HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY S43/2022

BETWEEN: **KINGDOM OF SPAIN**

Appellant

and

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

10 First respondent

**ENERGIA TERMOSOLAR B. V**

Second respondent

**APPELLANT'S REPLY**

**PART I: CERTIFICATION**

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

**PART II: REPLY**

2. **Overview.** The respondent Investors' Submissions (**RS**) overlook their onus as the party seeking to displace the immunity in s 9 of the Immunities Act, and do not (and cannot) demonstrate waiver by express words, nor the existence of a rule of customary international law effective to permit waiver of State immunity by implication from Art 54 of the ICSID Convention. It is for the Investors to overcome the undoubted presumptive immunity by locating and explaining the scope of any exception. With that burden in mind, Spain's primary argument on the appeal, which is not in any sense new, involves three steps. *First,* for a foreign State to submit to jurisdiction for the purposes of s 10(2) by way of "agreement" in the form of a "treaty or other agreement in writing" the terms of the relevant treaty must expressly, clearly or unambiguously waive that State's immunity (AS [25]). Implication is not enough both because of the proper construction of the Immunities Act (AS [42]-[47]) and by reason of customary international law which informs the interpretative exercise required by reference to each of ordinary meaning and context: VCLT Art 31(1) and (3)(c) (AS [26]-[41]). *Second*, Art 54 of the ICSID Convention does not expressly, clearly or unambiguously waive immunity and submit to jurisdiction, nor is there a "necessary" implication (AS [61] and following). *Third*, the terms of the Arbitration Act that give effect to the ICSID Convention are consistent with the preservation of *foreign* State immunity – but would permit enforcement against Australia *"within its territories*" consistently with Art 54(1) (see AS [48]-[55]).

3. **Immunities Act.** RS [25] relies on the clarificatory words in s10(2) that Australian law as the "*the proper law"* will not amount to submission. Those words relate to commercial contracts, not to an "agreement" found in the words of a "treaty" (governed by international law). In any event, those words only emphasise the need for express waiver as a jurisdictional precondition and not as an automatic consequence of choice of law.

4. RS [26]-[27] focus on references in ALRC 24 [78] to "implied" waiver – again by reference to conduct. RS [27] refers to the commentary to the 1982 Draft ILC Art 8 ("Express consent to the exercise of jurisdiction"). True it is that Art 8[10] refers to the *"law of treaties"*: RS [28]. But what of the content of that law? RS [28] refers to footnoted material that makes indirect reference to a number of further sources which upon analysis do not assist. The UN Materials was a collation on the topic of jurisdictional immunity generally, and the inclusion of any particular text within it was expressly said not to "*imply any judgment as to the status of the text concerned on the part of the Secretariat"*: see

Introduction p xiv. As to the suggestion that the 1958 New York Convention Art III amounts to waiver of State immunity – regardless of what the author of the footnote may have (derivatively) implied – it is a tenuous submission, and has not been accepted as an "agreement" to submit to Australian jurisdiction by an Australian Court.

5. RS [31] cites *Li v Zhou* (2014) 87 NSWLR 20, [37] as explaining that the law of treaties does not permit ambiguity or uncertain inference to establish waiver or submission. That is agreed: AS [41]. But RS [31] adopts the *obiter* reasoning in *Li v Zhou* at [38] in which the Court of Appeal went on to suggest that acceptance of jurisdiction could be established by "*necessary implication*". That part of the reasoning was unsupported by authority. RS [31] has not sought to explain it. But even if accepted, no "necessity" arises here.

6. Contrary to RS [22], Spain's case sits conformably with *PT Garuda* and *Firebird* and does not seek to displace the Immunities Act as the basis of foreign State immunity in Australian law. But where submission by agreement is alleged to arise from a treaty (or treaties), it must be considered in a manner consistent with Art 31(1)-(3) of the VCLT.

7. **Express written waiver in international law**. Spain's argument concerns the identification of *written* waiver or submission to jurisdiction by way of international agreement. It acknowledged but did not address the concept of implied waiver by conduct: AS [26]. RS [35] thus selectively (mis)quotes AS [26] to attempt to undermine it, referring to a reluctance in international law "to identify implied waivers in writing" (RS [35] not quoting the underlined last words). So too RS [35] FN 44 misrepresents the effect of the passage in *Brownlie's Principles* (9th ed, 2019), at 486 which in fact distinguishes between express waiver and implied waiver by conduct.

8. The Investors also assert that Spain's argument demands "explicit" words (see eg RS [4],[7],[8],[18],[20],[25] etc). But the AS did not use the word explicit. Contrary to RS [18] the express words do not require a particular forms of words or "type of language". But implication is not enough, nor is reliance upon ambiguous language in a treaty.

9. RS [18]-[22] contends that Spain makes the submission for the first time in this Court. That is wrong. Spain's case, including in the materials to which the Investors refer, has since first instance been consistently that express, clear and unambiguous evidence of a State's intention to waive immunity and consent to the jurisdiction of another State's courts is required. As much is clear from the reasons of the primary judge at PJ [181]-[183] CAB 55 (engaging directly with *Li v Zhou*) and PJ [190]-[196] CAB 57-59; and Perram J at FFC [37]-[38] CAB 85 that cited international authorities.

10. Contrary to RS[6],[51], [55], at the special leave hearing reference was made to foreign state immunity as a rule of customary international law, its effect upon the construction of

the Immunities Act, the territorial limitation on Art 54 in respect of claims brought in Spanish Courts, and the relationship between Art 55 and Art 54.[1] Further authorities now relied upon merely support those propositions of law.

11. In any event, it was for the Investors to explain how the claimed "agreement" (for the purpose of s 10(2) of the Immunities Act) can be interpreted consistently with international law as amounting to submission to Australian jurisdiction. The Investors must show that by becoming party to the ECT and ICSID Spain waived its immunity. The ordinary meaning of the express words of Art 54 interpreted by reference to Art 31 VCLT do not sustain the claimed waiver. The Investors have briefly ventured an Art 31(3)(b) VCLT argument suggesting that alleged subsequent practice of Contracting States treat Art 54 as a waiver: RS [44]. But that argument cannot succeed. It is not a practice shared by all Contracting States[2] and certainly not by Pakistan, Hungary and Spain based on recent municipal cases. And, the Investors have not identified a customary rule (by reference to Art 31(3)(c) VCLT) permitting implied written waiver of State immunity.

12. As to the intertemporal point at RS[44], as noted, it was for the Investors to identify the scope of the exception to immunity. The task for the Court is not simply to interpret the *meaning* of Art 54, but also to ascertain its legal *effect* by reference to the customary and binding rules of State immunity. Art 31(3)(c) VCLT is not temporally limited. It is a rule of systematic integration, that requires ('*shall*') custom to be taken into account at the time of interpretation to ensure a treaty is not applied in isolation from or in conflict with the entire system of international law.[3] But if (contrary to the foregoing) an earlier time must be identified, customary international law required express words in *either* 1965, when ICSID opened for signature, or 1985, when the Immunities Act was enacted. Bearing in mind that custom is not a "momentary" system and will necessarily only be determined after the fact,[4] the materials upon which Spain relies at AS [26]-[47] establish the rule. Further examples exist.[5] Contrary to RS [21] no "finding" of relevant principles of sources international law is required. It can be established *in law* by reference to the accepted of

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[1] RFM 417 T3.49,86-88; RFM 418 T4. 128-134; RFM 419 T5.154-161.
[2] *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening) (Merits)* [2014] ICJ Rep 225 [83].
[3] *Legal Conseuqences for States of the Continued Presence of South Africa in Namibia (Advisory Opinion)* [1971] ICJ Rep 16, [53]; Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers, 2009), 423-433; Dorr & Schmalenbach, *Vienna Convention on the Law of Treaties* (Spinger, 2nd ed, 2018) [92]-[96]; see also the consideration of intertemporal issues in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) ICJ Rep 2019, p. 95 [142].
[4] J Crawford, *Chance, Order, Change: The Course of International Law* (Hague Academy of International Law, 2014) at 81.
[5] *Convention on the Privileges and Immunities of the United Nations,* opened for signature 13 February 1946, 1 UNTS 15 (entered into force 17 September 1946) Art II s 2; International Law Association's *Draft Articles for a Convention on State Immunity*, Art III.A.1 International Legal Materials, Vol 22, 1983, p. 288; Draft regulations

international law.[6] With respect to customary international law, practice and *opinio juris* may be established by inference from the treaties, texts and judgments to which both parties have referred.[7] Those sources inform the enquiry as to whether the Investors have demonstrated a waiver of immunity in the terms of the treaties.

13. Contrary to RS [39]-[40] diplomatic immunity is relevant. The "*law relating to diplomatic immunity is not free-standing from the law of sovereign or State immunity, but is an aspect of it*".[8] The privilege of immunity enures for the benefit of the sending state (not the diplomat) and any waiver or submission must be authorised and intended by that State.[9]

14. **Interpretation of the ICSID Convention.** RS [45] attempts to argue waiver by reference to the ordinary meaning of Art 54(1). But that glosses over the words in Art 54(1) "*within its territories"*. RS [46] and following retreat to waiver by implication, said to be necessary to give effect to the purpose of the ICSID Convention scheme (see RS [49]). Such a "liberal" (to use the words of RS [24]) interpretation of Art 54, a minutely reviewed and debated provision, ought not be adopted.[10] There simply is no "necessary" implication.

15. There is no dispute Art 54 of the ICSID Convention obliges a State to enforce an award against itself in its own territory (see AS [66]-[67] and RS [52]), or to enforce an award against an investor of its own nationality or a foreign nationality within its own territory. The parties only differ on whether, by concluding Art 54 and thereby undertaking to do these things, a State implicitly waives its immunity from recognition or enforcement of an award against itself *in the territory of another State party*. The last proposition is the most radical when regard is had to the gravity of State immunity.

16. Drawing an implication of waiver is both unnecessary, and contrary to statutory context. The statutory context includes Art 27(1) that contemplates an investor's State of nationality may give diplomatic protection, if an award debtor State were to not comply

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on Competence of Courts in suits against Foreign States or Sovereigns, adopted by the Institut de droit international in 1892: Art 4(4).

[6] See *The Cristina* [1938] AC 485, 497; *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 1 QB 529, 569; *ACCC v PT Garuda Indonesia (No 9)* (2013) 212 FCR 406, [32]; *Ure v Commonwealth of Australia* (2015) 323 ALR 164, [83]-[84]; *Ure v The Commonwealth* (2016) 236 FCR 458, [29]-[35].

[7] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Jurisdiction)* [2002] ICJ Rep 3, [54], [58]; *Military and Paramilitary Activities in and against Nicaragua (Merits)* [1986] ICJ Rep 14, [186]; Crawford at 69, 75, 81; J Finnis, *Natural Law and Natural Rights* (OUP, 2nd ed, 2012), 238-245.

[8] *Propend Finance Pty Ltd v Sing and the Commissioner of the Australian Federal Police* [1997] 111 ILJ 611, 633; *Dynasty Co for Oil and Gas Trading Ltd v Kurdistan Regional Government of Iraq* [2022] QB 246, [121]. See also *Brownlie's Principles of International Law* (OUP, 9th ed, 2019) 383.

[9] *Propend Finance Pty Ltd v Sing and the Commissioner of the Australian Federal Police* [1997] 111 ILR 611 at 642-644; *Public Prosecutor v Orhan Olmez* [1987] 87 ILR 212, 222.

[10] *Al-Malki v Reyes* [2019] AC 735, [11]-[12].

with an award.[11] Mindful that the conferral on investors of *any* rights against States under the ICSID Convention was a departure from the normally exclusive position of States as subjects of international law,[12] it not surprising that the States parties intended by Art 27(1) to leave open such *foreign* enforcement in favour of an investor to its State of nationality, and not entrust that step to the domestic courts of all other States party to the ICSID Convention, chosen at the election of the investor. That is consistent with the *travaux*.[13]

17. **Intervention.** Spain supports the European Commission's (**EC**) intervention. Contrary to RS [69], the Courts below proceeded on the basis the Investors relied on both ECT Art 26, and ICSID Convention Art 54 to demonstrate waiver: PJ [42], [56], [179] CAB 22, 25, 54; FFC [13] CAB 77-78 where Perram J recorded that the Investors "*argued that by acceding to Art 26 of the ECT…*"etc. Contrary to RS [71], Spain makes no submission in respect of the tribunal's jurisdiction. It follows that RS [73]-[74], FN 87, [76] are misplaced.[14] No "*de novo"* hearing on jurisdiction is sought. Spain's submissions were in the Courts below, and are now in this Court confined to waiver of immunity; described by the Full Court as an *"orphan submission"* FFC [15] CAB 78. The EC takes the same approach, explaining the difference between jurisdiction and immunity (ECS [36]-[40]). It follows there was, and is, no *Re McBain* issue.[15] Further, it is appropriate for the Court to have the benefit of the EC's intervention on a matter of significance not only to the parties to the dispute, but also to the Commonwealth's relations with other States. If leave is granted to the EC, Spain would not duplicate oral address on this topic. RS [76] suggests the Investors require further written submission to respond to the EC. Spain would not oppose such leave.

18. **Notice of Contention.** Spain repeats AS [61]-[65] and [81] and otherwise submits that evidence of the precise meaning of the French and Spanish texts is unnecessary to identify the existence of the ambiguity. Otherwise, the NOC grounds primarily assert that which needs to be demonstrated, ie that Art 54 constitutes a waiver.

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[11] *Barcelona Traction, Light, and Power Ltd (Belgium v Spain) (Judgment)* (1970) ICJ Rep 3; International Law Commission, *Draft Articles on Diplomatic Protection*, UN Doc A/61/10 (2006).
[12] See *Mavrommatis Palestine Concessions (Greece v UK) (Jurisdiction)* (1924), PCIJ (ser A), No 2, [10].
[13] *History of ICSID Convention* (1968), Vol II 58, 59, 60, 763, 764, 767, in particular Mr Broches' observation at 764 that the availability of diplomatic protection under what became Art 27(1) was necessary because "*the Convention provided means by which non-State parties could be forced through courts to comply with the award while there was no such possibility of enforcement against States*".
[14] But contra the cases cited in RS FN 91, see: *Green Power Partners v Kingdom of Spain* SCC Arb 2016/135 (16 June 2022) [460], [476]-[478] (decided after the CJEU's decision in *Komstroy*).
[15] *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372, cf FFC [115] CAB 105.