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
First Respondent

ENERGIA TERMOSOLAR B.V
Second Respondent

SUBMISSIONS OF THE EUROPEAN COMMISSION

10 **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: BASIS OF INTERVENTION AS *AMICUS CURIAE*

2. The European Commission applies for leave to be heard as *amicus curiae* pursuant to rule 42.08A of the *High Court Rules 2004* to make submissions in support of the appellant, the Kingdom of Spain.

PART III: WHY LEAVE SHOULD BE GRANTED

3. The European Commission is an institution of the European Union (the **EU**) and acts on behalf of the EU as its external representative. The European Commission is charged with the duty to present the official position of the EU, and speaks on behalf of the EU before international courts and arbitral tribunals.

4. All of the parties to the appeal sit within the EU: Spain is a Member State of the EU, and the respondents are incorporated in Luxembourg and the Netherlands respectively, each a Member State of the EU.

5. The European Commission seeks leave to be heard as *amicus curiae* to make submissions to the effect that, by reason of applicable rules of EU law and international law, Spain cannot be taken to have agreed to submit to the jurisdiction of the Australian courts with respect to the recognition and enforcement of intra-EU investment arbitration awards for the purposes of s 10(2) of the *Foreign States Immunities Act 1985* (Cth) (**Immunities Act**).

6. The European Commission submits that leave should be granted for three reasons.

7. *First*, the European Commission's proposed submissions will significantly assist the Court in reaching a correct determination.[1] The submissions address the rules of EU law and international law compelling the conclusion that the Energy Charter Treaty (the **ECT**) cannot be a source of a waiver agreement. In that

[1] *Roadshow Films Pty Ltd v iiNet Limited* [2011] HCA 54; (2011) 248 CLR 37, [4], [6].

connection, the European Commission's 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: cf AS [95]-[96].

8. *Second*, the proposed submissions raise discrete points falling within a relatively narrow compass. The European Commission's intervention would therefore cause no material delay to the proceedings, and would have limited costs consequences for the parties.[2]

9. *Third*, the subject matter of the appeal raises important issues of EU law and has implications for the rights and obligations of EU Member States and citizens, and for subsequent enforcement actions in Australia involving intra-EU arbitral awards. The European Commission, known as the "Guardian of the Treaties", is the voice of the EU before international courts and arbitral tribunals. The EU ought to be heard, not only as a matter of international comity, but to assist the Court in understanding the relevant principles of EU law at stake.

PART IV: SUBMISSIONS

10. The European Commission's submissions advance four propositions. *First*, any waiver agreement for the purposes of s 10(2) must be located in both the ECT and the ICSID Convention.[3] *Second*, the validity and interpretation of the agreement is governed by international law, which includes EU law. *Third*, EU law is to the effect that the ECT cannot be interpreted as containing Spain's agreement to intra-EU investment arbitration and the recognition and enforcement of resulting awards. *Fourth*, this goes to the existence of any waiver of immunity as distinct from the arbitral tribunal's jurisdiction, and the Full Court was wrong to refuse the European Commission's intervention below on the basis that its submissions went to jurisdiction.

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2 *Roadshow Films Pty Ltd v iiNet Limited* [2011] HCA 54; (2011) 248 CLR 37, [4].

3 Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

A. Any waiver agreement must be found in the ECT and the ICSID Convention

11. Section 9 of the Immunities Act provides that a foreign State is immune from the jurisdiction of the courts of Australia, except as provided by the Act. Section 9 thus establishes the general position ordinarily pertaining to the immunity of foreign States in Australian proceedings.

12. Section 10(2) provides a possible exception to that immunity, enabling a foreign State to submit to the jurisdiction "by agreement". The appeal turns on the existence and operation of any such agreement. "Agreement" is defined in s 3 to mean "an agreement in writing and includes (a) a treaty or other international agreement in writing; and (b) a contract or other agreement in writing". In this case, the agreement can only be a treaty.

13. The primary judge proceeded on the basis that the relevant agreement was Art 54 of the ICSID Convention in conjunction with Art 26 of the ECT: PJ [42], [56], [179]; CAB 22, 25, 54. In the Full Court, Perram J did not consider Art 26 because he viewed the ECT as going to jurisdiction and not immunity: FFC [15], [111]; CAB 78, 104. But the respondents relied on Spain's accession to Art 26 as part of the agreement enlivening s 10(2): FFC [13]; CAB 77.

14. The primary judge was correct to identify that any waiver agreement comprises both Art 54 of the ICSID Convention and Art 26 of the ECT, not the ICSID Convention alone. Article 54 imposes an obligation on each Contracting State to recognise and enforce ICSID awards within its territories. By its terms, Art 54 does not record an agreement by Spain to recognise and enforce ICSID awards in Australia. Any agreement must therefore arise from the combination of Spain's commitments under the ICSID Convention and Spain's commitments under Art 26 of the ECT.

15. That proposition is consistent with the nature of the ICSID Convention. The ICSID Convention establishes a mechanism for resolving certain investment disputes by arbitration.[4] It applies only when the parties have consented in

[4] ICSID Convention, Art 1.

writing to refer disputes to ICSID.[5] Absent consent, the ICSID Convention has no application. In other words, the ICSID Convention is not a freestanding agreement about how Contracting States will treat arbitral awards at large: there must be another agreement – typically an investment treaty – to enliven rights and obligations under the ICSID Convention.

B. The agreement is governed by international law, including EU law

16. On its proper construction, the "agreement" contemplated by s 10(2) of the Immunities Act must be an agreement that is validly made, containing terms that are effective to submit to the jurisdiction of the courts of Australia. The concept of an agreement carries with it the concept of a valid agreement effecting an operative waiver. That calls attention to the laws applicable to the validity of the agreement and the interpretation of its terms.

17. When, as here, the agreement is a treaty, the principles are well established. The ECT, being an international treaty, is governed by international law: Vienna Convention on the Law of Treaties, Art 2(1)(a). This is made explicit in Art 26(6) and Art 27(3)(g) of the ECT. The validity and interpretation of any agreement by Spain to waive its immunity for the purposes of s 10(2) therefore falls to be determined by reference to international law.

18. The EU is a party to the ECT, making the ECT an integral part of the legal order of the EU: *Republic of Moldova v Komstroy LLC* [2021] 4 WLR 132, [23]. EU law, in turn, forms part of international law, and therefore the law applicable to the ECT and the proper construction of any waiver agreement. EU law is "rooted in international treaties" and has become "part of the international legal order".[6] As explained by a tribunal presided over by the eminent late Judge James Crawford, EU law is binding on Member States as a matter of international law:

> [F]or just as the European treaties are part of international law, so the CJEU [the Court of Justice of the European Union], which exercises

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5 ICSID Convention, Art 25.

6 *Electrabel v Hungary* (Decision on Jurisdiction), ICSID Case ARB/07/19, 30 November 2012, [4.120], [4.122]. While the tribunal was correct to identify EU law as forming part of the applicable international law, it was wrong in ultimate outcome because the tribunal failed to give effect to the principles of EU law as identified in the balance of these submissions.

jurisdiction as between EU Member States, is an international court whose decisions are binding on those states *inter se*. International law allows the states parties to a regime treaty to establish their own international courts with jurisdiction over and authority to bind the Member States on issues of international law affecting them. It also allows those States to establish the priority of the regime treaty over other sources of international law, at least so long as peremptory norms are not implicated.[7]

19. It follows that the law applicable to the interpretation and validity of any relevant agreement under s 10(2) of the Immunities Act is international law, including EU law.

C. Article 26 of the ECT cannot contain an agreement to waive immunity

20. The EU is founded on two treaties: the Treaty on European Union, and the Treaty on the Functioning of the European Union (the **TFEU**). These are referred to collectively as the **Treaties**.

21. The judicial system of the EU comprises the courts of the Member States and the Court of Justice of the European Union (the **CJEU**). The CJEU is the ultimate authority on the interpretation and application of EU law.[8] This arises principally from two articles of the Treaty on the Functioning of the European Union, Art 267 and Art 344.

(a) Art 267 confers jurisdiction on the CJEU to rule on the interpretation of the Treaties and all other acts of EU law, including the ECT. National courts of Member States may (and, where they are courts of final instance, must) refer any relevant question of interpretation and application of EU

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7 *BayWa RE Renewable Energy GmbH v Spain* (Decision on Jurisdiction, Liability, and Directions on Quantum), ICSID Case ARB/15/16, 2 December 2019, [280]. The award was rendered before the CJEU's decision in *Republic of Moldova v Komstroy LLC* [2021] 4 WLR 132: see [27] below. The majority was therefore wrong, at [282], in characterising *Slovak Republic v Achmea BV* [2018] 4 WLR as non-binding dicta.

8 *Commission v Ireland (MOX Plant)*, Case C- 459/ 03, EU:C:2006:345 30 May 2006, [80]-[139].

law raised in proceedings before them to the CJEU for a preliminary ruling.

(b) Art 344 prohibits Member States from submitting a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein. This extends to the interpretation and application of international agreements to which the EU and its Member States are a party.

(c) Art 267 and 344, read together, grant the CJEU exclusive jurisdiction to issue final and binding interpretations of EU law and thus guarantee the correct and uniform application of EU law in all of the numerous areas in which it is applicable. Again, this includes the application of international agreements to which the EU and its Member States are party, insofar as their intra-EU application is concerned.

22. The Member States have thus conferred exclusive jurisdiction on the CJEU to issue final and binding rulings on the interpretation of the ECT. It follows that, if the CJEU determines the correct interpretation of the ECT, the CJEU's finding authoritatively establishes the position as between the EU Member States on an *inter se* basis both as a matter of EU law and as a matter of international law.[9]

23. Against that background, the CJEU has determined that provisions such as Art 26 of the ECT cannot properly, as a matter of peremptory EU law, be seen or held to enable arbitration proceedings to be commenced by an EU investor against an EU Member State.

24. The CJEU first confronted the issue in *Slovak Republic v Achmea BV* [2018] 4 WLR 87. The case concerned a claim by an investor domiciled in the Netherlands against the Slovak Republic, each an EU Member State, pursuant to a bilateral investment treaty. The question was whether an agreement enabling

[9] See Art 344 TFEU; *Commission v Ireland (MOX Plant)*, Case C- 459/ 03, EU:C:2006:345, 30 May 2006, [80]-[139]; *BayWa RE Renewable Energy GmbH v Spain* (Decision on Jurisdiction, Liability, and Directions on Quantum), ICSID Case ARB/15/16, 2 December 2019, [282].

an investor from one Member State to bring arbitration proceedings against another Member State was compatible with the Treaties: *Achmea* [31].

25. The CJEU held that it was not: *Achmea* [60]. The case was decided by the CJEU sitting as a Grand Chamber of 15 distinguished judges, a configuration reserved for matters of high precedential importance. The CJEU reasoned that intra-EU investor-state arbitration would cause private arbitral tribunals to interpret and apply EU law outside of the judicial system of the EU and without the capacity for full review by member courts or the CJEU: *Achmea* [41]-[55]. That arrangement is fatally incompatible with the Treaties and EU law.

26. Because *Achmea* concerned a bilateral investment treaty between EU Member States, there was residual doubt in some quarters about the extent to which it applied to multilateral investment treaties such as the ECT. That doubt was definitively resolved by the CJEU in a subsequent decision, *Republic of Moldova v Komstroy LLC* [2021] 4 WLR 132.

27. *Komstroy* concerned the same issue as *Achmea* but arising in the context of an arbitration commenced under the ECT. The CJEU began at [62] by reiterating its reasoning in *Achmea*:

> [T]he exercise of the European Union's competence in international matters cannot extend to permitting, in an international agreement, a provision according to which a dispute between an investor of one Member State and another Member State concerning EU law may be removed from the judicial system of the European Union such that the full effectiveness of that law is not guaranteed.

28. The CJEU proceeded to hold that the *Achmea* principle applies equally to a multilateral treaty such as the ECT in respect of the treaty's operation between EU Member States: *Komstroy* [62]-[66].

29. The CJEU further found that a provision such as Art 26 of the ECT "is intended, in reality, to govern bilateral relations between two of the Contracting Parties" in an analogous way to a bilateral investment treaty: *Komstroy* [64]. Expressed another way, the ECT "creates a bundle of bilateral and reciprocal international

obligations" such that the CJEU's interpretation of Art 26 concerns a dispute between an investor from one EU Member State and another EU Member State and thus takes place within the EU legal order, and subject to EU law, without affecting Contracting Parties that are not Member States.[10]

30. As a result, the CJEU could authoritatively interpret Art 26 of the ECT as it applies in bilateral relations between two EU Member States in conformity with the principles of EU law set out in *Achmea*.

31. The CJEU's ultimate conclusion was that "Article 26(2)(c) of the ECT *must be interpreted as not being applicable* to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State": *Komstroy* [66]. That is, the CJEU resolved the matter by declaring the binding interpretation of the ECT in its application between EU Member States. For the reasons noted above, this forms part of international law.

32. The CJEU's judgments generally apply retrospectively.[11] The jurisprudence of the International Court and its predecessor indicates that the interpretation of a treaty has retrospective effect:

> [I]n accordance with the rules of law, the interpretation given by the Court to the terms of the Convention has retrospective effect— in the sense that the terms of the Convention must be held to have always borne the meaning placed upon them by this interpretation.[12]

In the same way, the CJEU is the authoritative arbiter of the objective meaning and effect of the ECT in its application to EU Member States. The CJEU identifies the meaning that the ECT has and always had, preventing international law from becoming fragmented and uncertain.[13]

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10 Tim Rusche, 'How to Enforce the *Achmea* Judgment: Tools for EU Member States before, during and after Investment Arbitration Proceedings Brought by an Investor from Another EU Member State' (2021) 6(1) *European Investment Law and Arbitration Review Online,* 310.

11 *Association Vent De Colère! Fédération nationale v Ministre de l'Écologie, du Développement durable, des Transports et du Logement*, Case C-262, ECLI:EU:C:2013:851, 19 December 2013, [39].

12 *Access to German Minority Schools in Upper Silesia* [1931] PCIJ Rep Series A/ B No 40, 19.

13 Eirik Bjorge and Robert Kolb, 'The Interpretation of Treaties over Time' in Hollis (ed), *The Oxford Guide to Treaties* (2nd ed, 2020), pp 500-502.

33. That conclusion follows definitively from the agreement's proper interpretation. As well, it follows from the structure and operation of EU law because the CJEU has conclusively declared the legal position for EU Member States. Section 10(2) is triggered only by an agreement that is validly made. For example, an agreement procured by coercion would not ground an effective waiver of immunity. The consequence of the CJEU's interpretation is that Spain's consent was never capable of being given. While not in the category of coercion, the effect of the CJEU's jurisprudence is that, as regards intra-EU investment arbitration, any claim that there has been an agreement to arbitrate under Art 26 of the ECT is misconceived. Any agreement resting on Art 26 is invalid.[14]

34. The CJEU has determined that EU Member States could not, and did not, agree to the resolution of intra-EU investment disputes by arbitration under the ICSID Convention through Art 26 of the ECT. It follows that Spain could not have agreed to recognise and enforce the resultant awards, and to waive its associated immunity. There has been no legally operative agreement, properly understood, to waive immunity. Section 10(2) is not engaged.

35. The circumstances of this case present additional difficulties. EU investors, who are subjects of EU law, are seeking to enforce an arbitral award in the courts of Australia in a manner inconsistent with EU law in circumstances where the award and the underlying dispute have no connection to Australia. This action would be unavailable to the investors within the EU.[15] This is another reason for caution in the identification of any agreement sufficient to engage the operation of s 10(2) of the Immunities Act.

D. Article 26 goes to the waiver of immunity and is not purely jurisdictional

36. In the European Commission's submission, the question before the Court is whether the ECT and the ICSID Convention together constitute a waiver of

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14 See generally Jan Klabbers, 'The Validity and Invalidity of Treaties' in Hollis (ed), *The Oxford Guide to Treaties* (2nd ed, 2020), p 551, 554; and Jennings and Watts, *Oppenheim's International Law* (9th ed), Vol 1, Part 4, § 644, p 1294.

15 *Raiffeisen Bank International AG and Raiffeisen Bank Austria d.d. v. Croatia*, Bundesgerichtshof Beschluss, [German Supreme Court], I ZB 16/21, 17 November 2021; *Poland v Strabag SE*, Cour d'appel de Paris, Chambre commerciale internationale, [Paris Court of Appeal], RG 20/13085, 19 April 2022.

immunity within s 10(2) of the Immunities Act. That is a different question to whether the arbitral tribunal had jurisdiction under Art 25 of the ICSID Convention. Jurisdiction and waiver may turn on aspects of the same instruments but that does not conflate the two separate questions: one is a precondition to a tribunal's asserted mandate; the other concerns the existence of a waiver agreement and the capacity to recognise or enforce certain awards against a sovereign state in the courts of Australia.

37. That distinction between the immunity question and the jurisdictional question may be tested by considering the outcome of the appeal. If Spain succeeds in establishing its immunity, the arbitral tribunal's finding of jurisdiction remains undisturbed. The appeal has no direct bearing upon the recognition and enforcement of the award outside of Australia. Any such proceedings are governed by the rules on immunity of the country where recognition and enforcement are sought. Nor would it remove the award from the international legal order, that being reserved to the ICSID annulment process under Art 52 of the ICSID Convention.

38. The Full Court refused to grant the European Commission leave to intervene: FFC [112]; CAB 104. Perram J reasoned that the status of Art 26 of the ECT was a matter going to the tribunal's jurisdiction and did not affect the question of immunity: FFC [113]; CAB 104. That was in error because the agreement said to constitute the waiver is grounded in both the ECT and the ICSID Convention. That was the basis on which the respondents proceeded, as was recognised by the primary judge and acknowledged in passing by Perram J: PJ [42], [56], [179]; CAB 22, 25, 54; and FFC [13]; CAB 77. It must be so given the terms of Art 54 of the ICSID Convention.

39. Perram J further reasoned that the argument sought to be advanced by the European Commission was not an issue forming part of the matter between the parties: FFC [115]; CAB 104. That conclusion rests on the same misapprehension of the point being raised by the European Commission and the consignment of its relevance to the tribunal's jurisdiction. As Spain's submissions demonstrate, the decisions in *Achmea* and *Komstroy* form part of

the matter before the Court because they bear upon the nature and content of any waiver agreement: AS [95]-[96].

40. Had the European Commission been granted leave, it would have had an opportunity to explain the distinction between jurisdiction and immunity. The refusal of leave rested on a characterisation of the European Commission's position in circumstances where the European Commission was not given leave to be heard. For that reason, the Full Court's refusal to grant leave should not stand as an impediment to the grant of leave in this Court.

PART V: ORAL ARGUMENT

10 41. If the European Commission is given leave to be heard orally, it estimates that it would require no more than 10 minutes to make its submissions.

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ANNEXURE TO SUBMISSIONS OF THE EUROPEAN COMMISSION, SEEKING LEAVE TO INTERVENE

Pursuant to Practice Direction No 1 of 2019, the European Commission sets out below a list of the statues referred to in the submission.

	Description	**Version**	**Provision(s)**
1.	*Foreign States Immunities Act 1985* (Cth)	Current	ss 3, 9, 10(2)