HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **KINGDOM OF SPAIN**
Appellant

and

INFRASTRUCTURE SERVICES LUXEMBOURG S.À.R.L.
First Respondent
ENERGIA TERMOSOLAR B.V.
Second Respondent

RESPONDENTS' SUBMISSIONS IN RESPONSE TO SUBMISSIONS OF THE EUROPEAN COMMISSION SEEKING LEAVE TO BE HEARD AS AMICUS CURIAE

PART I: CERTIFICATION

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

PART II: OVERVIEW

2. These submissions are filed pursuant to leave of the Court given on 16 August 2022 and are in response to the EC's application for leave to be heard as *amicus curiae* pursuant to r 42.08A HCR (**EC Application**) and its submissions in support.

3. Terms used in these submissions and not otherwise defined have the same meaning as in the Respondents' submissions filed on 3 June 2022 (**RS**).

4. *First*, the Respondent opposes leave being granted as the EC Application: (a) raises an issue conceded by the Appellant at first instance and in the Full Court, goes beyond any issue on which Special Leave was granted, and is contrary to a finding of fact not appealed from; (b) is unhelpful to the Court and productive of undue wasted time and cost, as it makes no effort to engage with the substantial body of international jurisprudence rejecting the very contentions it advances; and (c) raises matters which the Appellant was well able to argue itself below had it chosen to (it now being too late to do so).

5. *Second*, the substantive submissions depend upon a misinterpretation of the relationship between the ICSID tribunal's jurisdiction to issue the award and the Appellant's submission to these proceedings by Art 54 ICSID Convention. As any issue of jurisdiction is expressly excluded from recognition proceedings under the ICSID Convention, the submission in Art 54 is necessarily made notwithstanding any such issue. For the purposes of s 10 Immunities Act, on its proper construction Art 54 is a submission within the meaning of s 10(2), and nothing in the ICSID Convention nor the ECT imposes any limitation, condition or exclusion also requiring proof of valid consent to jurisdiction

6. *Third*, the substantive submissions by the EC that the Treaty on the Functioning of the European Union (**TFEU**) affects the validity of consent to arbitration in Art 26 ECT by EU Member States rests on *obiter* comments by the Court of Justice of the European Union (**CJEU**) and are in any event wrong under the rules of international law applicable *in this Court*. The same substantive submission has been rejected by over 60 international tribunals.

PART III: WHY LEAVE SHOULD NOT BE GRANTED

7. The Respondents say that the ECS will not significantly assist the Court[1] and oppose the EC Application for the following reasons.

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[1] ***Levy*** *v Victoria* (1997) 189 CLR 579, 604-605 (Brennan CJ); ***Roadshow*** *Films Pty Ltd v iiNet Ltd (No 1)* (2011) 248 CLR 37, [4], [6].

8. As in the Full Court, the EC seeks to raise matters not in issue between the parties to this appeal. The EC seeks to argue that "EU law and international law [compel] the conclusion that the [ECT] cannot be a source of a waiver agreement".[2] The EC relies on Arts 267 and 344 TFEU and, in turn, on the judgments of the CJEU in *Achmea* and *Komstroy*, to argue that Art 26 ECT is invalid as between EU Member States and so any consent by the Appellant to arbitration before ICSID giving rise to the award was likewise invalid (***Achmea* Objection**) (see esp. ECS [23] and [33]-[34]).

9. However, as already submitted,[3] the Appellant did not advance an argument at trial or in the Full Court that it had not validly consented to the jurisdiction of ICSID. The sole question was the effect of Art 54. When the EC sought to intervene in the Full Court to argue that the "ECT does not contain a valid offer to arbitrate" so there could be no submission under s 10(2) Immunities Act, the Appellant: (a) accepted that it had not taken these points at trial; (b) conceded that had it done so this may have affected the conduct of these proceedings; and (c) said that it did not seek to agitate the points raised by the EC. Two critical matters flow from this.

10. *First*, and *contra* ECS [39], the Full Court refused the EC's intervention application both because it considered the validity of Art 26 ECT was irrelevant to the question before the Court (which the EC claims was a misapprehension of its argument as going to jurisdiction not waiver) *and* because of the concessions made by the Appellant referred to at [9] above: FFC [114]-[116] CAB 104-105. Perram J's statement at [115] that "the present argument was not advanced by Spain to the trial judge and is not advanced by it on appeal" arose from the concessions made by the Appellant to the Full Court. There was no misapprehension by the Full Court of *those* facts. *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 was thus fully engaged.

11. *Second*, as already submitted,[4] given its concessions, the Appellant did not seek special leave to appeal on the grounds that there was an absence of consent to jurisdiction under Art 26 ECT and so a lack of submission under Art 54 ICSID Convention. Rather, it sought to raise the decision in *Komstroy* "simply for this purpose, to say that in circumstances where European law does not recognise the jurisdiction of ICSID in the circumstances of this case, it cannot be said that … the ICSID Convention applies with such clarity and unambiguity so as to amount to a waiver of sovereign immunity before the courts of this country."[5] The AS

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[2] ECS [7].
[3] RS [70]-[71].
[4] RS [72], [75].
[5] Transcript, SLA, 18 March 2022, T 8.312-317 RFB 422.

(at [95]-[96]) contain nothing beyond an incorrect and in the present case irrelevant assertion of the need to prove both an agreement to arbitrate (which the Appellant conceded at trial) and the Appellant being a party to the ICSID Convention (which is not in issue) and then a bare restatement in AS [96] of the little said in the SLA.

12. The Appellant, as below, supports the EC Application but does not adopt the ECS,[6] which it cannot given the concessions it made below.

13. The proposition that the ECT "cannot be a source of a waiver agreement" (ECS [7]) by reason of EU law as part of international law goes well beyond the scope of leave to appeal on any ambiguity resulting from any application of EU law. The EC concedes that its position "is different to the submissions advanced by Spain, which focus on the ambiguity of any waiver as opposed to its necessary absence as a matter of applicable law".[7] Nothing in the notice of appeal as filed extends the scope of the appeal beyond the way the point was raised in the SLA to cover this new argument, especially in light of the concessions below.

14. *Third*, the EC's position whether or not adopted by the Appellant is precluded by the *fact* of the Appellant's concessions below and the *finding* of the primary judge that the Appellant agreed to arbitrate (PJ [179] CAB 54-55), which is not appealed from.

15. The issue of jurisdiction was raised in the arbitration between the parties and determined against the Appellant both by the tribunal and the *ad hoc* annulment committee.[8] In accordance with the terms of the ICSID Convention given force of law by s 32 Arbitration Act, that outcome is *binding* on the Appellant and *cannot* be traversed by it. The Appellant acted consistently with this binding outcome in not raising the question of its consent to arbitrate below. Even if the EC's argument is deployed under the guise of s 10 Immunities Act, it requires consideration of whether there was valid consent to arbitrate along the way to applying (or not) Art 54 ICSID Convention. It is not open to a party, let alone an *amicus curiae*, to dispute a matter conclusively determined between the parties before ICSID.

16. *Fourth*, the EC Application adds unduly to the burden of time and cost, given the complexity of the issues.[9] The *Achmea* Objection has been raised before multiple international tribunals and ICSID annulment committees, whether by the respondent State, the EC as intervener, or both. To date, it has been rejected in over 60 cases.[10] In addition to

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[6] In its Reply Submissions at [17], the Appellant supports the EC Application (but does not adopt the ECS).
[7] ECS [7].
[8] *Antin Infrastructure Services Luxembourg S.à.r.l. v Kingdom of Spain* (ICSID Case No ARB/13/31, Award, 15 June 2018) (***Infrastructure Award***), [163]-[181] RFB 67-73, [204]-[230] RFB 80-89; *Infrastructure Annulment*, [123]-[130], [153]-[160].
[9] *Levy*, 604-605 (Brennan CJ); *Roadshow*, [4]. See also: RS [76].
[10] *Infrastructure Annulment*, [154] ("The Committee notes that 56 other tribunals have dismissed the intra-EU jurisdictional argument raised by Spain (of which 35 were considering the intra-EU argument in the context of the ECT)."). Since that decision, see e.g.: ***Sevilla Beheer*** *B.V. v Kingdom of Spain* (ICSID Case No

the award in these proceedings,[11] the Respondents refer the Court to the decisions of tribunals including widely respected international jurists in ***Vattenfall*** *v Germany*,[12] ***BayWa*** *v Spain*,[13] ***Eskosol*** *v Italy*,[14] and ***Cube*** *Infrastructure Fund v Spain*,[15] each decided after *Achmea*, and to ***LSG*** *Building Solutions v Romania*,[16] decided after *Komstroy*. The decisions also include ***Electrabel*** *v Hungary*,[17] on which the EC relies.[18] No authority supports extending the *Achmea* Objection beyond a jurisdictional question for the tribunal concerned, and into the field occupied by Art 54, let alone when recognition and enforcement are sought outside the EU.

17. Some or all of the arguments now advanced by the EC were advanced in various guises before those tribunals and rejected,[19] including in cases in which the EC itself applied to intervene and was refused, or was heard and its arguments rejected.[20] Yet, no mention is made of the principles of international law on which the tribunals rejected the contentions the EC now advances. The ECS [§IV.B]-[§IV.C] ignore this extensive body of international jurisprudence. The key points made in these international decisions which justified rejecting those contentions are merely summarised in [§IV.B] below. For the purposes of the grant of leave to appear as *amicus*, such failure to engage with a significant body of relevant international jurisprudence makes the bald submissions of the EC unhelpful to the Court.

ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, 11 February 2022), [620], [629]-[676], [678]; *NextEra Energy Global Holdings B.V. v Kingdom of Spain* (ICSID Case No ARB/14/11, Decision on Annulment, 18 March 2022), [229]-[234], [309]-[312]; *Cube Infrastructure Fund SICAV v Kingdom of Spain* (ICSID Case No ARB/15/20, Decision on Annulment, 28 March 2022), [180]-[220], [234]-[235]; ***RENERGY*** *S.à.r.l. v Kingdom of Spain* (ICSID Case No ARB/14/18, Award, 6 May 2022), [325]-[418]; *InfraRed Environmental Infrastructure GP Ltd v Kingdom of Spain* (ICSID Case No ARB/14/12, Decision on Annulment, 10 June 2022), [484]-[506]; ***LSG*** *Building Solutions GmbH v Romania* (ICSID Case No ARB/18/19, Decision on Jurisdiction, Liability and Principles of Reparation, 11 July 2022), [595]-[785].

[11] *Infrastructure Award*, [224]-[226] RFB 88.

[12] *Vattenfall AB v Federal Republic of Germany* (ICSID Case No ARB/12/12, Decision on the *Achmea* Issue, 31 August 2018), in which the Chair of the Tribunal was Professor Albert Jan van den Berg.

[13] *BayWa r.e. Renewable Energy GmbH v Kingdom of Spain* (ICSID Case No ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019), in which the Chair of the Tribunal was the late Judge James Crawford AC SC.

[14] *Eskosol S.p.A. in liquidazione v Italian Republic* (ICSID Case No ARB/15/50, Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection Based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes, 7 May 2019), in which the Tribunal included Professor Brigitte Stern.

[15] *Cube Infrastructure Fund SICAV v Kingdom of Spain* (ICSID Case No ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019), in which the Chair of the Tribunal was Professor Vaughan Lowe QC, and the Tribunal included The Hon James Spigelman AC QC.

[16] In which the Tribunal included Judge Thomas Johnson of the Iran-United States Claims Tribunal.

[17] *Electrabel S.A. v Republic of Hungary* (ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012).

[18] ECS [18], fn 6. In *Electrabel*, the tribunal found that "the ECT and the ICSID Convention were and remain valid treaties under international law legally binding on the Respondent and validly invoked by the Claimant in this arbitration", and that there was "no material inconsistency between the ECT and EU law": [4.194]-[4.196]. The tribunal rejected the intra-EU objection advanced by the EC: [5.32]-[5.38].

[19] See e.g.: *Vattenfall*, [48]-[59], [81]-[91], [108]-[229]; *BayWa*, [240], [244]-[283]; *Eskosol*, [23]-[42], [61]-[227]; *Cube*, [83]-[100], [118]-[160]; *LSG*, [438]-[476], [492]-[494], [595]-[785].

[20] See e.g.: *Vattenfall*, [11]-[16], [81]-[91], [108]-[229]; *BayWa*, [16]-[18], [30]-[31], [52]-[54].

18. The only tribunal to accept the *Achmea* Objection, in ***Green Power*** *Partners v Spain*,[21] did so in an arbitration seated in an EU Member State, conducted under local rules and as such subject to the national law of an EU Member State. The Appellant argued that the ECT as interpreted by the CJEU formed part of EU law and distinguished *Vattenfall* on the basis that the *lex arbitri* was that of an EU Member State, which distinction was accepted by the tribunal and relied upon as one of the reasons to apply EU law to the question.[22] The great complexity of that tribunal's decision on jurisdiction, rejecting any 'either / or' approach to applying public international law or EU law and finding room to admit the latter in applying the former, underlines the Respondent's point that the time and complexity of the question, however simplistically the EC's position is *currently* put, is not one that the Court should entertain where it is not an issue between the parties.

19. *Fifth*, the Appellant made submissions on its own behalf on whether Art 26 ECT was a valid consent to arbitrate before a number of tribunals, including in the underlying arbitration.[23] Those arguments were rejected. In these proceedings, the Appellant correctly observed its obligations to Australia and other Contracting States to the ICSID Convention (to which the EU is not party) by not canvassing the adverse outcomes of those jurisdictional arguments at the stage of recognition. It maintained that position despite the EC's attempted intervention in the Full Court. Nothing in the SLA, the notice of appeal or the Appellant's submissions should be understood as qualifying this undoubtedly correct position.

PART IV: SUBMISSIONS

20. Part IV of the ECS asserts four propositions, each of which should be rejected. The first (ECS [§IV.A]) and fourth (ECS [§IV.D]) concern the question of submission to the jurisdiction of ICSID and its relationship with Art 54 ICSID Convention, and as a consequence, with s 10 Immunities Act. The second and third propositions (ECS [§IV.B]-[§IV.C]) are substantive arguments rejected by numerous international tribunals.

IV.A Spain's submission to jurisdiction is in Art 54 ICSID Convention

21. The EC's first proposition is that "any waiver agreement comprises both Art 54 of the ICSID Convention and Art 26 of the ECT, not the ICSID Convention alone" (ECS [14]).

22. *First*, contrary to ECS [13], the primary judge did *not* proceed on the basis that the relevant agreement for the purposes of s 10 Immunities Act was Art 54 ICSID Convention "in conjunction with" Art 26 ECT. At trial, and in the Full Court, the Respondents identified

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[21] ***Green Power*** *Partners K/S v Kingdom of Spain* (SCC Arbitration V 2016/135, Award, 16 June 2022).
[22] *Green Power*, [135]-[140], [153]-[172], [397], [447].
[23] *Infrastructure Award*, [163]-[181] RFB 67-73; *Infrastructure Annulment*, [123]-[130].

two bases of agreement to submit:[24] (a) an agreement between the Respondents as investors (having the benefit of an offer to arbitrate made through Art 26 ECT (PJ [179] CAB 54-55)), carrying with it the agreed consequence of Art 54 for any award; and (b) an agreement between the Appellant and other Contracting States including Australia in Art 54 alone to accept the exercise of national jurisdiction over the Appellant in proceedings Art 54 contemplates. The final sentence of PJ [179] is consistent with both bases. In any event, the primary judge correctly dealt with both submissions in finding that Art 54 was "the heart" of the Appellant's submission to jurisdiction, reference to the ECT being necessary "only to the extent that it gave [the investors] the option to arbitrate under the auspices of the Centre under the [ICSID] Convention": PJ [183], [185] CAB 55-56. The relevant submission was thus to be found in the ICSID Convention and arises from the Appellant "becoming a Contracting State" to the ICSID Convention: PJ [190]-[192] CAB 57-58.

23. The Full Court similarly found that Art 54(2) constituted the "agreement" or submission to the jurisdiction of the Australian courts, rejecting the necessity of Art 26 to any submission: FFC [15], [111], [113]-[114] CAB 78, 104.

24. *Second*, *contra* ECS [14], Art 54 is an agreement (submission) to the exercise of national court jurisdiction; if not, Art 26 ECT (which says nothing about submission to jurisdiction) can add nothing. For the reasons set out in RS [§V.C],[25] the only necessary agreement to submit for the purposes of s 10(2) Immunities Act is found in Art 54 and arises irrespective of the validity of any agreement to arbitrate.

25. Fundamentally, and *contra* ECS [14]-[15], the EC's submissions read Art 54 divorced from the plain terms and structure of both the ICSID Convention, and the effect given to it by the Arbitration Act. The 'self-contained' system embodied in Arts 26, 27, 49(2) and 50-53 ICSID Convention precludes reliance on any dispute as to consent to arbitration at the stage of recognition and enforcement, whether or not the issue was raised before ICSID.[26] Section 33(2) of the Arbitration Act gives effect to this by excluding any recourse against the award outside the Convention system. Section 34 gives it further effect by precluding reliance on any jurisdictional defence otherwise available under ss 8 or 16 (read with Art 36 of the Model Law in Sch 2) of the Arbitration Act. The Appellant thus agreed not to raise, and is precluded by both the ICSID Convention and the Arbitration Act from raising, any

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[24] Applicants' [Investors'] Outline of Further Submissions, 1 July 2019, [117]-[121] RSFB 52-54 (filed in NSD 601/2019 and adopted by the Investors in NSD 602/2019 pursuant to Orders of Stewart J made on 25 October 2019 in NSD 602/2019 RSFB 63); Transcript, FC, T 30.38-33.14 RFB 272-275 (first basis), T 29.42-30.37 RFB 271-272 (second basis); Respondents' Outline of Submissions on Application by the European Commission, 20 August 2020, [11]-[25] RSFB 70-73.

[25] See further: RS [45]-[46].

[26] See RS [73] fn 87; PJ [79] CAB 30; FFC [114] CAB 104.

issue as to the tribunal's jurisdiction at the stage of recognition and enforcement, whether or not the issue was raised beforehand. The submission in Art 54 is to proceedings in which Appellant agreed not to take issue with its consent to arbitrate. The necessary corollary of this is that the submission to jurisdiction in Art 54 is made or given *notwithstanding* any dispute the respondent State has about the jurisdiction of the tribunal. Art 54 does not depend upon the validity of consent to the arbitration giving rise to an award; it is enlivened by proof only of an award certified by the Secretary-General of ICSID: Art 54(2).[27]

26. *Contra* ECS [§IV.D] (esp. [37]), the EC urges on the Court a necessary finding that the ECT does not contain a valid offer to arbitrate. While the ultimate point of reliance on the asserted invalidity of Art 26 ECT is that s 10 Immunities Act is not satisfied, this requires traversing the same points heard and rejected in the arbitration and the same field that the ICSID Convention prohibits the Appellant from traversing in these proceedings. As it is the proceedings that engage s 9 Immunities Act, the question of immunity cannot be divorced from the limited scope of the proceedings, which requires proof only of an award certified by the Secretary-General for orders to be made: FFC [114] CAB 104.

27. *Contra* ECS [38]-[39], and for reasons set out above, the Full Court was right to reject the relevance of the intervention given the effect of Art 54.

IV.B The substance of the EC's submissions should be rejected

28. It is unnecessary to deal with these matters if the Court accepts either that the EC Application should be refused or that the agreement between Contracting States to Art 54 ICSID Convention operates as a basis for waiver of immunity without requiring proof of validity of consent to the arbitration giving rise to the award. However, the weaknesses in the ECS are an additional reason to refuse the EC Application.

29. The EC's second proposition is that the Appellant's agreement to submit to jurisdiction is governed by international law, and that international law includes EU law.[28] The first part of that proposition is irrelevant if (as explained above) the waiver in Art 54 arises notwithstanding any issue of the validity of the consent to arbitrate. The second part is unremarkable insofar as the TFEU is a treaty and in that sense part of international law. Australia is not however a party to the TFEU and EU law is neither binding on Australia nor does it regulate Australia's obligations under the ICSID Convention.

30. *First*, and as a preliminary matter, the ECS are premised on the presumption that in *Achmea* and/or *Komstroy* the CJEU authoritatively determined the effect of Art 26 ECT in respect of EU Member States. This overstates the effect of these decisions. *Achmea*

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[27] Cf. s 9(1) Arbitration Act (proof for recognition and enforcement under Art IV New York Convention).
[28] ECS [§IV.B].

concerned a bilateral investment treaty between EU Member States, not a multilateral treaty involving non-EU members.[29] In *Komstroy*, the CJEU's remarks on the validity of a State's consent to arbitrate under Art 26 ECT were entirely *obiter* as: (1) the parties were not, or not from, an EU Member State[30] (the Council of Europe and several EU Members all submitting that accordingly the CJEU had no jurisdiction to answer *any* questions referred to it);[31] (2) the validity of such consent was not one of the questions referred to the Court by the Paris *cour d'appel* on the interpretation of Art 26 ECT;[32] and (3) the *ratio* of the decision (at [79]) was merely that the contract for sale of electricity was not an "investment" within the meaning of Art 1(6) ECT, and so it was unnecessary to answer the other questions (at [86]).

10 Further, the arbitration in question was seated in France, an EU Member State. Neither *Achmea* nor *Komstroy* say anything about the effect of any invalidity of consent to arbitration on Art 54 ICSID Convention or its operation in or as between an EU Member State and other non-EU Member States.

31. *Second*, as the TFEU and EU law have no direct effect in Australia, it is necessary to have regard to the other terms of the ECT itself or general international law to determine the effect on Art 26 ECT of any inconsistency of the kind posited. For the former, Arts 16 and 26(6) ECT provide relevant guidance.[33] For the latter, one must consider the rules embodied in Arts 30 and 41 VCLT.[34] The EC does not address these matters, which would arise before a tribunal properly seised of the jurisdictional questions the EC asks this Court to consider.

20 As can be seen from the submissions immediately below, these issues do not lend themselves to consideration, let alone final determination, by this Court on the basis of such inadequate treatment, especially when international tribunals have repeatedly rejected the EC's position.

32. Arts 16 and 26 ECT do not assist the EC: Beginning with Art 26 ECT, this contains nothing of assistance. Applying orthodox rules of treaty interpretation,[35] it has been held that the ordinary meaning of Art 26, in its context, is that a tribunal has jurisdiction to

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[29] *Achmea*, [62].
[30] Bianca Böhme, "The Future of the Energy Charter Treaty after *Moldova v Komstroy*" (2022) 59 *Common Market Law Review* 853, 861-862; Jed Odermatt, 'Is EU Law International? Case C-741/19 *Republic of Moldova v Komstroy LLC* and the Autonomy of the EU Legal Order' (2021) 6(3) *European Papers* 1255, 1263.
[31] *Komstroy*, [21].
[32] *Komstroy*, [20].
[33] Any dispute under Art 26 ECT is to be determined in accordance with the ECT and "applicable rules and principles of international law": Art 26(6). Art 26(6) ECT is "unexceptionable" and "would have had to be implied if it had not been expressed": *BayWa*, [267]; see also: *Cube*, [139].
[34] See e.g.: *BayWa*, [270]-[273]; *Eskosol*, [100], [132]-[147]; *Vattenfall*, [194]. The relevant States are States Parties to the VCLT: Spain acceded to the VCLT on 16 May 1972, Australia on 13 June 1974, and the Netherlands on 9 April 1985; Luxembourg ratified it on 23 May 2003. As to the customary basis of Arts 30 and 41 VCLT, see: **ILC, *Fragmentation* *of International Law*,** UN Doc A/CN.4/L.682 (2006), [228]; Anthony Aust, *Modern Treaty Law and Practice* (3rd edn, CUP 2013), 202; Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill 2009), 538.
[35] In particular, VCLT Arts 31 and 32. See: *Infrastructure Award*, [206] RFB 81-82.

entertain claims against a Contracting Party[36] by investors of another Contracting Party related to "Investments" made by the claimant(s) in the area of the respondent State; nothing in the text or context of the ECT carves out or excludes investments by a national of an EU Member State in the territory of another EU Member State; there is no 'disconnection clause' in the ECT and in fact the *travaux préparatoires* point against implying one.[37]

33. Art 16 ECT prevents even a subsequent treaty that deals with the same subject-matter as Part III ECT (which contains the substantive investment protections) or Part V ECT (which contains the dispute settlement provisions, including Art 26) from derogating from Art 26 "or from any right to dispute resolution with respect thereto under this Treaty, where any such provision is more favourable to the Investor or Investment." With respect to the TFEU, as various international tribunals have held, the issue of derogation does not arise and Art 16 does not apply because, applying the express terms of Art 16, the TFEU does not "concern the subject matter" of the ECT[38] and in any event, the TFEU is *less favourable* to the foreign investor and cannot derogate from Art 26 ECT.[39]

34. Art 30 VCLT does not assist the EC: Art 30 VCLT provides a *lex posterior* rule for dealing with the "rights and obligations of States parties to successive treaties relating to the same subject-matter" where they conflict. Under Art 30(3), if all the parties to the two treaties are common and the earlier is not terminated or suspended, "the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty." Plainly, all the States Parties to the ECT[40] are not parties to the TFEU. In that case, under Art 30(4) VCLT: "(a) As between States parties to both treaties the same rule applies as in paragraph 3; (b) As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations." However, as also held by various international tribunals, again, Art 30 VCLT does not apply because the ECT and the TFEU do not relate to the same subject matter.[41]

35. Art 41 VCLT does not assist the EC: Art 41 VCLT concerns agreements to modify multilateral treaties between certain of the parties only (and as between them only), and does not require that the treaties have the same subject matter, subject to certain qualifications. However, as various international tribunals have held, the TFEU is not an agreement to modify the ECT within the meaning of Art 41; it does not refer to the ECT at all, much less

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[36] ECT, Art 1(2); *BayWa*, [247(2)].
[37] *BayWa*, [247]; *Infrastructure Award*, [215] RFB 83-84.
[38] *Vattenfall*, [194]; *BayWa*, [271]; *LSG*, [720]-[730]; *Electrabel*, [4.176].
[39] *Vattenfall*, [229]; *BayWa*, [271]; *Eskosol*, [100]-[102]; *LSG*, [752]-[753]; *RENERGY*, [381]-[383]; ***SolEs Badajoz GmbH v Kingdom of Spain*** (ICSID Case No ARB/15/38, Award, 31 July 2019), [248]-[250].
[40] See the list of ECT States Parties in: Affidavit of Tamlyn Shaze Mills, 17 April 2019, TM-8 RSFB 12-15.
[41] *BayWa*, [273]; *Eskosol*, [140]-[147], citing ILC, *Fragmentation*, [254]-[255]; *LSG*, [720]-[730].

express an intent to modify the ECT generally or Art 26 specifically.[42] Further, a modification via the TFEU resulting in the invalidity of Art 26 ECT (contrary to Art 41(1)(b)) is prohibited by Art 16 ECT, as outlined above.[43] Still further (contrary to Art 41(1)(b)(ii)) such modification has been held to be incompatible with the effective execution of the object and purpose of the ECT as a whole.[44] Finally, no notification as required by Art 41(2) was given, and strict compliance with this procedural protection is required.[45]

36. In the absence of an applicable conflicts rule which leads to the TFEU prevailing over the otherwise plain meaning of Art 26 ECT, that meaning applies. The EC's assertion that because EU law forms part of international law and the determinations of the CJEU have retrospective effect, Art 26 bears a different meaning for EU Member States than for other States parties is not explained and for the foregoing reasons lacks a proper juridical foundation. The *Achmea* Objection should therefore be rejected. Art 26(4) ECT is valid and conferred jurisdiction on the ICSID tribunal, as held by that tribunal and by the ICSID annulment committee in the underlying arbitration.

Dated 26 August 2022

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[42] *LSG*, [680]-[691], [700]; *Eskosol*, [150]; *Vattenfall*, [221].
[43] *Eskosol*, [151]; *Vattenfall*, [221].
[44] *BayWa*, [276]-[277]; *Sevilla Beheer*, [650].
[45] *BayWa*, [276]-[279]; *LSG*, [702]-[703]; *Eskosol*, [150]; *Sevilla Beheer*, [650]; *SolEs*, [251]. In *BayWa* at [282], the tribunal distinguished *Achmea* on the basis that the CJEU was not there considering a multilateral treaty like the ECT. In *Komstroy*, the CJEU *was* considering the ECT, however the correct analysis regarding Art 41 VCLT is not affected by the CJEU's *obiter* statements in *Komstroy*, see: *LSG*, [701]-[703], [754]-[764].

ANNEXURE

Legislation (in force at 23 April 2019 unless otherwise indicated)

Australian Legislation

1. *Foreign States Immunities Act 1985* (Cth) (**Immunities Act**), ss 9, 10
2. *High Court Rules 2004* (Cth) (**HCR**), r 42.08A
3. *International Arbitration Act 1974* (Cth) (**Arbitration Act**), ss 8, 9, 16, 32, 33, 34, Sch 2

Treaties

4. *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159 (in force 14 October 1966) (**ICSID Convention**), Arts 26, 27, 49(2), 50-54
5. *Energy Charter Treaty*, opened for signature 17 December 1994, 2080 UNTS 95 (in force 16 April 1998) (**ECT**), Art 1, Part III (especially Art 16), Part V (especially Art 26)
6. *Treaty Establishing the European Economic Community*, opened for signature 25 March 1957, 298 UNTS 3 (in force 1 January 1958), as most recently amended by the *Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community*, opened for signature 13 December 2007, 2702 UNTS 3 (in force 1 December 2009) (**TFEU**), Arts 267, 344
7. *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (in force 7 June 1959) (**New York Convention**), Art IV
8. *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (in force 27 January 1980) (**VCLT**), Arts 30-32, 41