# States Cannot Invoke Sovereign Immunity to Avoid Registration of ICSID Awards— *Infrastructure Services Luxembourg SARL & Anor v The Kingdom of Spain* [2024] EWCA Civ 1257

**November 26, 2024**

On 22 October 2024, the Court of Appeal of England and Wales handed down its judgment in *Infrastructure Services Luxembourg SARL & Anor v The Kingdom of Spain* ("*Antin v. Spain*"), which was heard together with the appeal in *Border Timbers Limited & Anor v Republic of Zimbabwe* ("*Border Timbers v. Zimbabwe*"). Both appeals dealt with the same issue: whether State immunity can bar the registration of ICSID awards in the United Kingdom (the "UK").

In a judgment authored by Lord Justice Phillips, the Court unanimously answered the question in the negative, concluding that Article 54 of the ICSID Convention[1] is a waiver of sovereign immunity, echoing similar findings of courts in other jurisdictions.

## BACKGROUND

The dispute in *Antin v. Spain* arose out of the reform of Spain's renewable energy framework. Antin had invested in solar power installations that were affected by the regulatory changes. Antin resorted to ICSID arbitration under the Energy Charter Treaty (the "ECT"), obtaining a favourable award in 2018 of over EUR 100 million.[2] Antin has initiated enforcement proceedings in several jurisdictions, including Australia

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1 ICSID Convention, Article 54: "*(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state. (2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation. (3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.*"

2 Compensation was set at EUR 112 million in the original award—the amount was modified to EUR 101 million after rectification in 2019.

and the UK. The award was registered in the UK in 2021, and Spain's application to set aside the registration was dismissed in May 2023 by Mr Justice Fraser.

In *Border Timbers v. Zimbabwe*, the dispute arose out of an expropriation of the claimants' land following Zimbabwe's land reform programme. The investors initiated ICSID arbitration under the Switzerland-Zimbabwe BIT and obtained a favourable award of over USD 125 million in 2015.[3] The award was registered in the UK in 2021, and Zimbabwe's application to set aside that registration was rejected in January 2024 by Mrs Justice Dias.

Both Spain and Zimbabwe appealed against the set-aside decisions, claiming that: (i) neither the ICSID Convention nor the UK's Arbitration (International Investment Disputes) Act 1966 (the "1966 Act") deprived them of their immunity from the adjudicative jurisdiction of UK courts, as guaranteed by section 1(1) of the UK's State Immunity Act 1978 (the "SIA");[4] (ii) Article 54 of the ICSID Convention is not a prior written agreement to submit to the jurisdiction of UK courts within the meaning of the State immunity exception under section 2 SIA;[5] and (iii) the appropriate exception to State immunity is found under section 9 SIA,[6] applying in cases where States have agreed in writing to submit their dispute to arbitration. In relation to the latter point, both Spain and Zimbabwe argued that they were entitled to challenge—and the Court must determine anew—the validity of the reference to arbitration and the jurisdiction of the arbitral tribunals.

In this context, Spain challenged the validity of the arbitration agreement under Article 26 of the ECT on intra-EU grounds. Specifically, Spain claimed that the agreement had been disapplied between EU Member States following the judgments of the Court of Justice of the EU in *Achmea* and *Komstroy*,[7] which found that investor-State arbitration between EU investors and EU Member States (under BITs and the ECT, respectively) is

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[3] The tribunal ordered the reinstatement of the investors' properties and the payment of over USD 30 million in compensation; in default of reinstatement, Zimbabwe was ordered to pay over USD 124 million. The tribunal further ordered the payment of USD 1 million in moral damages. *See also* Judgment, para 4.

[4] SIA, section 1: "*(1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act. (2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question.*"

[5] SIA, section 2: "*(1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom. (2) A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement; but a provision in any agreement that it is to be governed by the law of the United Kingdom is not to be regarded as a submission…*"

[6] SIA, section 9: "*(1)Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration. (2)This section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between States.*"

[7] *Slovak Republic v Achmea BV*, Case C-284/16 ECLI:EU:C:2018:158; *Republic of Moldova v Komstroy LLC*, Case C-741/19 ECLI:EU:C:2021:655.

incompatible with EU law.[8] Zimbabwe claimed that the dispute brought by the investors did not fall within the scope of application of the arbitration agreement in the underlying Switzerland-Zimbabwe BIT.[9]

## THE COURT'S JUDGMENT

The Court's task was to first assess whether the SIA applied to the registration of ICSID awards. If it found so, the Court would then turn to whether one of the separate and alternative sovereign immunity exceptions under sections 2 and 9 SIA were satisfied.

### SIA Applies to the Registration of ICSID Awards

The Court first examined whether section 1(1) SIA applied in principle to the registration of ICSID awards against a foreign State. It found that the act of registration is not a ministerial or administrative act (contrary to the finding of Dias J) but adjudicative, as it requires a judge to be satisfied that the requirements of the 1966 Act are met.[10] Lord Justice Phillips then found that enforcement of an award against another State is a sovereign act engaging State immunity.[11] He concluded that section 1(1) SIA applied to the registration of ICSID awards. This finding then gave rise to the "*key question*" of whether one of the sovereign immunity exceptions were engaged.[12]

### Section 2 SIA Exception Satisfied

The Court had to assess whether Spain and Zimbabwe had "*submitted to the jurisdiction of the courts of the United Kingdom*" by way of Article 54 of the ICSID Convention. The Court found that, on its true construction, Article 54 was an agreement by ICSID Contracting States to recognise and enforce ICSID awards in all their jurisdictions as final court judgments.[13] It also found that it contained an express and sufficiently clear submission to the jurisdiction of the courts of the UK, as required by section 2(2) SIA.[14] For the Court, it did not matter that such agreement was found in a convention and not in a particularised arbitration agreement concerning a specific dispute between identified parties (disagreeing with Dias J)—SIA addresses this in section 17(2), which provides that "*references to an agreement include references to a treaty, convention or other international agreement*."

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8 Judgment, para 8(i).

9 Judgment, para 8(ii).

10 Judgment, para 37.

11 Judgment, para 38.

12 Judgment, para 58.

13 Judgment, paras 77-83.

14 Judgment, para 96; *see also* para 103.

### Unnecessary to Address Section 9 SIA Exception

Given the Court's prior findings on section 2 SIA, it considered it "*unnecessary*" to address whether section 9 actually applied. Consequently, it also declined to address Spain's challenge to the validity of the arbitration agreement under Article 26 ECT on intra-EU grounds, simply calling it "*a particularly complex issue*". The Court did not understand Zimbabwe to challenge the validity of the arbitration clause in the Switzerland-Zimbabwe BIT.[15]

Notwithstanding the above conclusion, Lord Justice Phillips made two comments on section 9 SIA: (i) he distinguished section 9 from section 2, emphasising that section 9 requires the Court to assess whether a valid arbitration agreement to submit the *specific* dispute to arbitration exists, "*imposing a duty on the court to satisfy itself that the state in question has in fact agreed in writing*" to submit the specific dispute to arbitration;[16] and (*ii*) although Article 54 of the ICSID Convention provides a prior written agreement for the purposes of section 2 SIA, the Convention *does not* contain a specific (or valid) arbitration agreement for the purposes of section 9 SIA.[17]

Since one of the exceptions was satisfied, there was no immunity from jurisdiction, and the Court dismissed the appeals. In *Border Timbers v. Zimbabwe*, it remitted the case to the lower court for determination of Zimbabwe's other defences per the State's request.

## COMMENT

The Court's judgment adds to the "*broad international consensus*" that Article 54 of the ICSID Convention is a waiver of adjudicative immunity by each ICSID Contracting State, confirmed by courts in Australia, New Zealand, the United States, France and Malaysia.[18] Throughout the judgment, Lord Justice Phillips referred to—and extensively quoted from—an April 2023 judgment by the High Court of Australia which dealt with similar issues, treating it as a "*highly persuasive opinion of the highest court in Australia*" that got the interpretation "*plainly right*".[19]

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15 Judgment, para 106.

16 Judgment, para 105.

17 Judgment, para 105.

18 *See also* Judgment, para 59. The only outlier is the *ex tempore* decision of the BVI High Court in *Tethyan Copper Company Pty Limited v Pakistan* (Claim No. BVIHC (Com) 2020/0196 of 27 April 2021), which concluded that ICSID Contracting States waived sovereign immunity for recognition and enforcement of awards only before their *own* courts. The Court dismissed this interpretation (*see* Judgment, para 77).

19 Judgment, para 77; *see also Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* [2023] HCA 11 (12 April 2023).

For Spain, resisting registration is part of its overall strategy to escape enforcement of intra-EU awards—notably, Spain raised familiar intra-EU arguments to contest the validity of its consent to arbitration under Article 26 of the ECT and the ICSID tribunal's jurisdiction. These arguments had been previously dismissed by the tribunal in its 2018 award[20] and in the ICSID *ad hoc* committee's 2021 decision on annulment.[21] Spain routinely raises these arguments in all intra-EU investment treaty claims. Overall, 115 known tribunals and *ad hoc* committees have rejected the intra-EU objection to date, in both ECT and non-ECT and ICSID and non-ICSID claims; Spain has succeeded only three times.[22] Similarly, courts in Australia, Switzerland, the UK and the United States have rejected these arguments in enforcement proceedings. European Union courts have been more open to upholding the intra-EU objection, either in set-aside or enforcement proceedings.

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Please do not hesitate to contact us with any questions.

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[20] *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018.

[21] *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Decision on Annulment, 30 July 2021.

[22] *Sapec, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/19/23, Final Award, 11 October 2024; *European Solar Farms A/S v. Kingdom of Spain*, ICSID Case No. ARB/18/45, Final Award, 11 October 2024; *Green Power K/S and SCE Solar Don Benito APS v. Kingdom of Spain*, SCC Case No. V2016/135, Award, 16 June 2022.

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