MR WARD:** Yes, and we say that that is supportive of the proposition that there is a procedural bar which – unless the State waives its foreign immunity, there is a procedural bar which would affect each of the concepts: recognition, enforcement, and execution.

**GORDON J:** But not on your alternative argument.

**MR WARD:** Yes, not on the possible alternative argument relating to the orders. Then, at paragraph 46, we see Professor Schreuer, in our submission, making commentary that is consistent with the way we are understanding the concepts of recognition and enforcement. That is, drawing a line between recognition that does not sound in pecuniary consequences; and enforcement, which does.

That is part of what I will describe as our characterisation argument, that these proceedings are properly characterised as proceedings for enforcement, not for recognition alone – contrary to the reasoning of the Full Court. I should draw your Honours' attention to what Professor Schreuer says at paragraph 48, that is – if you were looking at the third edition, now found in paragraph 57 of the third edition, but is relevantly the same text.



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**GORDON J:** I think also 47 is quite helpful because it recognises that you can have:

> recognition . . . as a first step –

and "as a consequence" it "becomes a valid title", but:

> Recognition is subject only to the requirements of the Convention and may not be refused for reasons of domestic law.

Subject to the domestic law. So, one has this idea that you can have recognition by a court for good reason and it may be a preliminary step to execution, but itself is a different concept with different effect.

**MR WARD:** Yes, we accept that that is Professor Schreuer's view. We do not agree with it, but that is Professor Schreuer's view, and it is consistent with his conclusion at paragraph 48, with which we also do not agree.

Could I ask your Honours now to turn to the judgment. The judgment of the primary judge, which is found in core appeal book, relevantly at page 34, and I am drawing your Honours' attention to paragraph 90 of his Honour Justice Stewart's judgment. We think that this is the correct approach in relation to the distinction, if there be any, between recognition and enforcement, and it is also consistent with what the House of Lords said in *Clarke v Fennoscandia* at the passage cited by his Honour.

It is also consistent with this Court's approach in *TCL Air Conditioner*. That is, recognition and enforcement are closely linked. As your Honour Justice Gordon said, it is possible to have something called, conceptually, recognition as a prior step to enforcement, but here recognition and enforcement as concepts run together, because what was sought in these proceedings by way of characterisation of the proceedings was enforcement.

As his Honour says at paragraph 94, there is a concept in civilian jurisdictions known as exequatur. That is itself an ambiguous and somewhat uncertain concept but we accept completely that there is a doctrine similar to the concept of recognition and enforcement in civilian law jurisdictions; we do not think it assists to make that observation. Recognition alone carries with it – for the reasons we gave yesterday – legal consequences, particularly in relation to a res judicata or issue estoppel.

We would note again that there was an acceptance by the drafters of the ICSID, there is a fundamental inequality between investor and State but



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that inequality is not intended to be, in our submission, affected by anything in 54 or 55 – that, to the extent that recognition carries with it legal consequences of potential res judicata or issue estoppel, it is, for the purposes of Article 54, relevantly indistinguishable from a step in enforcement for precisely the reasons the Primary Judge gives and that, therefore, once the Full Court recognised – as Justice Perram did – that the better view is that the French and Spanish texts relatively intertwine concepts of execution and enforcement wherever those terms are used, the application of the immunity in 55 to all of 54 should follow contrary to his Honour's and Chief Justice Allsop's views, with whom Justice Moshinsky agreed.

**EDELMAN J:** The primary judge, at paragraph 90 – which you took us to a moment ago - - -

**MR WARD:** I am sorry, paragraph 90 of - - -

**EDELMAN J:** At paragraph 90 of the primary judge - - -

**MR WARD:** Yes.

**EDELMAN J:** - - - there is a reference to paragraph 23 of the *TCL Air Conditioner Case*.

**MR WARD:** Yes.

**EDELMAN J:** Three paragraphs earlier, at paragraph 19, in the judgment of Chief Justice French and Justice Gageler, their Honours say that, by reference to the UNCITRAL analytical commentary, that there is:

> a "useful distinction between recognition and enforcement in that it takes into account that recognition not only constitutes a necessary condition for enforcement but also may be standing alone" –

Do you say that is wrong?

**MR WARD:** No.

**EDELMAN J:** That recognition cannot stand alone.

**MR WARD:** No, it could, but not in the context of Article 54. Could I ask your Honours to turn to paragraph 95 of the reasons of his Honour Justice Perram, found at page 100 of the core appeal book.

**JAGOT J:** Sorry, what did you mean that it could not in the light of Article 54? Why do you say that?



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**MR WARD:** Because Article 54, we say, intertwines so closely the concepts of recognition, enforcement and execution. We say that recognition and enforcement, for the purposes of Article 54, run together, because there is no relevant bright line between recognition and enforcement. If one accepts that point, then, for the reasons given by Professor Schreuer and the Full Court, execution and enforcement, where that term is used in Article 55, apply to the entirety of the Article 54 process.

**JAGOT J:** So, irrespective of the nature or character of the proceeding in every case, as a result of Article 54; they are so close together.

**MR WARD:** Yes.

**JAGOT J:** So, that is Article 54(1). Then, because other language versions treat enforcement as the same as execution, all three - - -

**MR WARD:** All three.

**JAGOT J:** - - - run together. That is how you get there.

**MR WARD:** Yes.

**JAGOT J:** Okay. All right.

**MR WARD:** And there is also the use of the word "or" in Article 54(2) which adds a little bit of flavour to the concept as well.

Could I ask your Honours just to look at paragraph 95, page 100 of the core appeal book. This is where, between 1994 and 1995, his Honour Justice Perram, we think correctly, analyses the problem and accepts that execution and enforcement in Article 55 run together – as we say they should – and then identifies what his Honour says is the problem in 95 which is, put bluntly, that Spain would win, and then goes on to find at paragraph 96:

> what really mattered about the proceeding was that it was a recognition proceeding to which, on no view, could Art 55 apply.

In other words, his Honour goes from a construction problem to the characterisation of the proceedings problem in order to overcome the construction problem. We say that was impermissible.

**JAGOT J:** Sorry to hark back. I thought you answered Justice Edelman when he asked – and I may have misunderstood – could this Court make a



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bare recognition order, and I thought you said yes to that. But if you are right about how you just answered me – that is what I am not following – is the answer not no to that?

**MR WARD:** In the alternative, your Honour, we accept that that could be done if all of our other arguments are rejected, including our primary argument in relation to the lack of any words of waiver in Article 54 as a matter of construction of the text of Article 54(1).

We start with the first proposition, which is that 54(1) does not contain within it any words of waiver, nor does the *Energy Charter Treaty*. We move second to the application, if we are wrong about that, that there is some form of implication at 54(1). We say 55 catches it, because execution and enforcement are preserved – immunity from execution and enforcement are preserved in 55. Then, and only then, do I need to address Justice Edelman's proposition as to the form of orders, which is the characterisation problem and, we accept, possibly a way out of the characterisation issue, although it would mean that the orders made by the Full Court are wrong.

**JAGOT J**: To the extent that they provided for the enforcement of the pecuniary penalty?

**MR WARD:** To the extent that they go, I think, beyond order 1(a) and the last word of 1(a).

**JAGOT J**: So, your answer to Justice Edelman should be understood as only if you are wrong about all proceedings.

**MR WARD:** That is right.

**JAGOT J**: Sorry, that was my fault.

**EDELMAN J:** And your primary submission that recognition, enforcement, execution are all so intertwined in Article 54, but not in Article 35 of UNCITRAL that the Chief Justice and Justice Gageler referred to, even though Article 35 of UNCITRAL is pretty similar to Article 54.

**MR WARD:** Similar, but not identical. And nor are, for example, references to the New York Convention that appear in some of the treaties as well, which have an entirely different framework for the enforcement of awards and preserve, for example, public policy arguments and the like, as well as State immunity.

**GAGELER J:** Mr Ward, I am aware that there is quite a lot of American case law on the construction of Article 54 and the effect on State immunity.



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I do not think it all goes through away, but are you going to say anything about it?

**MR WARD:** I will do it in one sentence. Section 1605 of the relevant statute of the United States statutes expressly preserves possibility of an implied waiver of immunity, whereas our statute does not. That is why the cases go on the tangents they do. There has also been a slight rolling back of the American cases since *Amerada Hess*, but that is the answer I give to your Honour.

**GAGELER J:** Thank you.

**MR WARD:** I think your Honour Justice Edelman asked me yesterday what I will call the pleading point or the new case point that was agitated below. We do not take the pleading point, but we do take the immunity from process point. I think that might sufficiently answer your Honours' question. We say that once this case was filed and once the immunity was asserted, at that point the shutter came down – or should have, it did not – but we say it should have come down, and it was not for any court to recast the application in a way that surmounted the immunity that had been claimed.

**EDELMAN J:** It was not possible?

**MR WARD:** That is right. So, that is the answer that I have for your Honour.

**EDELMAN J:** That means the answer you gave to me earlier this morning is wrong, because earlier this morning, when I asked you, would it be open for this Court to make a bare recognition on your alternative submission, I think you said that you did not see any obstacle to that.

**MR WARD:** I think you are right, your Honour. In the alternative, I can see how a court could find against what I have just put to your Honour and say that we do have that residual power, but our primary submission would be the shutter could have come down at the point.

**GORDON J:** Did you run that argument below? Sorry, I know you were not there, but was that part of your case below?

**MR WARD:** It appears to have been agitated, and it appears to have been dealt with by the Full Court in the paragraphs - - -

**GORDON J:** No, it is a more direct point. There was an argument about the change of case, but did you ever put it that it was not possible for there to be a bare recognition order?



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**MR WARD:** I do not think it was put in terms of that clarity.

**GORDON J:** Thank you.

**MR WARD:** I think, your Honours, that addresses – unless there are any questions – the primary submissions that we seek to make in relation to the construction and characterisation problems. Could I, last, just address what we say about the decision of the European Court of Justice in *Komstroy* and its relationship to the *Energy Charter Treaty*. Just pardon me one moment, your Honours. It is in volume 7, tab 35. The decision starts at page 1897. If your Honours are following along on the outline, I have now moved to point 18 of the outline.

The starting point for our submissions in this regard is that the agreement – as I have said a couple of times, the agreement that we are looking for, by which there is a waiver, in our submission, involves both the underlying agreement to arbitrate and the ICSID, not just ICSID alone; that one is looking for sufficiently clear or unambiguous words in either or both of those treaties; that they are not to be found in our submission in either of the treaties.

The decision in *Moldova v Komstroy* followed an earlier decision of the European Court of Justice which had found that a bilateral investment treaty, which raised for determination issues of EU law, was inconsistent with the treaty on the functioning of the European Union, which was said to preserve to the ECJ any right to conclusively interpret provisions of EU law. It did not directly relate, though, to the *Energy Charter Treaty*. *Komstroy* did, and that is why we seek to raise it.

**GAGELER J:** Why? What do we get out of it?

**MR WARD:** What we get from it, your Honour, is additional support for the proposition that we seek to advance, which is that Spain, as a European State, could not have – whether subjectively or objectively – thought at the time it was signing the *Energy Charter Treaty* – be thought to have been waiving its sovereign immunity before the courts of this country in any respect at all.

**GAGELER J:** If there is a waiver here, it is in Article 54, is it not? Is anyone suggesting that it is somewhere else?

**MR WARD:** No. We say, though, that the agreement involves Article 26 of the ECT. So, you have to read, in our submission, collectively, Article 26 of the ECT with Articles 54 and 55 of the ICSID to try and locate any words of waiver by necessary implication or otherwise. The fact that



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the European Union and the European Court of Justice has conclusively determined that there is not even an agreement to arbitrate that is valid contained in Article 26 is relevant to your Honours consideration of whether - - -

**GAGELER J:** You will have to spell that out. I just do not understand the process of reasoning that you would have us engage in to treat that circumstance as relevant.

**MR WARD:** Yes.

**GAGELER J:** You need to spell it out, Mr Ward.

**MR WARD:** There is a point, your Honour, at which I do not think that I can spell it out more than I just did. And I think those are our submissions in relation to *Komstroy*. We say that it is relevant. We say that the European Court of Justice, having conclusively determined that there is no valid arbitration agreement at all, is a matter which goes to the likelihood, or not, that the combination of the ECT and the ICSID amounted to an express or necessarily implied waiver of immunity before the courts of this country.

**EDELMAN J:** But the ECJ decision came after the entry into the *Energy Charter Treaty*.

**MR WARD:** Yes, it did. The ECJ decision came very recently. It came after the decision of the Full Court.

**GLEESON J:** After the award.

**MR WARD:** After the award, yes.

**GAGELER J:** And, as best I am understanding the relevance, you would have us take that into account as bearing on an inference as to the intention of Spain in entering into what?

**MR WARD:** Your Honour, it does not go to an inference. Well, it does go to an inference, but the relevance of it is for the purpose of the location of the agreement that section 10 invites us to look for.

**GORDON J:** The problem with that argument, possibly, is this: even if you are right about the ECT, there was a choice made, and that choice made was to arbitrate. An arbitration your client participated in voluntarily, putting aside debates. So, you have a fact. One then goes to the ICSID Convention, which governs the way in which that was undertaken. So, in a sense, the horse has bolted, even on the way you put it, as I understand it.



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**MR WARD:** Well, the jurisdictional point, I think, was taken at some point, but - - -

**GORDON J:** It is too late.

**MR WARD:** Yes.

**GORDON J:** That is the question. So, the ECT is a historical fact, but, given the conduct of your client, is nothing more than that, is it not?

**MR WARD:** Yes. The only thing I will say to that, your Honour, is that the ECT – as I think I said yesterday – contained within it a number of options.

**GORDON J:** But they chose an option.

**MR WARD:** Well, the investors chose an option.

**GORDON J:** Your client turned up, arbitrated, there was an award, you participated, and we know we do not go behind the award because that is the whole purpose of the ICSID Convention, is to have the award and to deal with it. That is the set of facts that we are dealing with.

**MR WARD:** Yes.

**GORDON J:** Put in terms of immunity, one can claim an immunity with knowledge of the facts, and those facts your client had knowledge of.

**MR WARD:** Yes. I do not think there is anything I can say further, your Honour. Your Honours, unless there are any questions, those are our submissions in-chief.

**GAGELER J:** Thank you, Mr Ward. Mr Walker.

**MR WALKER:** If it please your Honours. Your Honours, could I focus immediately on the orders against which the appeal is brought. You find them in the core appeal book starting at page 111, and they are obviously central to the analysis of the two statutes in question concerning the correctness of the decision in the Full Court to make these orders. Order 1(a) commences with words which are unmistakable in their intent:

> The Court hereby and in these orders recognises as binding . . . the award –

And then, secondly:



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> pursuant to s 35(4) of the *International Arbitration Act 1974* (Cth) the Court orders that judgment be entered –

I pause there. The cardinal difference between this form of orders – which is the form of orders under scrutiny in this Court – and the first-instance form was that the first-instance form actually, à la mandatory injunction, ordered payment. Instead, here, it was judgment be entered, and then for the award sums. There is no dispute that that is a faithful replication of the binding effect of the award. On the next page, 1(b) of the orders says of 1(a) that nothing in it:

> shall be construed as derogating from the effect of any law relating to immunity of the respondent from execution.

A word which, mercifully, in these orders, is to be understood according to our law. There is no ambiguity about it, and there is no French or Spanish to be considered. I will come back in the course of our argument to the significance of what might be called the caveat about the meaning of the recognition and entry of judgment, or, as I will try to persuade your Honours, what is probably better understood as recognition by entry of judgment, though that distinction may not be critical.

Because of the last matter that our learned friend has raised, may I very briefly deal with it not so much out of sequence, as before embarking upon the sequence in our outline. I hope that I can put it briefly thus: ICSID, as Justice Gordon has just drawn to attention, is what I will call – adopting the jargon – a self-contained system. Relevantly, your Honours are familiar with Article 41(1) – kompetenz-kompetenz, judge of its own competence – and then, in particular, the possibilities in Articles 50 and following for the canvassing of the award on a number of grounds.

Relevantly, the one that matters for consideration of this case, and Spain's position before this Court, in relation to this award, is that there was a request under Article 52(1) for annulment, and it was a jurisdictional ground based on what I will call *Komstroy* or *Achmea*, stemming from the clash perceived elsewhere between the *Energy Charter Treaty* and the relevant European treaty obligations.

The Committee – that is the second tier tribunal – my expression – to which that annulment went, as your Honours know, rejected the annulment; upheld the award against the challenge of want of jurisdiction. That, of course, means that the award, including the ICSID consideration and rejection of want of jurisdiction to give the award, is before this Court binding in all those respects; monetary obligation, for pecuniary obligation, plus jurisdiction to do so.



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As we understand it, the combination of what was said yesterday about *Komstroy* – in what I will call the interpretive context in which the notion of implication played a central role in our friend's argument – and today – which, we think, was returning to the same notion – is, of course, not an attempt by Spain to invite this Court to mark the work of the Committee under Article 52. That is utterly contrary to the effect of section 32 of our Act, which renders those articles of ICSID the law of Australia and gives the conclusive effect, to which I have already referred.

Rather, as we understand it, my friend puts it, whether subjectively or objectively, it has something to do with the interpretive exercise called for ultimately by section 10 of the Immunities Act concerning Spain's – it was not clear to us whether it is position, belief, preference, attitude; whatever it be – some state of mind to be attributed to an international actor – a polity. It is, in our submission, utterly without any principal foundation as an argument to be considered by this Court on the issues joined before this Court.

We can put to one side, surely – peremptorily – the notion of subjective intention, whatever that would be and whatever evidence one might suppose you would find in this record concerning subjective intention. If it be objective intention, but it is in the nature obviously of the kind of fiction which is mostly judged, at least in our system, by reference to what persons observing conduct might be reasonably taken to understand as to the mental state actuating that conduct – hence, in our law, for example, the notion of election by conduct unequivocally referrable to one choice rather than another, for example.

In our submission, if, as we understand it, this continued raising of what I will call the *Komstroy* point lost for the annulment committee – if that continued raising in this Court be understood as the only way we understand it to be, which has to do with whether there will be sufficient clarity in the terms and operation in the facts that have happened of, in particular, Article 54, then this can be said somewhat tartly.

The point of *Komstroy*, the point of *Achmea*, was that there was an inconsistency said to be resolved by preventing the ECT operating according to its tenor, permitting investors to invoke, by the anterior agreement with the State ICSID arbitration, that that inconsistency appeared with such clarity that there could not be reconciliation by interpretation. There simply had to be the adjudication of that inconsistency with what those other tribunals – which have nothing to do with this Court's responsibility – held, as I say, rendered, the ECT – the *Energy Charter*



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*Treaty* – incapable of bringing in its train by its agreement, the jurisdiction of ICSID to determine disputes with what I will call European elements.

In other words, the whole point of those decisions was the perception – correctly – of the clarity with which the ECT and ICSID – in the combination that they have in this case – presented, by way of the ultimate commission to the courts of other States' parties to ICSID, of the outcome of an arbitration under ICSID between an investor and a State. It is for those reasons that there is absolutely nothing in the point and this Court should not accede to the invitation to regard that as material upon which there could be any sensible suggestion that there is what my learned friend repeatedly called ambiguity, in the effect of the words of the treaty to which Spain is party, relevantly. I am talking, of course, about ICSID because I will not mention ECT, unless required to, again. It is simply the launching pad by which ICSID becomes involved.

It becomes involved by agreement because the ECT agreement was that, at the investors' choice – that is, there is an agreement between Spain and the investors it was seeking to attract – there was an agreement that if there be a dispute, then the investor could opt between different modes of dispute resolution and that is why Spain, obviously, participated honouring its agreement. So far, pacta sunt servanda was observed. The ECT leading to ICSID, and then ICSID producing an outcome, and the outcome being one which was challenged as to adjudicative jurisdiction in ICSID within the self-contained system, unsuccessfully, leading to the binding effect which under ICSID, Article 53 accords.

Your Honours will, I hope, have seen from our written submission and outline that, in terms of the words which are at the heart of the interpretative exercise in this Court to review the correctness of the outcome in the Court below, one really has to have as a central focus Article 53. Because, in our submission, Articles 54 and 55 are working-out modes of what might be called implementation, both scope and limits, of what it means under Article 53.

**STEWARD J:** It is the quality of being bound.

**MR WALKER:** Your Honour has it. Yes. And may I say this. Your attention has been drawn to commentary, including commentary by Professor Schreuer, who, in a somewhat reflective manner, noted that the drafters did not proceed upon the basis that State parties to a treaty would defy the treaty. Nonetheless, it has to be observed, even Spain here today has not been bold enough to suggest that the expression the parties in 53 does not apply to the State. Bearing in mind what S in ICSID stands for, that must be so. This is a treaty by which disputes between States who have invited investment and who later made – for their own political sovereign



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reasons decided, to use an ugly word, to renege on conditions of investment, may be called to account in what is no doubt a complete volte-face in terms of State practice formerly.

**STEWARD J:** You say the very function and purpose of this Convention is to mitigate against foreign sovereign risks?

**MR WALKER:** Exactly so. It is what it is for. Now, it is tempered, it is nuanced, but it is a complete reverse of what was, in its absence, a sovereign capacity, including what is, again to use an ugly word, expropriation. Regulating that kind of State conduct by means that lacks any binding effect is an absurdity. And it is not to be supposed that the serious State parties, including Australia, who joined in ICSID, have engaged in any such farce. We can put that to one side.

That, in our submission, is a key to an understanding of the words used – we do not have to talk about implication as such, just the words used – and what they mean. What the words mean obviously includes a consideration of what might, without any danger, be referred to as a process of implication, but it is no more significant and no less central to understanding the meaning than going to a dictionary to observe that there are seven different meanings of a word but only one of them is appropriate in context. The choice of dictionary definitions is no different, no less central than the choice of what words mean including by what is sometimes called implication.

**GAGELER J:** Mr Walker, Article 27 played a role in the argument against you. Will you address that article in this context?

**MR WALKER:** Yes, indeed. The role that Article 27 in a way that – how should I say, does not get very full treatment in the courts below – the role that Article 27 had in our friend's argument yesterday would appear to be that it is a kind of expressio unius, that you have something offered in fairly grudging terms in 27, and that that somehow means that what might otherwise appear from a reading of, say, 54, is eliminated – not qualified, but eliminated.

Now, the first and obvious answer is that the subject matters of 54 – and forgive me for just saying 54, I always mean the collocation of 53, 54, 55, it is the words in 54 in particular – their subject matter is the machinery relevantly of the judicial arm or activity of a State party, what might be called for convenience as the contracting State, which is the recognising State, Australia in this case, and Article 27 is concerning the international presence as an international actor able to give what is called diplomatic protection, or bringing an international claim which, of course, does not



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refer only to one recognising State's judicial activity at all, it spans the globe.

**GLEESON J:** Mr Walker, given what you have just said, why is it not preferable to read Article 54 as operating as an implied repeal – partial repeal of section 9 of the Foreign Immunities Act than an agreement to submit to jurisdiction?

**MR WALKER:** Your Honours have seen that we do engage with that, and at that point I should have said, I am sharing the advocacy with Mr Hogan-Doran who will be addressing notice of contention points, as well as some aspects raised by our learned friend of what I will call an international doctrine so as to, as we would have it, correct some matters.

Without stealing thunder, may I say this. There is a beguiling appeal to the notion that the self-contained ICSID in the section 32 position of strength or dominance that it is given by the Act ought to be understood as, by its nature, whether because it is more specific than the subject of the Immunities Act or whether it is because, relevantly later – and it is really the former that should be the preferred way of looking at it – provides the law concerning immunity.

Can I just jump ahead at this point? Article 55, most obviously in the role it has taken in the presentation of argument this morning, is in danger of being misunderstood as to what it actually does about immunity. And you will recall this morning, 55 is said, notwithstanding the sole word "execution" being used, is said to encompass recognition, enforcement and execution, leaving aside that the moment overlaps between them, so as to swallow up, as we would have it, 54.

**GORDON J:** It would render 54 of no assistance.

**MR WALKER:** A mockery – a mockery in an international agreement of self-evident importance.

**GORDON J:** So, in that sense, you would have 53; whatever effect 53 has, and 55.

**MR WALKER:** Another mockery to parties agreeing that something is binding, but that they will be at liberty to ignore it anywhere where binding effect is asserted. Now, there is an initial premise to all of that, which is based upon a complete misreading of 55. Article 55 does not say, and States are immune from execution. It says that it is:

> the law in force in any Contracting State relating to immunity of that State . . . from execution.



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That is not derogated from by 54. Which, if I may say so, is entirely in accord with, and equally ancillary or explanatory, as 54(3) is, which says that execution – and this is execution of award in which a State may have lost – where a State bears the burden of the binding effect under Article 53. It says in Article 54(3) that:

> Execution of the award shall be governed by the laws concerning the execution judgments in force in the State in whose territories such execution is sought.

And that means, of course, execution of the award which shall have been by judicial process – I stress, by judicial process, recognised. Whether one can or should after the argument that this case brings to this Court, and the phrase and enforcement or "or enforcement" is perhaps provocative, because you can see in the earnest attempts in the reasons below what difficulties are presented by the overlapping concepts even before you introduced the French and Spanish apparently different linguistic approach – maybe conceptual approach.

**GAGELER J:** Mr Walker, my understanding then that Article 55 really provides the answer to Justice Gleeson's question as to why Article 54, as picked up by section 32 of the *International Arbitration Act* does not derogate - - -

**MR WALKER:** It does not displace - - -

**GAGELER J:** - - - section 9.

**MR WALKER:** - - - section 9, and there is more than section 9 I am going to come to, obviously, because the law in force of any contracting State translated to our case, the law in force in Australia can be found, for example, in Part IV of the Immunities Act, to which I will come.

Now, in deference to what Justice Gleeson just raised, that appears to be done by force of Article 55 given force by section 32. So, there is a sense in which it is this Act – its section 32 giving force of law to Article 55 – which then picks up something called a law in force. And, unless there be an absurdity at that point – that is, a burst bubble that you cannot reconstruct – one must be going to, among other things, Part IV of the Immunities Act. It may be that this is a six of one, half a dozen of the other point.

One way or the other, by dint of section 32 and Article 55 and by dint of Part IV of the Immunities Act, plainly intended to be governing by reason of section 32 and Article 55, one finds, as your Honours know, that



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there is no blanket immunity from execution, and I stress from execution. Here there needs to be a distinction between execution on an Australian judgment and what 54(3) calls execution of the award. It may be accepted that execution of the award is not something to which anyone can immediately leap, let alone without producing the authenticated copy of the award as contemplated in 54(2) for the purposes of the proceedings contemplated in 54(1) in order to give substance to the binding effect agreed and stipulated in 53(1).

Now, immunity from execution is to be contrasted with immunity from all and any proceedings. That is recognised, of course, in the Immunities Act itself, which contemplates that even where a foreign sovereign may be impleaded pursuant to its terms, there will not follow – as there would for any other non-State party litigant – access to all the assets of that unsuccessful litigant, the State party, by way of execution.

There is obviously a distinction. To put it at its most obvious and unthinkable, the Spanish Embassy is not available for reasons of transcendently important diplomatic dealings, and as a matter of international customary law. So, the distinction between execution of a judgment in Australia and the judgment is second nature. There is absolutely no difficulty with that distinction, though their relation – and their causal relation – is obvious.

We submit the same is clearly true of 55, which needs to be allied with 54(3), which refers to execution – significantly – as explanation, if necessary, imposing a limit on the consequences of the binding effect being recognised, and – gingerly to use this word – enforced, pursuant to, and in the form of the conduct required by 54(1) and (2).

Your Honours, the next point in our argument is to note that section 10, which in this case is engaged concretely by treaty as the form of agreement – section 3 definition – nonetheless contemplates submission by agreement or otherwise. "Or otherwise" is so general as not only to comprehend the conduct of which there are then specific examples in subsections (6) to (9), but also necessarily thereby conveys that you are looking for that which can be gathered from agreement – including by treaty – or otherwise, including an unlimited range of conduct to be attributed to the State party in order to ascertain, find, adjudicate whether there has been a submission in the case of agreement, of course, and on what terms, because there can be terms limiting the nature of the submission.

But that is enough, surely, to make it clear that the notion of submission is something which comes from an examination by a court seized of that issue, of either the agreement – and where they are relevant,



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its particular terms – or otherwise, which will include a whole range of different forms of conduct to see whether they mean, amount to, convey, carry out, bring about, constitute, submission. That is why a concern about resort to uncertain implications, et cetera, are really not to the point.

Now, my learned friend Mr Hogan-Doran will continue to develop in particular the answer we have to a large part of the argument against us, which I can summarise without developing by the assertion, made good by the materials we have already addressed in written submissions, that there is simply no rule of customary law, no State practice, no opinio juris – either assembled in this record or yet to be properly available to this Court for its consideration – which has the effect for which our friends contend.

It is for those reasons that we simply observe that when you look at the agreement in the Charter, in the ECT, the disputes to be arbitrated – if so chosen by the investor through ICSID – when you see what dispute resolution through ICSID entails – I stress "entails" – then one is simply left in this case with the section 10 question, does the agreement by being a party to ICSID and it being invoked against you – and you participating in that process – are you, Spain, thereby submitting to the jurisdiction of the Australian courts, which must be exercised by reason of the treaty by the Australia courts when asked to by an investor.

The whole point about the ICSID obligation in 54(1) – imposed on a "recognising State" – that is, on a State in the position of Australia, in this case – is that you do not get, as it were, the Crown heads agreeing that no mere commercial entity will enforce anything against any of them. That has been reversed. The notion is now that a trader – perfectly private enterprise – having succeeded in a grievance against a State party covered by ICSID can then go to any of the contracting States – in which, of course there might be, say, commercial property of Spain situate – commercial property available in this country, at least, for execution of a judgment.

In that sense, compulsory jurisdiction of Australia is agreed in advance – and we submit that then narrows the question down to the unremarkable proposition that of course it is entailed in the agreement of Spain to the ICSID scheme that it cannot frustrate or render nugatory – in my language, make a mockery of – 53 and 54 and 55 by saying, as our friends do at their highest pitch today, that be it recognition, enforcement or execution, by reason of 55 and it must be by reason of section 9 – because 55 merely diverts attention to section 9 – there cannot be the proceedings which, oddly, Spain has agreed Australia must entertain.

**GORDON J:** Is another way of looking at that to say that, on the Spanish approach to this interaction between ICSID and the Immunities Act, it would write out section 10(2)?



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**MR WALKER:** Yes, yes, it does.

**GORDON J:** In other words, it fails to recognise that there is an express exception brought in to deal with these kinds of arrangements.

**MR WALKER:** Yes. Sections 9 - - -

**GLEESON J:** Which is separate from subsection (5)?

**MR WALKER:** Yes, yes. Sections 9 and 10, or course, ride together. They could have been – maybe in former times they might have been – expressed in one section. But section 10 is not to be seen as some extraneous and somewhat distasteful possibility contrary to the benevolent rule claimed by section 9. There is a totally different view of section 9 – namely, that in days of commercial dealings between States' parties and private enterprise, it is positively beneficial that there be – to pick up my learned friend's figure of speech – something in the nature of a level playing field.

My learned friend, Mr Hogan-Doran, is going to come back to that figure of speech by way of a response as well. But, can I just say this about it? In many ways, the joining together of the States' parties to ICSID – including Articles 53, 54 and 55 – is to impose upon them – peculiarly because they are States' parties – obligations which cannot exist in relation to the private enterprise entities for whose benefit – and that is for the common, global perceived benefit of encouraging certain forms of trade – are intended to be able to obtain binding awards against States. So, obviously, private entities do not have their own judicial system. They do not have their own sovereign territories and they cannot have the specific obligations with respect to both those matters that 53, 54 and 55 convey.

It is for those reasons that when our learned friend enlists language such as noted by Justice Basten in *Li v Zhou* – "inadvertence", "ambiguity", or "uncertain reference" – they are as far removed from the position that we submit the words in question in this case necessarily display concerning submission to the jurisdiction of the Australian court for the purpose of the proceeding which produced the orders which were made in the Full Court by way of a correction, that is now no longer controversial, between first instance and Full Court.

That is because, in our submission, the notion of – I will start again. That is because the clear intent of these provisions – 53, 54 and 55 – necessarily involve a contracting party such as Australia – not a party to an award – to which, nonetheless, a contracting State is a party – by which its exercise of jurisdiction is compulsory. A proposition that necessarily



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entails, without any strain and certainly not so as to show "inadvertence", or any "ambiguity", or any "uncertain inference", necessarily entails – almost so as to go without saying – that that second contracting State, the party to the award, may not refuse the capacity, the power, the jurisdiction of the recognising State – the contracting State not party to the award to whose courts an application comes – by claiming an immunity.

We stress that that is an immunity against the proceeding contemplated by 54(1), which is not an immunity to which 55 speaks at all. So that, if there is an immunity, it has to be through section 9. If it is through section 9, it is of course subject to section 10. Now, this case has not been argued on the basis that you do not need – that sections 9 and 10 go away – you have simply got section 32 giving force to Article 54. Because, in our submission, evidently on the same statute book, the Immunities Act and the Arbitration Act very satisfyingly form a scheme concerning the amenability to jurisdiction of these international actors, States who, under customary international law, enjoyed what might be called a presumption of immunity.

**GORDON J:** As I understand it, it is on your argument, one starts with the presumption of immunity – section 9, one comes to section 10 and says: do I have an exception? One goes to 10(2), possibly 10(5) – but let us take 10(2) for the moment – we go to ICSID and we say: what happened in ICSID under the – which is now the law of Australia by reference to section 32 – and have we not got, for present purposes, an agreement?

**MR WALKER:** Yes. That is right. We simply say that this is an agreement by Spain, with Spain and with Australia and others, that in the events that have happened in this case, Australia must exercise the judicial power contemplated by 54. A State is required to do something, and the State that is a party to the compact; the agreement; the treaty by which that obligation is imposed is surely in a position where the second State cannot be heard to say, you have got to do this, but I can prevent that by claiming immunity, bearing in mind that this is . . . . . a treaty which is not peculiar to a particular dispute, one knows that it is mutual in the sense that the boot may be on the other foot next week, so to speak.

There is reality in seeing what is entailed in a promise by Australia, to Spain – and to others including the contracting States whose residents have standing under ICSID to arbitrate a dispute. Where that is so, of course there is entailed in that that Spain may not frustrate the only evident intent of this dispute resolution scheme for the creation and recognition of binding awards by simply asserting immunity – and as our friend puts it today, immunity at the earliest point. One asks, in fact, how that sits with the familiar notion that when – I am sorry, your Honours, I have noted the time.



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**GAGELER J:** I was waiting for an appropriate break in your argument, Mr Walker.

**MR WALKER:** I was worried I was not going to draw breath, your Honour.

**GAGELER J:** On that basis, we will take this available opportunity for the morning adjournment.

**AT 11.22 AM SHORT ADJOURNMENT**

**UPON RESUMING AT 11.36 AM:**

**MR WALKER:** Proposition 5 in our outline. Could I briefly touch, particularly in response to the way our learned friend put the matter, on section 17. Section 17 does not have the effect of altering the meaning, according to their plain tenor, of the terms of section 10. But can I remind you that section 17 is a quite different subject matter from ICSID arbitrations. Section 17 is referring to the kind of arbitration which might, according to Australia law, be subject to the kind of proceeding contemplated in subsection (1) of section 17. None of which, of course, can be imagined with respect to an ICSID arbitration.

Subsection (2), as to the premise of the application of the rest of subsection (2) that is contained in paragraph (a), where the parties are agreed they were not available in this case, bespeaks even more plainly the fact that one is there talking about claims of a kind which, were they litigated in a court in Australia, would fit within the specific provisions specified in paragraph 17(2)(a) – and this foreign State would not be immune.

Section 17(2) goes on to say that if instead of being litigated that had been arbitrated, then – no doubt so as to apply the general policy observable around the world to eliminate immaterial differences between litigation and arbitration for dispute resolution – then there would be no immunity for certain judicial proceedings in Australia in relation to such an arbitration. So, the subject matter is quite apart from the kind of subject matter to which section 10 can speak with respect to ICSID. They cannot – they are not occupying the same universe at all.



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But it is significant to note that in that Australian statutory removal of any immunity, had there been any presumed – see section 9 – that in the removal for those different, I will call them domestic arbitrations, that – in order to render the scheme workable – the proceedings to which the immunity would continue not to be available, include proceedings concerning the recognition as binding for any purpose or for the enforcement of an award.

In our submission, that is a powerful indication that judicial proceedings of that kind are to be understood in this country – including for the purpose of the arbitration Acts giving the force of law to ICSID – as being organically ancillary to the effectiveness of arbitral proceeding, including the making of binding awards.

**GORDON J:** Can I ask about that? Is that also supported by the fact that Part IV of this Act it deals with enforcement separately?

**MR WALKER:** Yes, I am going to come to exactly that; yes, your Honour. Before I come to Part IV, just before I come to Part IV, and to complete my drawing to your Honours' attention of references to arbitration, there is section 28, which is equally not central to the dispute between the parties before your Honours. But your Honours again see that there is then an expression proceedings leading to judgment, or an order, for the recognition or enforcement of a foreign award.

It is plain from the – what I might call diplomatic niceties to be observed concerning time for things to be considered and for there to be a response stipulated in section 28. Those are not matters which are regarded as alien to the scheme for the subjection of foreign States to the jurisdiction of Australian courts. I stress, the *Foreign State Immunity Act* is not to be understood as a statute which simply grants immunity across the board. Section 9 starts a process of inquiry according to the facts of a case.

Now, Part IV, to which Justice Gordon has just referred, which is headed "Enforcement", just for fun, so to speak, starts with section 30 "Immunity from execution", but really this is not the stuff of distracting cruces of interpretation because in our legal English, execution and enforcement are, to put it mildly, not unrelated matters, and it may even be that the former is a subset of the latter, though one does not need to engage in terminological taxonomy for the reasons the Chief Justice in the court below noted in his paragraph 3 and following.

But in section 30 there is a similar pattern, as one sees in sections 9 and 10, and the distinction is significant. Sections 9 and 10 concern what I think our learned friends were referring to yesterday as adjudicative



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jurisdiction, but with or without that epithet, Part II of the Immunities Act, sections 9 and 10, have to do with the jurisdiction of the courts of Australia in a proceeding and the position of immunity of a foreign State.

Part IV is dealing with a different, though evidently integrally related, phase of dealings between parties, including a foreign State. Section 30, like section 9, provide for a rule which renders it necessary to consider the extent to which that rule is disapplied or qualified in the following provisions of the Part. One sees there that another term is inserted, "the satisfaction", and then one comes to the notion of enforcement, it is:

> enforcement of a judgment, order or arbitration award –

But the immunity is from execution, as the heading says – but, more to the point, what the words say:

> the property . . . is not subject to any process or order . . . for the satisfaction or enforcement of a judgment –

et cetera. That plainly and functionally distinguishes between the binding effect of an award or judgment, on the one hand, and the availability of property of a foreign State for its satisfaction – it being a form of enforcement – on the other hand.

**GLEESON J:** So why – you said that the order that was made by Justice Stewart was in the nature of a mandatory injunction.

**MR WALKER:** I have checked the words. It was an order that Spain paid - - -

**GLEESON J:** But you were not meaning to say it was an order in the nature of execution.

**MR WALKER:** No, no, no, no. How shall I say? We have no dog in the fight concerning the improvement or correction of the orders in the Full Court. For what it is worth – and without starting a controversy that we do not wish to maintain – there are reasons to doubt whether an order that somebody paid, made by a judge, is execution.

**EDELMAN J:** But it made the enforcement an order that - - -

**MR WALKER:** Absolutely. For all the reasons that your Honours have seen in our written submission that we do not need – subject to what my learned friend will follow on – we do not really need – bearing in mind that our friends succeeded in their proposed dichotomy below. There are three



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words, but they succeeded in making it a dichotomy. Very well, that is why we embrace enthusiastically what the Full Court says – both the Chief Justice and Justice Perram. If there be a dichotomy, then looking at what is sought by my client against Spain, is that recognition or execution? It is manifestly recognition and not execution.

The fact that both recognition and execution could sensibly, as a matter of legal language, be seen as aspects of either steps towards or stages in enforcement is really not to the point. By the way, your Honours appreciate that there is a difference between enforcing an Australian judgment and enforcing an award which is – classically, paradigm form of enforcement of an award, is by entry of an Australian judgment.

**GORDON J:** That is why I am asking, is that a reason why Part IV is of interest, I think.

**MR WALKER:** Yes.

**GORDON J:** Because it draws that distinction.

**MR WALKER:** Yes, and so that is why I am drawing it to attention.

**GORDON J:** So, when you took us to the orders that were made by the Full Court this morning, is that what you say is the working-out of the second part of those orders?

**MR WALKER:** Yes. Part IV is left to operate in the facts that may happen from time to time. As your Honours know, commercial property is not – see section 32 – it is not immune. Section 31, however, before I come to property which is not immune – that is, it is within the exception in the opening words of section 30 – there is, of course, also the concept which can be cautiously paralleled with section 10 in section 31 of a waiver of that immunity, and it so happens that that can be done only by agreement. One thing is for sure: that by reason of Article 55, that has not been done in this case, because, rather than a waiver, the parties have agreed that it will be left to the Australian law concerning immunity from execution, and we know that some property is immune and some is not.

That is why the Full Court was correct, obviously, not to declare an immunity, which is absurd because it has to do with different kinds of property, but rather to say these orders are not to be understood as giving effect to any supposed waiver or finding that there is any applicable exception. That has to be left to be worked out when the sheriff turns up and seeks to take over the embassy. Which, of course, will not happen – but that would be a case for immunity.



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**GAGELER J:** Mr Walker, you took us to the order that was made by the Full Court which uses the word "execution".

**MR WALKER:** Yes.

**GAGELER J:** Why would not that word, as appearing in the order, be read consistently with the meaning of the word "execution" in Article 55 as picked up by section 32?

**MR WALKER:** Yes. Yes, it does.

**GAGELER J:** All right. I mean, the word may have a meaning in international law as so picked up which is slightly different from the domestic law meaning - - -

**MR WALKER:** Yes, yes. There is nothing nuanced in what we say. We say that order by the Full Bench below is using "execution" as required by section 32, which gives force of law to Article 55, and, by the way, refers off to other Australian law which happens to be in Part IV of the Immunities Act.

**GAGELER J:** Well, not just Part IV, is it?

**MR WALKER:** No, I know, but - - -

**GAGELER J:** It overlaps with section 9.

**MR WALKER:** If I may say so, all the – I will call them adjectival provisions, which have to do with who can turn up to do what – there is a lot of law about execution, most of which is uncontroversial for the purposes of this argument. This argument happens to focus on what is marginal to most people's concerns about execution; namely, the immunity of the person not immune from judgment, but not all of whose property can be taken.

Now, leave aside that which might be available to everybody – workman's tools cannot be taken, that kind of thing – foreign States have a more grandiose and customary international law-based presumption, which has been, if I say, much affected by provisions such as Part IV of the Immunities Act. So, commercial property is available, for example. That is why, in our submission, the orders made on our application are orders which, on any view of it, fall on the recognition rather than execution side.

**EDELMAN J:** It may just be a semantic point, ultimately, but that part of the order that provides that judgment be entered in relation to particular amounts, is that not traditionally understood as part of enforcement?



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**MR WALKER:** Your Honour, I cannot possibly say no, but that does not it is not also recognition. Enforcement must either start with recognition or commence immediately upon, and by reason of, recognition. Those differences are, in our submission, hair-splitting for the purposes of understanding, under section 10, the effect of Article 54(1) in particular.

**EDELMAN J:** But if the proper division in Article 54(1) is a division between recognition on the one hand and enforcement and execution on the other, again, it may be semantic, but would the formal order more accurately then be expressed in relation to the first half that you described; in other words, the recognition that the award is binding is rectified and so on, but without the part of the order that judgment be entered?

**MR WALKER:** It is an available view, but not to be preferred. The terms of 54(1) employ the familiar notion of the courts treating an award as if it were a final judgment of the courts. And, I suppose, the strength of the Full Court observing what courts in other systems have done by way of entering judgment, by way of recognition – or in order to recognise – is that it would be a bit odd to say, you would have to treat as if it were a final judgment, but whatever else you do, you must refrain from entering a final judgment.

Bearing in mind that treating as if it were a final judgment means that, subject to immunity of property, there would then become available execution. Then, there are multiple reasons, all combining the same direction, in favour of the clarity in courts of record of there had been a judgment; the official records of the recognising States saying there is a judgment by way of recognition of this binding award. Whether you may proceed to execution or not will depend – as the Full Court stipulated in 1(b) in this case – upon the application of the Australian law as to immunity from execution; embassy, no, pinball parlour, yes.

That is why, when one looks at the repetition of that phrase in 54(1), it is, in our submission, the preferred view that there is no transgression into execution by entering the judgment on the express basis that immunity from execution – that is not immunity from judgment or proceedings as immunity from execution of a judgement – is left to be determined by, in this case, Part IV of the Immunities Act.

In Article 54(1), the positive obligation on the recognising State – Australia, in this case – is to recognise an award. And - - -

**GORDON J:** But, Mr Walker, it is to recognise it as if it were a final judgment of the court in that State. If one has got a debt claim and one gets



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final judgment, one gets an order which says – does it not – that it be judgment entered in the sum of X?

**MR WALKER:** That is my point entirely, that the obligation to recognise – you are not told at that point in the sentence, how do I do that, and - - -

**GORDON J:** The other way of looking at it is if you step back out of this immunity situation and look at it as an ordinary debt claim entering in judgment, the fact that you have got the debt claim may say nothing about recovery because the person is subject to some sort of insolvency arrangement or whatever. All it does is it gives you a piece of paper which tells you what you are entitled to.

**MR WALKER:** Which may or may not be the basis of - - -

**GORDON J:** Execution or enforcement.

**STEWARD J:** It may not matter to your argument, but at least Article 54(2) does suggest that recognition is a different thing to enforcement.

**MR WALKER:** Yes, it does. Would your Honour mind if I come to that fairly soon?

**STEWARD J:** I was just going to suggest, before you do that, that it may be that the active enforcement in Article 54(1) is the act of entering judgment.

**MR WALKER:** Yes. But that is not execution.

**STEWARD J:** That is not execution, no, because - - -

**MR WALKER:** Because 55 is talking about execution, bearing in mind that 54(3) has gone to the trouble of saying – 54(3)says nothing about immunities, by the way. Article 55 says something about immunities, but 54(3) first of all says there is a law concerning the execution of not awards, not the executions against parties – sovereign States – but the execution of judgments.

There is a law concerning the execution of judgments, which, as it happens, also answers the description of being a subset of that law. That is Article 55, a reference to Part IV of the Immunities Act. You look at all the law about execution, what can a sheriff do; how do you conduct the auction; how do you account for the proceeds, et cetera, all of that; writs and the like. But 54(3) – and, in our submission, that does not make much sense if



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there is no judgment of which there can be execution to be governed by the laws referred to in 54(3). There is a self-conscious and entirely salutatory assimilation in 54(3) of what is called execution of the award with execution of judgments.

What better way to recognise the award or to enforce it, short of execution, in light of those provisions and to enter judgment to reflect the binding force of the award upon which judgment then the laws in force concerning the execution of judgment can then be availed of so as to execute the award. It is for those reasons that the form of order – this is a very long answer to Justice Edelman, I am sorry. It is for those reasons that the form of order in the Full Court below is to be preferred, because the laws in force from time to time concerning the execution of judgments – I hope this is not just a wind in the willows point – means that there has to be a judgment in order for there to be execution.

The question would be whether section 32, giving force of law to 54(3), works some silent addition to every law concerning execution of judgments so as to have the footnote including an award recognised. In our submission, there is every consideration of convenience, there is no objection in principle, and there is, in our submission, the great virtue of official clarity – that is, process of the recognising State by its courts' judgment – in the way in which the Full Court proceeded in this case.

**GAGELER J:** Mr Walker, there is an obligation under Article 54 to enforce. What does that require?

**MR WALKER:** Yes. That requires, in our submission, the entry of a judgment which can then be dealt with according to the laws about what rights and recourse a judgment will give; that is 54(3).

**GAGELER J:** So, just trying to understand this. You say there is no distinction between recognition and enforcement?

**MR WALKER:** Not in the circumstances of this case, bearing in mind what we sought and were given. The only relevant distinction is that enforcement may, without violence to the language, extend to what we call execution of judgements, which is extra-judicial though judicially (a) mandated, and (b) supervised.

**EDELMAN J:** And, presumably, Mr Hogan-Doran then is going to come to the point that the Spanish and French versions do not detract from that?

**MR WALKER:** Yes. I mean, we submit – and I do not want to cut across anything my friend is going to put. The Chief Justice put it pithily below, we submit.



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As I say, 54(1) –and this goes back to a matter that Justice Steward has asked me about 54(2) – in 54(1), your Honours see that the obligation – if I can just select the words in question – are to "recognize" "and enforce", not or enforce, recognise and enforce. And, we stress, for the reasons I hope I have sufficiently put – at least for it to be understandable what our position is – as if it were a final judgment of the court. There is, necessarily, some awkwardness, but we do assert that the very best way to do that is to reflect the award in a judgment to that effect.

**GORDON J:** And do you accept that the Full Court – the orders that they made as falling within the first limb of that?

**MR WALKER:** Yes. For what it - - -

**STEWARD J:** Is it possible for the tribunal to make an award which does not include a pecuniary obligation?

**MR WALKER:** Yes. Yes. To give something back. Those expropriated windmills, give them back now. If it went on – or, in the alternative, pay what we might call conversion damages, that would be pecuniary. But, to give the windmills back, no, ICSID does not pick that up.

**STEWARD J:** But do you say the words "as if it were a final judgment the court" must qualify or deal with both recognition and then enforcement if there is a pecuniary obligation?

**GORDON J:** That is why I asked if it must be possible to split them.

**MR WALKER:** Yes, quite. What I am saying is - - -

**GORDON J:** Which is what the Full Court did, in the sense. They said, we are not going to have this debate about whether it is enforcement or not because we do not need to.

**MR WALKER:** That is right. Because we are not executing and we are not authorising execution, that is left to the law concerning execution – see Article 55. Lurking underneath Spain's position is, look, we are immune from execution, therefore we should immune from everything. At every point – and I am sorry if that is a travesty, it is not intended to be – but at every point of that simplification, it is wrong. I need to point out that in the second sentence of 54(1), the permission is provided for countries like us that we:

may enforce such an award –



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Now, is that shorthand, or is there any significance in the fact that it does not say anything about recognition? We submit – again for the reasons that are sufficiently canvased in the court below and in our written submissions, but to which my learned friend will turn, no doubt, in following – that of course there is no such hidden trap of interpretation in that language, which is, after all, international language, albeit given the force of the law in Australia.

Then we come to 54(2) and, bearing in mind the "and" in 54(1), there is not much of any significance – and certainly none for the differences between the parties in this case before your Honours today – by the word "or" having been introduced. So, whether you are seeking recognition or enforcement – and it may be that that is a form of words which rather dispenses anyone from drawing a distinction, let alone a bright line distinction.

So, whether it would be one or the other, in order to do so, you have to do something which, of course, both enlists the courts of the recognising State – Australia, in this case – and does so, familiarly, by what I am going to call an official document or record manner of proceeding. Extradition has a similar necessary international cooperation element. In our submission, the designation of the Federal Court – relevantly, in section 35 – echoing the obligation that section 32, in any event, imposes by the second sentence of Article 54(2) necessarily says that what Spain is agreeing to in ICSID is that the court system of Australia is to proceed in accordance with 54.

That is why, in our submission, it is really quite untenable to suppose that for section 10 purposes, there can be any doubt that that agreement is one that entails – if one must put it this way, it necessarily implies – in our submission, it is simply the meaning of the expressed words of ICSID – that Spain cannot claim immunity so as to stymie what Australia is obliged to do – by a promise to Spain, as it happens, as well as to Luxemburg and the Netherlands – in relation to this award.

In our proposition 6, there is a phrase that we do wish to emphasise in summarising what I have just finished addressing in argument. What we have been construing in Article 54, with a constant consideration of how 55 may affect it, all arises because of the event that Spain has failed to comply with its obligation under Article 53, however unlikely Professor Schreuer thought such a thing would ever be.

Spain holds back from saying that these are words that never imposed either binding nature of an award or obligations with respect to judicial proceedings for recognition and or enforcement upon a State party as opposed to a private enterprise entity. It follows, in our submission, as



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we put in propositions 7 and 8, that it is simply a working-out of what is entailed, necessarily implied in, implicit, or in fact just conveyed by the words of these provisions of . . . . . force of law, but, being an agreement of Spain, that amounts to the section 10 submission.

Your Honours, you have had your attention drawn to the way in which, with great respect, very thoroughly the primary judge considered the antecedent international dealings and the, I will call it, comparative law setting in which, necessarily, one must understand these words to have been chosen in ICSID in whatever language, and, in particular, reference to Justice Stewart's paragraph 94 – I do not need to take you to it. Could I remind you that what the then Professor Briggs was referring to in relation to exequatur should not be seen as some arcane, let alone, for our purposes, obscure notion.

It is simply the endorsement in one system of the outcome in another system, be it an arbitral system domestically, which is endorsed by a judgement of a court in the same jurisdiction, albeit, in this case, the reception by a designated authority – in our country, a court – of the ICSID document recording an award and the exequatur is, in familiar terms – I hope we do not have to give evidence of Latin – may it be carried out. That, in our submission, is, for the reasons that the scholarly material makes clear – to which we have drawn attention in writing – that is, either as well or probably best done by the entry of judgment in the manner the Full Court did.

It is to be recalled that whatever Article 55 does by its ambulatory reference to other provisions of the law to be found elsewhere, whatever else it does, it does not proscribe, in terms or by any effect of the words used, the enforcement of an award. Why would it, bearing in mind that Article 53 says an award is binding, including on such significant legal personalities as international States – States as a matter of international law. For all those reasons, in our submission, the section 10 reasoning in the Full Court is reasoning which produces a manifestly correct outcome and my friend will now follow.

**GAGELER J:** Mr Hogan-Doran.

**MR HOGAN-DORAN:** If it please the Court. Your Honours, I might just deal with the linguistic issue of the French/Spanish version in answer to a question, or a point, Justice Edelman made just a moment ago. After that, what I intend to do is to deal with two matters that were raised outside the scope of my learned friend, Mr Ward's, outline of oral argument and then deal with some parts, but only a few parts, of paragraphs 5 through 7 of that outline of oral argument in terms of the material that was relied on by the



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appellant to establish that custom international law rule which they were relying upon - - -

**GAGELER J:** Mr Hogan-Doran, could you speak up a little, please?

**MR HOGAN-DORAN:** I am sorry. Does your Honour need me to repeat what I just said?

**GAGELER J:** No, I heard you, but faintly.

**MR HOGAN-DORAN:** All right. Thank you. I will try to speak louder than Mr Ward. Could I deal first with the French and Spanish versus English point. The controversy between the parties at first instance, which is summarised in paragraphs 40 and 41 of the primary judge's reasons, which is at core appeal book 21 to 22. Starting at paragraph 40, at the bottom of page 21, the foundational argument, so to speak, of the applicants, which is my clients:

> submit that the Investment Convention excludes any claim for foreign state immunity in proceedings for the recognition and enforcement of an award, as opposed to . . . steps to execute upon a judgment that recognises and enforces such an award.

That was based upon our reading of the treaty – at least the English version – as having three terms, three concepts: recognition, enforcement and execution in Article 54, but where Article 55 deals only with execution.

Spain's position – which is set out in paragraph 41 – was, in a sense, that the French and Spanish versions of the authentic texts of the treaty, in a sense, govern and they employ two concepts: one being, really, recognition and enforcement, on the one hand, and execution, on the other. But, really, the French version, wherever the word "enforcement" appears in the English version, has a word such as "exécution", and that is repeated in 54 and in 55. So, the same term – or some very similar thing to the same term – is used in 54 and 55 for something that is not recognition.

**EDELMAN J:** There was no expert evidence about the nuance of either of those languages.

**MR HOGAN-DORAN:** No. It was just put in that very bald way.

**GORDON J:** Also, we are up against what his Honour addresses at 82, are we not, in the sense that was there not a recognition that all the texts were equally authentic?



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**MR HOGAN-DORAN:** That is right – which gave rise to a need to reconcile the texts. That brings into play Article 33 of the Vienna Convention that posits, essentially, a two-step process in Article 33(4) which is first – one attempts to reconcile the texts, having regard to the ordinary principles of interpretation – which is Articles 31 and 32; can one make sense of apparent differences between the two texts; and if one cannot, one then has to make a choice based upon which of two irreconcilable versions of the treaty best promote the objects and purposes of the Act.

His Honour reconciled the two, in a sense, by finding that the English text governs – I mean governs in the sense that the English text best expresses differences of nuance between recognition and enforcement. And then there is execution, whereas the French and Spanish texts, although they use the same word – or appear to use the same word for enforcement and execution – probably have a meaning that does shift according to the context in which the words appear.

**GLEESON J:** But you are not suggesting that we can really engage with this issue in any way without having some expert assistance about the terms of the French and the Spanish versions, are you?

**MR HOGAN-DORAN:** For present purposes, it is unnecessary for the reason – perhaps, I should come directly to explain – which is that his Honour, having made the finding that he did, that the English version best expresses what was intended by the treaty – and it was not just a question of looking at the linguistic differences. His Honour had regard to – he had the travaux preparatoires; he had various material commentators who had written about the Convention; his Honour also had the benefit of the report of executive directors; his Honour also made findings about what the objects and purposes are. Based upon that, his Honour found that there is, essentially, three concepts at play.

In a sense, whatever we were seeking, it was not execution – which is what matters because it is not Article 55 – and it could be recognition, or recognition and enforcement, as described in Article 54(1) and (2). But the real issue was, was it caught by Article 55 – and it was not – where his Honour, at paragraphs 89 to 94, goes through a process – and your Honours have already looked at that, but that is at core appeal book pages 34 and 35 – discusses the:

> concepts at play here, namely recognition, enforcement and execution.

That reflects his Honour's later finding that the reconciliation indicates that there are three concepts at play. His Honour then goes through an analysis,



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primarily having regard to common law authority and how one would understand traditionally recognition and enforcement to mean in our jurisdiction, which is we would typically think of a foreign award as being recognised and enforced essentially by entry of judgment on that award. But enforcement does not, in that instance, include any step of execution; that happens later. His Honour makes the point in paragraph 94 that:

> Recognition and enforcement by judgment on the award is equivalent to what is referred to in civilian jurisdictions as *exequatur*.

As an example, his Honour also had access to the decisions of the French courts, where the French courts found that an application for exequatur was consistent with Article 54 and the waiver of immunity in Article 54, and was not inconsistent with Article 55 which preserved State immunity at the national level.

**GORDON J:** So, if we just identify where we are at in terms of your argument, you have the primary judge adopting one view of the world, you have the Full Court adopting a different view of the world, and now we are being asked to look at something that we do not have evidence of in order to seek to resolve this distinction. Do you accept that we do not have the materials available and, absent evidence about it, it is not an exercise we can undertake?

**MR HOGAN-DORAN:** My submission is it is not necessary to resolve it because on either the primary judge's analysis or the Full Court's analysis, the proceedings which are either within the meaning of the treaty – recognition and enforcement but not execution, if one looks at the English language version – or the proceedings are recognition but not execution, where the French or Spanish versions of the treaty govern, either way, the preservation immunity in Article 55 only concerns execution.

**GLEESON J:** But, Mr Hogan-Doran, is there anything wrong with us taking an approach which involves just not looking at the French or Spanish versions because we do not have any evidence about what they mean? Can we just go with the English version?

**MR HOGAN-DORAN:** The difficulty, your Honour, with that is that the Full Court did resolve the controversy in a different way, having had regard to the French and Spanish texts and - - -

**GORDON J:** Well, they did not really. What they said was, we cannot resolve without evidence and so, what we are going to do is we are going to park that issue. Chief Justice Allsop and Justice Moshinsky criticised the lack of evidence.



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**MR HOGAN-DORAN:** The lack of evidence counted against my clients because we did not adduce evidence to say that the French and Spanish versions of the treaty had this perhaps ambulatory meaning where it could, in one context, mean what we would call enforcement, but in another context mean execution as a different concept. As we understand what the Chief Justice was saying, was that – and that is partly our notice of contention point 1; is that it appears to, we say in submissions, reverse the onus of proof. We failed to adduce evidence of the meaning of the French and the Spanish texts when it was Spain, the appellant, that was contending that the Spanish and French texts had a certain meaning.

One does not need to go to notice of contention ground 1 at all because on either of the judges' approach or the Full Court's approach of interpreting the treaty, the proceedings that were being brought were not execution, where execution, in Article 55, is the area within which national laws of immunity are preserved by the Convention.

**GAGELER J:** So, we do not need to resolve the issue for the purpose of determining this appeal? All we need to hold, in your submission, is that no execution is involved in these circumstances.

**MR HOGAN-DORAN:** That is right. Yes.

**GORDON J:** Does that mean not identifying or seeking to resolve the different approaches adopted below?

**MR HOGAN-DORAN:** It is not necessary to resolve them, so long as, on either view, it is not execution. And, if it is not execution, then there is no preservation of immunity.

**GAGELER J:** Let me just step through it. It has to be recognition. Whether it is enforcement in our terminology need not be determined, provided we hold that it is not execution.

**MR HOGAN-DORAN:** Yes.

**GLEESON J:** And that is execution within the meaning of the English language text?

**MR HOGAN-DORAN:** It is execution within the meaning of what is contemplated by Article 55, which I think is termed - - -

**GORDON J:** As part of our law?

**MR HOGAN-DORAN:** Would be as part of our law. Because there is no indication that Article 55 execution meant anything other than that once one



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has judgment entered, the steps that are then taken to enforce – sorry, I withdraw that. What is sometimes termed - - -

**GLEESON J:** We have to look at the Australian laws to give meaning to Article 55 and that can only point us to Part IV of the Foreign Immunities Act.

**MR HOGAN-DORAN:** Yes, that is right. And that is what Article 55 was directed at. That was certainly the view both of the primary judge and of the Full Court, that Article 55 was concerned with the steps that take place on the other side of the making of orders that are described in the nature of an exequatur where one could simply enter judgement in terms, for example, of the amount that is owed – which, as the Chief Justice explained, that just enables the machinery of execution of the resulting judgment or, if one looks through the judgment, enables the execution of the award and the obligation to pay under the award against specific property.

**EDELMAN J:** You do have to, though, rely on the onus point as well, do you not? Because in the interpretation of the Australian statute, one has to turn to the Convention. In the interpretation of the Convention, the meaning of the words are informed by their context and purpose, which includes the identical words in the Spanish and French version. On one view, the identical version in Spanish and French could be using their concept to mean execution and enforcement, on the one hand, as compared with recognition.

**MR HOGAN-DORAN:** When your Honour says execution and enforcement together, is your Honour using enforcement in a different sense to execution as we would understand that in domestic law, and is referring to the step of exequatur?

**EDELMAN J:** In other words, that the Australian use of the word "execution" was understood – in the context which includes the French and Spanish versions – as a word which would encompass what we would also call enforcement.

**GLEESON J:** Before you answer that, that raises a question in my mind. Why is that a necessary part of the context in circumstances where the English-language version is said to be an authoritative?

**MR HOGAN-DORAN:** It is equally authoritative, together with the French and the Spanish. That is the difficulty that gives rise to the need to reconcile the three versions. There is not a provision in the treaty that gives precedence to one linguistic text over another.



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**EDELMAN J:** The Vienna Convention would require all three to be considered, would it not?

**MR HOGAN-DORAN:** I am sorry, your Honour?

**EDELMAN J:** The Vienna Convention would require all three languages to be considered.

**MR HOGAN-DORAN:** Yes, and that is Article 33.

**EDELMAN J:** Yes.

**MR HOGAN-DORAN:** One looks to see if there is a provision that governs the relationship between a linguistic text, and some treaties do that. If there is not such a provision, then one gets to Article 33(4), that one has to reconcile using either ordinary principles of interpretation, or, if that does not lead to a reconciliation, choosing the version which best suits the objects and purposes of the Convention.

**GLEESON J:** Does that not mean that in the case of any dispute about a provision of ICSID, rather than being able to rely on one version as authoritative, what is required is to have expert evidence of the meaning of all three versions?

**MR HOGAN-DORAN:** It is not necessarily required if one accepts as a premise that the French and the Spanish, for example, as appears to be said, is using the same text; same word to describe one concept. There is no evidence from, say, surveying, to say that it was actually using multiple concepts. Then, one has the apparent use of a single word for "recognition", and a single word, as I said, for either "execution" or "enforcement". One then has to characterise it as being one or the other.

**GLEESON J:** But that is not necessarily how interpretation works, is it? Just to take one word out of a phrase that is used in a different language.

**MR HOGAN-DORAN:** No, and I am not suggesting that that is what was being undertaken. It was Spain that pointed to the apparent use of a single term in the French and Spanish versions of the treaty to indicate, well, there are only two concepts at work: recognition and execution. The question then was, well, even if that is right, one gets to the concession that Spain – concession is one way of putting it – but the point made in paragraph 67 of Justice Perram's judgment. Sorry, paragraph 69 of his Honour's judgment, in the final sentence:

it –



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Being Spain:

> 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 –

That is, why the proceedings could not be characterised as a recognition proceeding once one accepts Spain's contention that there are only two concepts at play: recognition and execution.

**JAGOT J:** What paragraph was that?

**MR HOGAN-DORAN:** Paragraph 69.

**JAGOT J:** Sorry, I though you said 59.

**GORDON J:** Is that concession made, or that observation made, only on the basis that there is acceptance that there are these two categories?

**MR HOGAN-DORAN:** Well, yes, because it comes after – or in the context of Justice Perram finding, as his Honour did, subsequently, that there are only two concepts at play once one accepts the French and Spanish version; which is, there is recognition on the one hand – translated into English – recognition on the one hand and execution. So, when there is a dichotomy, why could these proceedings not be said to be recognition within the meaning of the treaty?

**GORDON J:** Is that reflected in what his Honour says at 87 on page 97 of the core appeal book where he says:

> that 'execution' and 'enforcement' should be given the same meaning –

given in Australia in order to:

> bring them into line with the Spanish and French texts –

**MR HOGAN-DORAN:** Yes, that is "execution" and "enforcement" in the English text has to be given the – has to have one single meaning, which is the French and Spanish version of "l'exeuction" and "ejecutar". I note the time, your Honour. Is that the time?

**EDELMAN J:** You have another 15 minutes.

**MR HOGAN-DORAN:** I do, I am sorry. My mistake.



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**GAGELER J:** How long do you expect to be?

**MR HOGAN-DORAN:** If I am moving on from this point now, unless your Honours have further questions on it - - -

**GAGELER J:** Well, what is this point? What is the point that you have made; that we accept the approach taken in the Full Court?

**MR HOGAN-DORAN:** Well, your Honours could accept either, but certainly the Full Court's approach - - -

**GAGELER J:** We do not need to resolve it?

**MR HOGAN-DORAN:** We do not need to resolve it, no. It does not need to be resolved at the end of the day.

**GAGELER J:** Very well.

**MR HOGAN-DORAN:** Because the appeal that is before your Honours has not involved a re-agitation of the question of interpretation or reconciliation, rather, or the linguistic versions of the treaty. We have perhaps anticipated that might have been in the appeal, which is why our notice of contention grounds 1 and 2 are directed at this linguistic reconciliation exercise.

**GORDON J:** So, just so I am clear, we do not have to resolve it, and both 1 and 2 of the notice of contention fall away?

**MR HOGAN-DORAN:** Yes, that is right, your Honour.

**GAGELER J:** But what does that leave, Mr Hogan-Doran?

**MR HOGAN-DORAN:** The problems I want to deal with, your Honour, are two points that were raised orally, and certain parts of the material that our learned friend referred to. I anticipate that I can deal with the two points, certainly within the next 15 minutes, and I probably have about no more than about 20 minutes to go after lunch.

**GAGELER J:** What are you dealing with after lunch?

**MR HOGAN-DORAN:** Those are the points in response to paragraphs 5, 6, and 7 of the appellant's outline of argument, which is the material they rely upon to establish a customary international law rule that informs the interpretation of section 10 and appears also at Article 54 of the treaty.



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**GAGELER J:** All right.

**MR HOGAN-DORAN:** The two points I want to deal with – the first is a point raised by my learned friend, Mr Ward, yesterday at around 1268 of the transcript, where he effectively submitted that the Convention does not create a level playing field between, on the one hand, investors, and States on the other. This was, in part, subject to findings by the primary judge.

If your Honours can go to paragraph 114, which is at core appeal book page 39. In the context of discussing the "object and purpose" of the Convention, his Honour observed that one could glean that from the preamble, to the extent there was assistance, it:

> recognises that the mutual consent by parties to disputes that arise in connection with investments between Contracting States and the nationals of other Contracting States constitutes a binding agreement which requires . . . that any arbitral award be compiled with. Thus, it is apparent that the existence of an effective enforcement mechanism in the scheme . . . underpins the object and purpose of the Investment Convention.

There is then reference to the report of the Executive Directors – it is a document that I will come back to. Then, going over the page, in the last sentence, his Honour said:

> The preamble to the Investment Convention is consistent with this idea of equality of treatment in its statement that there is a desire to create facilities for international arbitration "to which Contracting States and nationals of other Contracting States" may submit disputes.

Then, at 116:

> It might thus be said that the object and purpose of the Investment Convention support the notion that effective enforcement mechanisms that treat investors and state parties to the Convention equally were intended. That would support the notion that, insofar as the text allows, arbitral awards should be recognised and enforceable equally against investors and state parties.

**GAGELER J:** Well, I mean, this is the thrust of Mr Walker's submissions this morning.

**MR HOGAN-DORAN:** That is right.

**GAGELER J:** What further do we get from his Honour having said that?



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**MR HOGAN-DORAN:** This is just a response to the point about level playing field. I do not think it adds very much. Your Honours were provided with a copy of the Commentary by Schreuer on Article 53, which perhaps takes the point a little further to tilt the level playing field in favour of investors. If your Honours go to the page marked 1447 – that is not the large Commentary, it is the short one – the short piece of paper on Article 53, from Volume II. Paragraph 14, beginning with:

> Art. 53 only addresses the award's effect –

**GAGELER J:** So, this is the current version of the Commentary.

**MR HOGAN-DORAN:** Yes, that is right. Yes, your Honour.

**GAGELER J:** 2022. Thank you.

**MR HOGAN-DORAN:**

> Art. 53 only addresses the award's effect on the parties to the arbitration proceeding. This is not to say that the legal consequences of an award are limited to the parties. For instance, Art. 54 provides for an obligation of each Contracting State . . . to cooperate in the award's recognition and enforcement. But this obligation is different from the primary obligation . . . to comply with the terms of the award.

Then the observation is made in 15:

> The legal basis for the award's binding force is not entirely symmetrical. ICSID proceedings, by necessity, involve a State party and a non-State party. Both are parties to the agreement to arbitrate. But during the Convention's drafting, it was pointed out repeatedly that the State party additionally has an obligation to abide by the award under the ICSID Convention . . . This obligation, arising directly under the ICSID Convention, exists vis-à-vis other parties to the Convention.

And that would include, for example, my clients' home States, as well as Spain, and:

> Its violation may lead to State responsibility.

The indication there is that perhaps, if anything, the level playing field is tilted somewhat in favour of investors, at least so far as Article 53 is concerned.



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My learned friend, from about transcript line 1235 and onwards, took your Honours to some parts of the travaux. I have no intention of burdening your Honours with slabs of the travaux. The primary judge was burdened in that way. His Honour dealt with that material, if your Honours go just briefly to core appeal book at page 40, which is just after the section we were dealing with. His Honour worked through what was quite large slabs of – selectively worked through large slabs of travaux preparatoires that the parties put in front of his Honour for the purposes of aiding interpretation. His Honour refers at 118, in particular, to a document which was the – sorry, not 118 – refers to the "Executive Directors" of the bank; that is, the World Bank. Then, at 119, the extensive consultation process led them to resolve – to approve:

> the text of the Investment Convention and their Report on it on 18 March 1965.

That is, at the end of all of the work done to draft the treaty, there were two documents. One was a report that was prepared to go to member States of the World Bank, and the second was the text of the Convention itself. Now, his Honour, going over to paragraph 132 on page 44, referred to in particular informing, that affected his Honour's interpretation of the treaty, paragraphs 42 and 43 of the report, and what I would like to just identify to your Honours is the report itself and those paragraphs in volume 9, at tab 51, starting at page 2426. This document in some respects operates in a way similar to an explanatory memorandum that accompanies a Bill.

**EDELMAN J:** Which tab is this?

**MR HOGAN-DORAN:** Tab 51 of volume 9. The first few pages set out historical and procedural matters before turning to commentary on the articles themselves. Could I take your Honours over to – of the folder, page 2438, under the heading "Recognition and Enforcement of Arbitral Awards". At 41, dealing first with:

> Article 53 declares that the parties are bound by the award and that it shall not be subject to appeal or to any other remedy except those provided for in the Convention.

It sets out what the remedies are, and then at 42, this is what his Honour was quoting from, 42 and 43:

> Subject to any stay of enforcement . . . the parties are obliged to abide by and comply with the award and Article 54 requires every Contracting State to recognize the award as binding and to enforce the pecuniary obligations imposed by the award as if it were a final



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> decision of a domestic court. Because of the different legal techniques followed in common law and civil law jurisdictions and the different judicial systems found in unitary and federal or other non-unitary States, Article 54 does not prescribe any particular method to be followed . . . but requires each Contracting State to meet the requirements of the Article in accordance with its own legal system.

**GORDON J:** Is that any more than following the text to say as if it were a final judgment of a court in the State?

**MR HOGAN-DORAN:** That is right, yes. There is – Article 69 of the Convention specifically authorised States to implement the legislation through its own domestic machinery, and that reflects a custom international law rule that where a treaty does not specify or does not fully specify procedural mechanisms and the like, then it is for the States – in good faith – to implement the treaty by passing legislation or the like to enable it to have full effect at the domestic level. Then, in 43:

> The doctrine of sovereign immunity may prevent the forced execution in a State of judgments obtained against foreign States or against the State in which execution is sought.

Then there is the point your Honour just asked:

> Article 54 requires Contracting States to equate an award rendered pursuant to the Convention with a final judgment of its own courts. It does not require them to go beyond that and to undertake forced execution of awards rendered pursuant to the Convention in cases in which final judgments could not be executed.

These are important words:

> In order to leave no doubt on this point Article 55 provides that nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity –

That indicates the purpose of Article 55, which was to ensure that it is understood that the obligation in Article 54 to recognise – or recognise and enforce a judgment as if it were a judgment of the domestic courts is not implying any further waiver of immunity at the stage of execution. That, in some ways, might be obvious to some people from the words, "as if it were a judgment" – one understands that as something in the nature of an exequatur, but guarding against possible misunderstanding, Article 55 has the role that its express terms indicate. Can I turn briefly, then, to just a few



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points concerning the material that my learned friend relied upon? That is probably a convenient time, if that works for your Honour.

**GAGELER J:** No, use another five minutes.

**MR HOGAN-DORAN:** Thank you, your Honour. As I understood it being articulated by my learned friend, the custom international law rule – for which the appellant maintains, or proposes – is that the jurisdictional immunity of States can only be waived by express terms – and that is what is said in the outline – but what does that mean? He suggested that that means, in no uncertain terms having regard, in particular, to the work of the International Law Commission. Precisely what that actually means is not that clear. It would seem to include explicit words, but when it comes to necessary implication – and this is in the context of a discussion of *Li v Zhou* – my learned friend said, at transcript 984, that, having accepted *Li v Zhou* – including paragraph 38 – it mentions "necessary implication", he said, but that is only:

> where the words of a treaty leave no other reasonable alternative.

That appears to be the boundary of the work that the appellant says is done by waiver in express terms, something that is explicit and necessary implication but only where the words of the treaty leave no other reasonable alternative. Now, your Honour Justice Gageler asked my learned friend to identify where one would:

> find the strongest statement of the interpretative principle –

My learned friend referred to Lord Goff's judgment in *Pinochet*, which in turn referred to the ILC report and then my learned friend took your Honours to the commentary on Article 8 in the 1991 yearbook, which is in volume 9 of the joint book of authorities at tab 57, and in particular, if your Honours turn to, perhaps, page 2545, which deals with the topic of consent given in advance by international agreement. Your Honours were taken through the first part of paragraph (10) and Lord Goff was quoting from – particularly relevant around about the sixth line:

> if consent is expressed in a provision of a treaty concluded by States, it is certainly binding on the consenting State –

But the high point of my learned friend's submission is over at page 2547 in the second line:

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



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such jurisdiction is exclusively within the discretion or the power of the court –

Now that is in paragraph (11) of the commentary. Just going back on the previous page, sorry, back to 2545 at the beginning of paragraph (11), it is:

> The practice of States does not go so far as to support the proposition that the court of a State is bound to exercise its existing jurisdiction over or against another sovereign State –

Just pausing there, that is not controversial. And then it says where that State:

> has previously expressed its consent to such jurisdiction in the provision of a treaty or an international agreement –

Now, that statement is based upon State practice, State practice being instances where a State has previously expressed its consent to such jurisdiction in the provisions of a treaty. But the footnote picks up the point that:

> There are certain multilateral treaties in point such as the 1972 European Convention on State Immunity –

my learned friend relies on that:

> and the 1926 Brussels Convention . . . and those listed in United Nations Materials on jurisdictional immunities –

Now that is a separate bundle of material that was assembled by the Secretariat of the ILC, but it was for the special rapporteur, in particular, the ILC, to select from that what they considered to be relevant material. And the point I will come to is that among the various treaties that are said to be treaties in point, being treaties in which States have expressed their consent to jurisdiction, it is included in that set of materials, the ICSID Convention Articles 53, 54, and 55, as well as the New York Convention and other matters. There is a point taken against us that the Secretariat disclaims responsibility for what is or is not in the materials – that was not their job.

Our point is the special rapporteur and then the ILC were the ones that made the selection of what are examples of State practice where States have expressed their consent to jurisdiction in the treaty. And further, in paragraph 11, there is a reference to this customary international law. There is no suggestion in the terms of paragraphs (10) or (11) – or anywhere else in the report – that suggests that State practice that is referred to is somehow



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inconsistent with the rule as formulated at 2547, based upon the State practice that has been identified by the ILC in the course of its work.

**GAGELER J:** Yes, thank you, Mr Hogan-Doran. The Court will now adjourn until 2.15 pm.

**AT 12.48 PM LUNCHEON ADJOURNMENT**

**UPON RESUMING AT 2.15 PM:**

**MR HOGAN-DORAN:** Your Honours, just two points – I am sorry, three points, rather. First, in relation to the question of necessary implication, the criticism of Justice Basten was the absence of a citation before what was said in paragraph 38 of his Honour's judgment. In paragraph 8 of our outline of submissions we have provided a reference to the *Bosnian Genocide Case* and we have provided a copy of that in our supplementary bundle of materials. I do not need to take your Honours to it, but it is an example of the use of necessary implication by the ICJ working from the ordinary meaning of the words of a treaty having regard to the objects and purposes.

The next point I want to take your Honours to briefly is the notice of contention grounds 3 and 4, including the implied repeal point. We deal with that in paragraphs 78 and 79 of our written submissions. As we say at 78, there is really only a need to engage with this if, on the one hand, the ICSID Convention does contain a relevant submission to jurisdiction, but, on the other hand, there is a level of clarity required by section 10 that exceeds what the Convention does. If that is not the case, then one does not have to deal with these points, otherwise the matter was only dealt with by the primary judge in a few paragraphs of his Honour's judgment towards the end, and we have set out in our submissions all we wanted to say on those points.

The last issue is the question of costs of the intervention, which we deal with at paragraph 16 in the third sentence of our outline. We do seek the costs of the intervention, for the same reasons that we sought and obtained it in the Full Court. We do understand that the EC is not here to be heard on the question. If your Honours are minded, we would have no



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objection at all if the EC was given an opportunity to put something in writing, perhaps as to the question of costs.

**GAGELER J:** Why should you have the costs?

**MR HOGAN-DORAN:** In our submission, the intervention has raised issues that go far beyond the matters that are the real issues between the parties. The way in which my learned friend put the *Komstroy* point was confined to a question of ambiguity, whereas it seems that the EC sought to agitate matters that went to the fundamental validity of Spain's consent to arbitration.

**GAGELER J:** Did you give notice to the EC that you would be making this submission today?

**MR HOGAN-DORAN:** We did not give notice before today, no.

**GAGELER J:** Very well.

**MR HOGAN-DORAN:** If it please the Court.

**GAGELER J:** Mr Ward.

**MR WARD:** Just one or two points, your Honours. Could I ask your Honours to turn again to Articles 53, 54 and 55, particularly Article 55 found at page 146 of volume 1. It seems to be said against us now that – and I think I am paraphrasing in a way that does not create a travesty – that Article 55 applies only an immunity to execution in the form of a Part IV of our Act execution, that is, execution against commercial property. That is not so, for reasons that arise textually, whatever language version is adopted. Article 55 in its plain words provides that "Nothing in Article 54", in its entirety – interposing those words "in its entirety":

> shall be constructed as derogating from the law in force in any Contracting State –

If it had been intended to limit that preservation of immunity only to execution against property, as that concept is traditionally understood, it would have been necessary only to make reference to Article 54(3), not the entirety of Article 54. Article 54(3) is the traditional understanding of execution against property and the immunities related to it. Articles 54(1) and (2) relate more broadly to, as we have put, the topics of execution, enforcement and recognition, we say intertwined, in the alternative, at least in relation to steps that could amount to enforcement or execution, enforcement being something more than the bare recognition of the binding effect of an award.



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In that regard, might I just draw your Honours' attention – Justice Steward, I think you asked a question about the effect in Article 54(1) of the reference to the binding force and the enforceability of "pecuniary" and "non-pecuniary" obligations. The answer is that recognition affects both but enforcement relates only to pecuniary obligations – and so much is also made clear by Professor Schreuer's commentary at paragraph 46 of the second edition – which I think is now 55 in the third edition.

As to the notice of contention point, we simply say that, for the reasons given in the analogous situation in *Firebird* relating to the *Foreign Judgments Act*, the field of operation between the *International Arbitration Act* and the Immunities Act is quite different. The Immunities Act is a preservation of immunity and covers the field in relation to immunities. The Arbitration Act does not deal with the question of immunities, and the reasoning of the Court particularly at paragraph 85 – which is at page 257 of volume 3 of the books – would be directly analogous to this situation. Otherwise, we rely on what we said in our written submissions.

If there is nothing else, those are our submissions in reply.

**GAGELER J:** Very well, thank you, Mr Ward. The Court will reserve its decision in this matter and will adjourn until 9.30 am tomorrow.

**AT 2.22 PM THE MATTER WAS ADJOURNED**



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