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**GLOBAL
LEADERSHIP
REGIONAL
EXCELLENCE**

A change in Investment Treaty Climate

Infrastructure Services Luxembourg S.A.R.L v Kingdom of Spain [2019] FCA 1220



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Introduction

1 Investor-state claims under energy charter treaties are becoming prolific against European countries. That is, there are claims being made by renewable energy corporations against nation states arising from the current changing investment climate.¹ Such claims arise when, after having been attracted to invest in foreign economies through governmental financial incentives, the incentives offered to entice foreign investors have been subsequently withdrawn. This

has resulted in adverse affects on these foreign investments.

- 2 Such rapid attention to the renewable energy sector has not come without turmoil. While nation states are seeking to become better corporate citizens, investment in the energy sector has left some nations with no choice but to rescind their position due to the financial viability in adhering to investment incentives they have offered. As a result, many investors in the renewable space are left with investments that cannot perform as anticipated, or which are potentially no longer viable. Consequently, this has opened the flood-gates to investor-state arbitrations.
- 3 Such investor-state claims have recently gained local attention in Australia when, in August this year, the Federal Court of New South Wales determined a stay application in the case of *Infrastructure Services Luxembourg S.A.R.L v Kingdom of Spain* [2019] FCA 1220 and subsequently heard the parties substantive submissions in the case.

Original award

- 4 The original award, dated 15 June 2018,² related to a dispute regarding measures taken by the Respondent, Spain, in the renewable energy sector and the alleged breaches of its obligation to provide fair and equitable treatment under both the Energy Charter Treaty (**ECT**) and international law with respect to the Infrastructure Services Luxembourg S.A.R.L and Energia Termosolar B.V.³ (**Claimants**) and their investments (**Award**).⁴
- 5 In 2011, the Claimants acquired shareholding participations in Andasol-1 Plant and Andasol-2 Plant, two operational concentrated solar power plants

¹ Pun intended.

² *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v Kingdom of Spain (Award)* (ICSID Committee, Case No. ARB/13/31, 15 June 2018) (*Infrastructure Services v. Spain (Award)*)

³ Formerly *Antin Infrastructure Services Luxembourg S.A.R.L and Antin Energia Termosolar B.V.*

⁴ *Infrastructure Services v. Spain (Award)* (n.2) [5].

located in Granada, Southern Spain.⁵ This investment occurred after Spain had introduced Royal Decree 661/2007 (**RD 661/007**) which⁶

'sought to grant [renewable energy] producers stability in time, allowing them to do medium and long-term planning while obtaining a sufficient and reasonable return'.

- 6 RD 661/007 introduced a feed-in-tariff (**FIT**) mechanism for renewable energy producers, amongst other incentives.⁷
- 7 In 2012, Spain made certain legislative changes which eliminated the right for the Claimants to receive a FIT.
- 8 The Claimants alleged that they invested approximately €139.5 million in the Spanish renewable energy sector⁸
'based on the expectation that their ... plants would generate regular and sustainable income that would allow the Claimants to service their debt and obtain a return on their investment'.
- 9 The Claimants contended that the Spanish legislative changes caused them to suffer substantial losses and violated Spain's obligations under the ECT to accord them fair and equitable treatment.⁹
- 10 The Tribunal found that, in the circumstances, it could not conclude that Spain had complied with its obligations under the ECT to accord investors fair and equitable treatment.¹⁰ The Tribunal awarded the Claimants €112 million in compensation plus interest

and a contribution to the Claimants' cost of the arbitration and legal fees.¹¹ On 29 January 2019, the Tribunal made a further award rectifying the amount of compensation to €101 million.¹²

Federal Court of Australia Proceedings

- 11 In April 2019, the Claimants in the arbitration who became the Applicants in Australian Federal Court proceedings, sought orders from the Federal Court of Australia for leave to have the Award enforced against Spain.¹³ The Applicants also sought payment of the Award in the amount of €101 million plus interest and costs.¹⁴
- 12 However, before any substantive steps were taken in the Federal Court proceedings, Spain filed an application with the ICSID to have the Award annulled and requested the Secretary General of ICSID to provisionally stay enforcement of the Award until the annulment application was determined.¹⁵ On 23 May 2019, the Secretary General of ICSID provisionally stayed the enforcement of the Award.¹⁶
- 13 The next step in the Federal Court proceedings was taken by Spain when, on 6 June 2019, Spain filed a conditional appearance for the purpose of asserting immunity from the jurisdiction of the court of Australia pursuant to the *Foreign States Immunities Act 1985* (Cth) (**Immunities Act**).¹⁷
- 14 In a twist, and as a result of the ICSID provisional stay, in July 2019, the Applicants filed an interlocutory

5 Ibid [70].

6 Ibid [91].

7 Ibid [93].

8 Ibid [359].

9 Ibid [360].

10 Ibid [573].

11 Ibid [748].

12 *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Enerfia Termosolar B.V. v The Kingdom of Spain (Decision on Rectification of the Award)* (ICSID Arbitral Tribunal, Case No ARB/13/31, 29 January 2019) [40].

13 *Infrastructure Services Luxembourg S.A.R.L v Kingdom of Spain* [2019] FCA 1220 [1]; (*'Infrastructure Services Luxembourg S.A.R.L'*).

14 Ibid [2].

15 Ibid [12].

16 Ibid [13].

17 Ibid [16].

application seeking orders staying their own enforcement proceeding.¹⁸ Their reason for this application was because, had they proceeded to take the prescribed steps in the Federal Court proceeding, they would be in conflict with the ICSID provisional stay.¹⁹ However, if they failed to continue with the Federal Court proceeding, they would be in breach of the Federal Court's programming orders for the service and filing of evidence.²⁰ The Applicants indicated that they would apply for the Federal Court stay to be lifted if the ICSID provisional stay was lifted.²¹

- 15 In a further twist, Spain opposed the Applicants' stay application and instead argued that the Federal Court must proceed to determine the foreign state immunity issue prior to exercising any jurisdiction against Spain, including by determining the stay application.²²

To Stay or to Proceed?

- 16 The key issue for consideration was the interaction between Articles 52(5) and 54(1) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (**ICSID Convention**) which, by virtue of s 32 of the *International Arbitration Act 1974* (Cth), has the force of law in Australia.
- 17 Article 52(5) of the ICSID Convention provides for the mandatory provisional stay of enforcement if requested in an annulment application. Whereas, Article 54(1) makes it mandatory for a state party to the ICSID Convention (which Australia is) to recognise and enforce an award made pursuant to the ICSID Convention.

- 18 It was Justice Stewart's view that the obligations on a state to recognise and enforce an award are subject to the provisional stay of enforcement provisions such that a provisional stay also suspends Australia's enforcement obligations.²³

- 19 Justice Stewart's position aligned with the reasoning in *Maritime International Nominees Establishment v Republic of Guinea*²⁴ where it was held that:²⁵

'although the Convention does not explicitly so provide, it seems clear that suspension of a party's obligation to abide by and comply with the award necessarily carries with it suspension of a Contracting State's obligation (and for that matter its authority) to enforce the Award even though during the pendency of the Committee's examination of the application for annulment the validity of the Award remains unaffected.'

- 20 In adopting the above reasoning, Stewart J found that the above position is the only logical way to read the articles together.

Spain's Immunity Argument

- 21 Before concluding on the Applicants' stay application, Stewart J had to address Spain's argument that the issue of state immunity must be determined prior to any stay being granted.
- 22 Justice Stewart distinguished between subject matter jurisdiction (which he found that the Federal Court clearly has as the designated court under the International Arbitration Act for the purpose of recognition and enforcement of ICSID awards) and jurisdiction over a foreign state.²⁶

18 Ibid [18].

19 Ibid [19].

20 Ibid.

21 Ibid [18].

22 Ibid [3], [19], [21].

23 Ibid [28].

24 *Maritime International Nominees Establishment v. Republic of Guinea (Interim Order 1)* (ICSID Committee Case No ARB/84/4, 12 August 1988).

25 Ibid [10].

26 *Infrastructure Services Luxembourg S.A.R.L* (n15) [39].

23 In considering whether the Federal Court had jurisdiction over Spain, Stewart J referred to the plurality in *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2012) 247 CLR 240 (**PT Garuda**), which considered jurisdiction in the context of the Immunities Act and noted that in this context,²⁷

"jurisdiction" is used not to identify the subject matter of a proceeding, but the amenability of a defendant to the process of Australian courts.'

24 The plurality in *PT Garuda* also considered the term 'immunity' in the same context and found that foreign immunity is a foreign state's protection from being impleaded or made a party to a legal proceeding against its will.²⁸

25 Justice Stewart considered these interpretations and found that his determination of the stay application did not 'implead' Spain, nor did it make Spain a party to a legal proceeding against its will.²⁹ He was therefore not prevented from determining the stay application.

26 On this basis, on 1 August 2019, Stewart J exercised the Federal Court's powers and stayed the Federal Court enforcement proceedings.³⁰

Determination in relation to ICSID Provisional Stay

27 On 21 October 2019, an ad hoc committee comprising Mr Cavinder Bull SC, Prof. Dr. Nayla Comair-Obeid and Mr. José Antonio Moreno Rodríguez lifted the provisional stay of the award.³¹

28 In reaching their decision to lift the stay of enforcement, the ICSID ad hoc Committee (**Committee**) considered the application of Article 52(5) of the ICSID Convention which provides that the Committee may ***'if it considers that the circumstances so require, stay enforcement of the award pending its decision'*** (emphasis in decision).³²

29 It was the Committee's view that, for a stay to be required, the circumstances must, at the very least, rise above those which are common to most stay applications³³, and that the continuation of a stay cannot be presumed.³⁴

30 The Committee considered the reasoning in the 2018 decision in the case of *Valores Mundiales v Venezuela*,³⁵ where the ad hoc committee observed, amongst other things, that:³⁶

'...the practice of most committees that have decided in favour of the continuation of the stay, to which Venezuela refers, is not enough to prove the existence of such presumption...'

31 The Committee also noted that the presumption in favour of granting a stay ran counter to the principle that ICSID awards were final and binding.³⁷ Accordingly, the Committee agreed with the observations by the ad hoc committee in *SGS v Paraguay*³⁸ that:³⁹

'...the binding nature of the award is the rule, whereas the annulment is the exception...'

The inevitable consequence of the foregoing reasoning is that, despite an application for annulment, awards must be enforced and only in

27 *PT Garuda Indonesia Ltd v Australia Competition and Consumer Commission* (2012) 247 CLR 240, 247 [17].

28 *Ibid.*

29 *Infrastructure Services Luxembourg S.A.R.L.* (n15) [37].

30 *Ibid* [41].

31 *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 (Decision on the Continuation of the Provisional Stay of the Enforcement of the Award)* (ICSID Committee, Case No. ARB/13/31, 21 October 2019). (*'Infrastructure Services v Spain (Decision on the Continuation of the Provisional Stay of the Enforcement of the Award)'*).

32 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 1 June 1991, art 52(5)).

33 *Infrastructure Services v. Spain (Decision on the Continuation of the Provisional Stay of the Enforcement of the Award)* (n15) [60]

34 *Ibid* [62].

35 *Valores Mundiales, S.L and Consorcio Andino, S.L v The Bolivarian Republic of Venezuela (Valores Mundiales v Venezuela) (Decision on the Request for a Continuation of the Provisional Stay of the Enforcement of the Award)* (ICSID Committee, Case No ARB/13/11, 6 September 2018).

36 *Infrastructure Services v. Spain (Decision on the Continuation of the Provisional Stay of the Enforcement of the Award)* (n35) [63]

37 *Ibid* [65].

38 *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay (SGS v Paraguay)* (Decision on Annulment) (ICSID Committee, Case No. ARB/07/29, 19 May 2014).

39 *Infrastructure Services v. Spain (Decision on the Continuation of the Provisional Stay of the Enforcement of the Award)* (n35) [66]

very specific cases where the circumstances so require, may enforcement be stayed by the corresponding committee.

- 32 As to whether there would be any prejudice to the respective parties if the stay was granted or not granted, the Committee made the following comments:
- (a) the burdens and risks raised by Spain are common to virtually all annulment applications, particularly in this case where Spain bears no high financial burden or risk in the connection of recovery of the award monies, nor conflict with their international obligations;⁴⁰ and
 - (b) while the Claimants submitted that the granting of a stay would move the Claimant to the *'back of a long line of award-creditors'*, the Committee formed the view that there was insufficient evidence to show that a continuation of the stay would occasion significant prejudice to the Claimants.⁴¹
- 33 Finally, the Committee did not consider that the merits of Spain's annulment application was a relevant circumstance that would demonstrate that a stay is required.⁴²
- 34 Accordingly, the Committee made a finding that the stay should not continue and reserved the issue of costs.⁴³

Federal Court of New South Wales

- 35 Meanwhile, in Australia, on 25 October 2019, following the above Decision on the Continuation of the Provisional Stay of the Enforcement of the Award, his Honour Justice Stewart made orders that the stay of the proceedings in the Federal Court of New South Wales be lifted, that the submissions filed and served by the parties in the original proceeding commenced in the Federal Court be treated as submissions in this proceeding, and that the matter be listed for hearing.⁴⁴
- 36 The one day hearing was held on 29 October 2019

during which counsel for both parties presented their oral arguments. Judgement has been reserved. We anticipate that Justice Stewart's judgment will be published in the first half of next year.

Investor-state arbitrations

- 37 Not only is this case of great interest to Spain, but its outcome will be relevant to other investors who may come to Australia to enforce their awards against foreign states.
- 38 For example, Tethyan Copper Company Pty Ltd (**Tethyan Copper**) has commenced proceedings in the same jurisdiction, being the Federal Court of Australia, to enforce an award of over USD 4 billion against the Islamic Republic of Pakistan.⁴⁵ A case management hearing for the Tethyan Copper proceedings was held before the same judge as the enforcement proceedings against Spain, Justice Stewart, on 21 November 2019. With no appearance from Pakistan, his Honour adjourned the case management to 6 February 2020. In the same move as Spain, Pakistan is reportedly seeking to annul the award at ICSID.
- 39 If the award against Spain is enforced in the Federal Court of Australia, this will be an encouraging outcome for Tethyan Copper and potentially other investors who are successful in investor-state arbitrations against foreign states.
- 40 Where the Australian pro-arbitration stance is already well known in the commercial arbitration sphere, if the court's decisions in the enforcement proceedings against Spain and Pakistan are in favour of enforcement, we could well see an influx of investor-state arbitration award enforcement proceedings in Australia.

⁴⁰ Ibid [72]-[73], [75].

⁴¹ Ibid [78].

⁴² Ibid [83].

⁴³ Ibid [85].

⁴⁴ A copy of the Orders of the Federal Court of New South Wales dated 25 October 2019 can be found here, <https://www.comcourts.gov.au/file/Federal/P/NSD602/2019/3855085/event/30069018/document/1491954>.

⁴⁵ *Tethyan Copper Company Pty Ltd v Islamic Republic of Pakistan* (Federal Court of Australia NSD1749/2019, commenced 17 October 2019).