FEDERAL COURT OF AUSTRALIA

Blasket Renewable Investments LLC v Kingdom of Spain [2025] FCA 1028

File numbers:	NSD 2169 of 2019 NSD 365 of 2020 NSD 449 of 2020 NSD 415 of 2023
Judgment of:	**STEWART J**
Date of judgment:	29 August 2025
Catchwords:	**ARBITRATION** – international arbitration – where foreign investors obtained the benefit of arbitral awards rendered by tribunals constituted pursuant to the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (1965) (**ICSID Convention**) against the Kingdom of Spain – where award creditor investors are nationals of current or former European Union Member States – where those investors or their relevant assignees seek recognition and enforcement of those awards in Australia under s 35(4) of the *International Arbitration Act 1974* (Cth) (**IAA**) **PUBLIC INTERNATIONAL LAW** – foreign State immunity – where the respondent asserts immunity pursuant to s 9 of the *Foreign States Immunities Act 1985* (Cth) (**Immunities Act**) from proceedings for the recognition and enforcement of arbitral awards in Australia – where respondent submits the position is not governed by *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl* [2023] HCA 11; 275 CLR 292 and it consequently has not waived its immunity under s 10 of the Immunities Act by acceding to the ICSID Convention – where respondent submits the High Court decision did not concern a situation where the binding status of an award is disputed whereas the binding status of the awards is presently disputed – whether the High Court decision governs this case and if not whether the respondent has waived its immunity to jurisdiction **PRIVATE INTERNATIONAL LAW** – assignment – where two of the applicants are the assignees of the original award creditor investors – where respondent disputes that the assignees can enforce their awards in Australia – where no dispute as to validity of deeds of assignment under governing law of the deeds – issue of which law governs the assignability of arbitral awards – whether under public

international law, Australian domestic law or foreign domestic law the ICSID awards or the rights of enforcement of them are capable of being assigned – whether in terms of international law assignment of awards is permitted under the ICSID Convention or under customary international law

PUBLIC INTERNATIONAL LAW – European Union law – EU autonomous system – principle of primacy – where the Court of Justice of the EU in *Republic of Moldova v Komstroy LLC* [2021] 4 WLR 132 and related decisions held that intra-EU arbitration agreements are inapplicable and not binding as between EU Member States pursuant to the EU foundational treaties – where EU Member States party to ICSID arbitral awards are now faced with a conflict between complying with the terms of the awards and complying with the obligation under the EU foundational treaties to not submit disputes to extra-EU resolution – where conflict is also said to arise because payment pursuant to the awards is unlawful State aid for the purposes of EU law – where respondent submits that the conflict ought to be resolved by giving primacy to the EU foundational treaties – whether if so the consequence is that the awards are not binding on the respondent under the ICSID Convention – whether if so an assignee domiciled in the Bailiwick of Jersey is relevantly subject to EU law

PUBLIC INTERNATIONAL LAW – treaty interpretation – where the respondent submits the consequence of intra-EU awards being not binding on it under the ICSID Convention is that Australia has no concomitant obligation under Art 54 of the Convention to enforce the award on the request of the applicants – where the respondent in the alternative contends that the same result obtains from the inter se modification of the ICSID Convention as a result of entering into the Treaty of Lisbon (2007) effected in accordance with customary international law or under Art 30 of the *Vienna Convention on the Law of Treaties* (1969) – whether the consequence asserted by the respondent flows from the meaning and operation of the ICSID Convention or the subsequent treaties said to effect the modification – where Australia is party only to the ICSID Convention but not the EU foundational treaties – whether intra-EU law rules have an effect on international law obligations owed to and from States parties outside the EU system

CONSTITUTIONAL LAW – infringement of Ch III – where the respondent submits that ss 32 or 35(4) of the IAA are constitutionally invalid to the extent that they require

the Court to recognise and/or enforce awards without looking to whether there was an agreement between the parties to submit their dispute to arbitration – whether the ICSID Secretary-General or the tribunal are impermissibly vested with Ch III judicial power as part of the arbitral enforcement regime under the IAA

EVIDENCE – proof of international law – admissibility of expert opinion evidence – whether issue to be treated as question of fact or question of law – approaches to proof of treaties and customary international law – whether proof of EU law is an issue of international law or foreign law

PRACTICE AND PROCEDURE – application to intervene – where European Commission applies for leave to intervene pursuant to r 9.12 of the *Federal Court Rules 2011* (Cth) – where Commission seeks to make submissions on the content of EU law and says that it is uniquely placed to do so – whether leave should be granted

Legislation:

Constitution, ss 55(xxix), 75(i), 76(i), (ii), 77(i), Ch III

Acts Interpretation Act 1901 (Cth), s 15A

Evidence Act 1995 (Cth), ss 136, 143, 144, 174

Federal Court of Australia Act 1976 (Cth), s 20(1A)

Foreign States Immunities Act 1985 (Cth), ss 9, 10

International Arbitration Act 1974 (Cth), ss 8, 16(1), 32, 33, 34, 35, Pt IV, Sch 2 (UNCITRAL Model Law on International Commercial Arbitration) Art 36

Judiciary Act 1903 (Cth), ss 38(a), 39B, 78B, 79

Federal Court Rules 2011 (Cth), rr 9.09(2), 9.11, 9.12

Conveyancing Act 1919 (NSW), s 12

Delaware Limited Liability Company Act 6 Del Code Ann § 18-101 et seq

Foreign States Immunities Act 28 USC § 1602 et seq

United States Code (US) Title 22 § 1650a

Statute of the International Court of Justice, Art 38(1)(c)

Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953)

Convention on the Recognition and Enforcement of Foreign

Arbitral Awards, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959), Art V

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 14 October 1966), Arts 1(2), 3, 11, 25, 26, 27(1), 36(1), 37, 41, 48, 49, 50, 51, 52, 53, 54, 55, 64, 65, 66, 69, 70

The Energy Charter Treaty, opened for signature 17 December 1994, 2080 UNTS 95 (entered into force 16 April 1998), Arts 2, 10, 26

Treaty establishing the European Economic Community, opened for signature 25 March 1957, 294 UNTS 3 (entered into force 1 January 1958) (now *Treaty on the Functioning of the European Union* [2009] OJ C 115/199), Arts 107, 108, 267, 344, 351, 355(5)(c), Pt 3 Title II

Treaty concerning the accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and to the European Atomic Energy Community, opened for signature 22 January 1972, 1374 UNTS 1 (entered into force 1 January 1973), Protocol No 3 Art 1(1)

Treaty concerning the accession of the Kingdom of Spain and the Portuguese Republic to the European Economic Community and to the European Atomic Energy Community, opened for signature 12 June 1985, 1447 UNTS 2 (entered into force 1 January 1986)

Treaty of Lisbon Amending the Treaty on European Union and Treaty establishing the European Union, opened for signature 13 December 2007, 2702 UNTS 1 (entered into force 1 December 2009)

Treaty on European Union, opened for signature 7 February 1992, 1755 UNTS 1 (entered into force 1 November 1993), Arts 1, 4(3), 13, 19

Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), Arts 4, 30, 31, 32, 41

ICSID Rules of Procedure for Arbitration Proceedings 2006, rr 41(5), 54(2), (3)

Agreement on the Interpretation and Application of the Energy Charter Treaty between the European Union, the European Atomic Energy Community and their Member States (COM(2024) 257 final) (26 June 2024)

Agreement on the withdrawal of the United Kingdom of

Great Britain and Northern Ireland from the European Union and European Atomic Energy Community [2019] OJ C 384 I/01

Decision 2025/1235 of 24 March 2025 on the measure State aid SA.54155 (2021/NN) implemented by Spain – Arbitration award to Antin [2025] OJ L 2025/1235

Decision C(2017) 7384, State aid SA.40348 (2015/NN) – Spain Support for electricity generation from renewable energy sources, cogeneration and waste [2017] OJ C 442/1

Declaration on the Legal Consequences of the Judgment of the Court of Justice in Komstroy and Common Understanding on the Non-Applicability of Article 26 of the Energy Charter Treaty as a Basis for Intra-EU Arbitration Proceedings [2024] OJ L 2024/2121

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Brownlie v FS Cairo (Nile Plaza) LLC [2021] UKSC 45; [2022] AC 995

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CC/Devas (Mauritius) Ltd v Republic of India (No 2) [2023] FCA 527

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Damberg v Damberg [2001] NSWCA 87; 52 NSWLR 492

Deputy Commissioner of Taxation v Shi [2021] HCA 22; 273 CLR 235

Eiser Infrastructure Ltd v Kingdom of Spain [2020] FCA 157; 142 ACSR 616

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PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission [2012] HCA 33; 247 CLR 240

Republic of Ecuador v Occidental Exploration and Production Co [2005] EWCA Civ 1116; [2006] QB 432

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Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Commercial Arbitration
Number of paragraphs:	368
Date of hearing:	9, 10, 13, 14 and 15 May 2024
Date of last submissions:	8 November 2024
Counsel for the Applicants in NSD2169/2019, NSD365/2020, NSD449/2020 and NSD415/2023	J A Hogan-Doran SC and C Brown SC
Solicitor for the Applicants in NSD2169/2019, NSD365/2020 and NSD415/2023	Norton Rose Fulbright Australia and Linklaters LLP
Solicitor for the Applicants in NSD449/2020	A&O Shearman
Counsel for the Respondent in NSD2169/2019, NSD365/2020 and NSD449/2020	S Robertson SC and P F Santucci (written submissions also by S Hoare)
Solicitor for the Respondent in NSD2169/2019, NSD365/2020 and NSD449/2020	Johnson Winter Slattery
Counsel for the Respondent in NSD415/2023	C H Withers SC and B Yin
Solicitor for the Respondent in NSD415/2023	Thomson Geer
Solicitor for the European Commission:	N Gallus of LK Law

ORDERS

NSD 2169 of 2019

BETWEEN:	**BLASKET RENEWABLE INVESTMENTS LLC** Applicant
AND:	**THE KINGDOM OF SPAIN** Respondent

NSD 365 of 2020

BETWEEN:	**9REN HOLDING S.A.R.L.** Applicant
AND:	**THE KINGDOM OF SPAIN** Respondent

NSD 449 of 2020

BETWEEN:	**BLASKET RENEWABLE INVESTMENTS LLC** Applicant
AND:	**THE KINGDOM OF SPAIN** Respondent

NSD 415 of 2023

BETWEEN:	**NEXTERA ENERGY GLOBAL HOLDINGS B.V.** First Applicant
	NEXTERA ENERGY SPAIN HOLDINGS B.V. Second Applicant
AND:	**THE KINGDOM OF SPAIN** Respondent

ORDER MADE BY: **STEWART J**

DATE OF ORDER: **29 AUGUST 2025**

THE COURT ORDERS THAT:

1. Within 14 days of the publication of these reasons, the parties provide to the Associate to Justice Stewart by email agreed or competing orders giving effect to these reasons.
2. The proceeding be listed for case management on 19 September 2025.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

STEWART J:

INTRODUCTION

1 Before the Court are four applications to enforce foreign arbitral awards under s 35(4) of the *International Arbitration Act 1974* (Cth) (**IAA**). Each of the applications is brought by former investors in renewable energy projects in Spain or their assignees. The respondent to each application is the Kingdom of Spain, a sovereign State, which conditionally appears to assert foreign State immunity.

2 The arbitral awards were rendered by arbitral tribunals constituted by the International Centre for Settlement of Investment Disputes (**ICSID**) under the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (1965) (**ICSID Convention**). Together, the awards amount to approximately €500 million, or AU$900 million.

3 Spain relies on s 9 of the *Foreign States **Immunities Act** 1985* (Cth) to assert that it is immune from the Court's jurisdiction in each of the proceedings. Its immunity case relies on arguments that are also relevant to the merits of the applications.

4 Spain's assertion of foreign State immunity must be understood against the backdrop of the unanimous judgment of the High Court of Australia in *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl* [2023] HCA 11; 275 CLR 292 (***Spain HCA***) which held (at [8]) that Spain's agreement to Arts 53-55 of the ICSID Convention amounted to a waiver of foreign State immunity from the jurisdiction of the courts of Australia in the proceeding to recognise and enforce the ICSID award in that case, but it did not amount to a waiver of immunity in respect of any processes to execute any resultant judgment. Spain formally makes the submission before me that the High Court was wrong in reaching that conclusion. It does so in

order to preserve its ability to apply to the High Court to reopen and reconsider its conclusion with regard to the effect of agreeing to the ICSID Convention.

5 Spain also advances arguments that were not advanced before or considered by the High Court and seeks to distinguish the present cases from the case decided by the High Court, including by making further arguments concerning the power of the Court to grant the relief sought that do not rely on foreign State immunity. In those circumstances, the outcome before me, regrettably, is not simply governed by the High Court decision.

6 The European Commission seeks leave to intervene in each proceeding pursuant to r 9.12 of the *Federal Court Rules 2011* (Cth) (**FCR**). The applicants resist that intervention, although Spain supports it.

7 The applications are made in each of:

(1) NSD2169/2019 – **Blasket** Renewable Investments LLC v The Kingdom of Spain (which I will refer to as the **RREEF proceeding** because the award creditors were RREEF Infrastructure (GP) Ltd and RREEF Pan European Infrastructure Two Lux Sàrl and Blasket claims as their assignee);

(2) NSD365/2020 – 9REN Holding Sàrl v The Kingdom of Spain (the **9REN proceeding**);

(3) NSD449/2020 – Blasket Renewable Investments LLC v The Kingdom of Spain (which I will refer to as the **Watkins proceeding** because the award creditors were Watkins Holding Sàrl and Watkins (Ned) BV and Blasket claims as their assignee); and

(4) NSD415/2023 – NextEra Energy Global Holdings BV & Anor v The Kingdom of Spain (the **NextEra proceeding**).

8 Although there is a considerable degree of commonality between them, it is necessary to set out in some detail the facts relevant to each individual proceeding. By way of high-level summary, the relevant common circumstances are as follows.

9 Since about 1997, Spain has adopted various regulatory measures intended to encourage the development of renewable energy in Spain. In 2007 and 2008, Spain promulgated a scheme known as "regimen economico primado" or premium economic scheme that provided premium feed-in tariffs for certain renewable energy producers. From about 2010 to 2014, the premium tariffs were altered by Spain. The applicant investors (including the assignors to Blasket) in these proceedings asserted that the alteration amounted to a breach of Art 10 of *The Energy*

Charter Treaty (1994) (**ECT**), which requires Spain to accord investments of investors of other States parties fair and equitable treatment.

10 The applicant investors and assignors submitted the disputes between themselves and Spain to ICSID, as contemplated by Art 26 ECT, and ICSID established arbitral tribunals to determine each of the disputes. Spain participated in the tribunal proceedings, although it objected (and continues to object) to the jurisdiction of the ICSID tribunals. Ultimately the tribunals concluded that they had jurisdiction and rendered awards in the investors' favour. The investors or, in some cases, their (purported) assignees, now apply to this Court to enforce the awards.

11 The ultimate question for the Court is whether the ICSID awards must be, or ought to be, enforced in Australia and whether judgment should be entered in favour of each of the applicants against Spain thereby enforcing the pecuniary obligations imposed by the awards.

12 Notwithstanding Australia's apparent public international law obligation under Art 54 ICSID Convention as given force in domestic law under s 32 IAA, and the conclusion of the High Court in *Spain HCA* that by signing the ICSID Convention Spain waived its right to foreign State immunity in enforcement proceedings under the Convention, Spain asserts foreign State immunity and argues that the adjudicative jurisdiction of the Court is not engaged.

13 It is important to identify some key particulars of that submission. The argument is made at two levels, in addition to the formal submission of the incorrectness of *Spain HCA* mentioned at [4] above.

14 First, Spain says that its accession to the ICSID Convention did not amount to a waiver of foreign State immunity under the Immunities Act, *where Spain is not bound to comply with such awards as a matter of public international law*. This raises the question whether what was decided in *Spain HCA* was limited to situations in which the binding effect of an award is not in dispute or if the holding is "at large" such that I am compelled to reject this submission.

15 Secondly, if it is held that Spain waived its immunity, Spain again submits that as a matter of public international law it is not bound to comply with the ICSID awards in the current proceedings. In the main, Spain says that the consequence of this is that there is no binding "award" which is capable of being enforced under the terms of s 35(4) IAA, and therefore no power of the Court to do so. While strictly speaking this is not an immunity argument, as Spain repeatedly acknowledges, its merits dovetail with the argument based on what is said to be the consequence of public international law that is relied on to refute the waiver of immunity.

16 That is, Spain makes a number of contentions which are said to lead to the result that each of the applications for recognition and enforcement should be dismissed, either because the adjudicative jurisdiction of this Court is not engaged by reason of Spain having not waived its foreign State immunity in these proceedings, or because (for the same reasons) this Court does not have the power to enforce the awards in issue in these proceedings.

17 It is, of course, common ground that if Spain's assertion of foreign State immunity is good, then the awards cannot be recognised or enforced.

18 As will be seen, an essential aspect of Spain's case turns on Spain and the States of which the investors are nationals being, at material times, Member States of the European Union. The relevant Member States are the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland (before the UK left the EU on 31 January 2020). In respect of the UK, the relevant investor is a national of the Bailiwick of Jersey, a British Crown Dependency. There is an issue whether that status is sufficient to treat Jersey as an EU Member State for relevant purposes.

REPRESENTATION

19 Although several of the applicants in the different proceedings have different firms of solicitors, they adopted the laudable expedient of briefing the same counsel, namely Mr Justin Hogan-Doran SC and, with him, Professor Chester Brown SC. Counsel for the applicants accordingly addressed all matters across all four proceedings.

20 For reasons that have never became apparent to me, Spain has instructed one firm of solicitors in three of the proceedings and a different set in the fourth, and those solicitors have briefed different counsel. In the result, Mr Scott Robertson SC and, with him, Mr Philip Santucci appeared for Spain in the RREEF, 9REN and Watkins proceedings and Mr Christopher Withers SC and, with him, Mr Boxun Yin appeared for Spain in the NextEra proceeding. The arguments that they put overlapped in certain respects but diverged in others. Without making any criticism of either set of counsel for Spain, that approach has proved unhelpful and burdensome. Be that as it may, as I understand matters, the arguments advanced by Mr Robertson and Mr Withers are to be taken to be made in each proceeding to the extent that they are relevant (eg the assignment question which I will come to is relevant only in the RREEF and Watkins proceedings and the Jersey question is relevant only in the RREEF proceeding).

21 Resolution of the four proceedings has been further complicated by the way in which the proceedings have been advanced, with numerous separate and duplicative expert reports and submissions in each proceeding as well as consolidated submissions across various of the proceedings, and the parties' submissions often not being responsive to other submissions or following a common structure. There are more than 20 separate documents containing the parties' submissions, including further submissions and numerous updates to the parties' outlines of argument well after the hearing. The burden on the Court has included being referred to around 700 separate authorities across innumerable jurisdictions and a court book of nearly 12,000 pages. Perhaps all of that is an inevitable consequence of the history of the different proceedings and how they eventually came to be heard together, along with what is at stake. I hope that I have done no injustice to the detailed and at times innovative submissions of the parties in what follows.

RELEVANT FACTS IN EACH PROCEEDING

The RREEF proceeding (NSD2169/2019)

22 The applicant in the RREEF proceeding, Blasket, moves on a further amended originating application dated 9 May 2024. Blasket is a company incorporated under the laws of Delaware, United States of America. The factual background to Blasket's application is as follows.

23 On 22 October 2013, two private equity companies specialising in infrastructure investments, RREEF Infrastructure (GP) Ltd (incorporated under the laws of the Bailiwick of Jersey) and RREEF Pan-European Infrastructure Two Lux Sàrl (incorporated under the laws of Luxembourg) (together referred to as the **RREEF parties**), submitted a request for arbitration to ICSID pursuant to Art 26(4)(a)(i) ECT. The claimants alleged that Spain had breached its obligations under Art 10 ECT through the adoption of legislative and regulatory measures between 2012 and 2014 that affected electricity production from renewable sources and consequently changed the conditions for the claimants' earnings on their investments in wind and solar power in Spain.

24 The ICSID arbitral proceeding is cited as *RREEF Infrastructure (GP) Ltd and RREEF Pan-European Infrastructure Two Lux Sàrl v Kingdom of Spain* (ICSID Case No ARB/13/30).

25 On 7 March 2016, the tribunal, comprising Professor Alain Pellet (President), Professor Pedro Nikken and Professor Robert Volterra, made its determination on Spain's jurisdictional objections, and subsequently issued its Decision on Jurisdiction on 6 June 2016 which set forth

its reasoning. The tribunal rejected all but one of Spain's arguments that it did not have jurisdiction to hear the parties' dispute and joined the remaining jurisdictional objection concerning tax measures with the merits. The tribunal concluded that it had jurisdiction to determine the dispute by reason of Art 26 ECT, particularly the claimants' consent to arbitration by submitting a Request for Arbitration to ICSID and Spain's consent to ICSID arbitration arising under Arts 26(3)(a) and (4)(a) ECT. The tribunal concluded that it also had jurisdiction under Art 25 ICSID Convention.

26 On 30 November 2018, the tribunal published its decision on the merits, being its Decision on Responsibility and on the Principles of Quantum. Professor Volterra publishing a Partially Dissenting Opinion. While upholding Spain's remaining jurisdictional objection concerning a tax measure, the tribunal concluded that in relation to all other measures over which it had jurisdiction, Spain was in breach of its obligations under the ECT.

27 The tribunal found that Spain had breached its obligation under Art 10(1) ECT in respect of the retroactive application of the new legislative and regulatory measures and that Spain had also breached its obligation to ensure a reasonable return on the claimants' investments.

28 The tribunal proceeded to issue an arbitral award on 11 December 2019 which was certified by the ICSID Secretary-General and dispatched to the parties on that date. By the terms of the award, the tribunal ordered Spain to pay the claimants €59.6 million in damages plus interest.

29 On 24 December 2019, the RREEF parties filed an originating application in this Court seeking recognition and enforcement of the ICSID tribunal's award. On 24 March 2020, Spain filed a notice of appearance on the basis of s 10(7) Immunities Act for the limited purpose of asserting its immunity from suit pursuant to s 9.

30 In the meanwhile, Spain filed an application for annulment of the award pursuant to Art 52(1) ICSID Convention which was received by ICSID on 8 April 2020. Upon registration of Spain's annulment application with ICSID on 15 April 2020, enforcement of the RREEF award was provisionally stayed, in accordance with r 54(2) of the *ICSID Rules of Procedure for Arbitration Proceedings 2006* (**ICSID Rules**). In light of that application, on 22 April 2020, I ordered that the RREEF proceeding in this Court be stayed until further order.

31 On 28 October 2020, the ICSID ad hoc committee hearing Spain's application for annulment of the award, comprising Professor Lawrence Boo (President), Professor Enrique Barros Bourie and Ms Bertha Cooper-Rousseau issued a decision on Spain's request for continuation

of the stay on enforcement of the award. The committee granted Spain's request and ordered that the stay continue until the decision on Spain's annulment application was rendered by the committee.

32 On 10 June 2022, the ICSID annulment committee issued the annulment award in which it dismissed Spain's application for annulment, terminated the provisional stay on the enforcement of the award and ordered Spain to pay the claimants' costs of the annulment proceeding.

33 On 19 October 2022, I ordered that the stay of the proceeding in this Court be lifted and granted the RREEF parties leave to file and serve an amended originating application, which they did on 26 October 2022. This application sought recognition and enforcement of both the original award and the annulment award.

34 During case management by me as the docket judge, Spain initially indicated that it would not be raising any substantive defence to the RREEF parties' application following the handing down of the *Spain HCA* judgment on 12 April 2023. By late May 2023, that position had changed and the proceeding was programmed for final, contested hearing in tandem with the 9REN proceeding (see below at [46]).

35 On 21 June 2023, the RREEF parties filed an interlocutory application seeking orders that Blasket be joined as an applicant and be substituted for the RREEF parties with the RREEF parties being removed as applicants pursuant to rr 9.09(2) and 9.11 FCR. The basis for that interlocutory application was that on 27 October 2022, the RREEF parties entered into a deed of assignment which purported to irrevocably and unconditionally assign to Blasket all of their rights, interests and benefits under or in respect of the award. Spain had been notified of that assignment on 18 January 2023.

36 Spain opposed the interlocutory application, challenging the validity of the purported assignment. On 26 June 2023, I made orders joining Blasket and substituting Blasket for the RREEF parties on the basis that the making of those orders would not prevent Spain from disputing the validity or efficacy of the purported assignment at trial, which it now does. I granted leave to Blasket to file a further amended originating application on 9 May 2024.

The 9REN proceeding (NSD365/2020)

37 The applicant in the 9REN proceeding, **9REN** Holding Sàrl, moves on a further amended originating application dated 9 May 2024. 9REN is a renewable energy company incorporated under the laws of Luxembourg. The factual background to 9REN's application is as follows.

38 On 30 March 2015, 9REN submitted a request for arbitration to ICSID, which was received on 31 March 2015. It sought compensation for alleged breaches by Spain of the ECT arising out of 9REN's investment in electricity produced by solar photovoltaic facilities in Spain, which it said was induced by Spain's guarantee of a premium feed-in tariff and which was impaired by Spain modifying the regulatory and economic regime applicable to renewable energy products to 9REN's disadvantage.

39 The ICSID arbitral proceeding is cited as *9REN Holding Sàrl v The Kingdom of Spain* (ICSID Case No ARB/15/15).

40 On 31 May 2019, an ICSID tribunal comprising the Hon Ian Binnie CC QC (President), Mr David R Haigh QC and Mr V V Veeder QC issued an arbitral award recording its conclusions that the tribunal was competent to hear and determine 9REN's claims against Spain, that Spain breached Art 10(1) ECT, and that 9REN is entitled to compensation in the amount of €41.76 million plus interest and costs.

41 On 15 July 2019, Spain submitted to the tribunal a request for rectification of the award under Art 49(2) ICSID Convention. On 6 December 2019, the tribunal issued its rectification award, in which it dismissed Spain's request for rectification and ordered Spain to pay the tribunal's costs and to pay 9REN US$6,103.01 for its portion of advances of the costs of the tribunal.

42 On 27 March 2020, 9REN filed an originating application in this Court.

43 On 3 April 2020, Spain applied to ICSID for annulment of the award, which under r 54(2) ICSID Rules had the consequence of enforcement of the award being provisionally stayed upon registration of Spain's application with ICSID on 7 April 2020. In light of that application, on 22 April 2020 I stayed the 9REN proceeding in this Court until further order.

44 On 17 November 2022, the ICSID annulment committee comprising Professor Dr Dàrio Moura Vicente (President), Professor Dr Nicolas Molfessis and Dr Fernando Piérola-Castro issued the annulment award, in which it dismissed Spain's application for annulment and ordered Spain to bear the costs of the annulment proceeding.

45 On 31 January 2023, Spain filed a notice of address for service in which it asserted immunity from suit pursuant to s 9 Immunities Act. On 1 February 2023, I made orders by consent that the stay of the 9REN proceeding be lifted.

46 As detailed above at [34], following the *Spain HCA* decision being handed down and Spain indicating that it nonetheless wished to assert substantive defences in opposition to the applications, the 9REN and RREEF proceedings were case managed together towards a final, contested hearing. I granted leave to 9REN to file a further amended originating application on 9 May 2024.

The Watkins proceeding (NSD449/2020)

47 The applicant in the Watkins proceeding moves on a second further amended originating application dated 9 May 2024. The factual background to the Watkins proceeding is as follows.

48 Watkins Holding Sàrl and Watkins (Ned) BV (the **Watkins parties**), incorporated under the laws of Luxembourg and the Netherlands respectively, were investors in the energy generation industry in Spain, in particular in connection with the purchase of seven wind farm sites.

49 On 26 October 2015, the Watkins parties (together with other claimants) filed a request for arbitration against Spain with ICSID. The Watkins parties alleged that Spain, in breach of its international obligations, adopted measures radically modifying and dismantling the legal and economic regime for renewable energy projects on which the Watkins parties relied when making their investment in the Spanish energy sector.

50 The ICSID arbitral proceeding is cited as *Watkins Holdings Sàrl and others v Kingdom of Spain* (ICSID Case No ARB/15/44).

51 On 21 January 2020, an ICSID tribunal comprising Mr Tan Sri Dato' Cecil W M Abraham (President), Dr Michael C Pryles AO PBM and Professor Dr Hélène Ruiz Fabri issued an award in favour of the Watkins parties. The tribunal unanimously concluded that it enjoyed jurisdiction under the ECT and ICSID Convention over the Watkins parties' claim (save in relation to an aspect of the claim concerning Spain's tax measures) and concluded by majority that Spain had breached Art 10(1) ECT by failing to accord fair and equitable treatment to the Watkins parties. The Watkins parties were awarded damages in the sum of €77 million plus interest and costs.

52 On 6 March 2020, Spain submitted a request for rectification of the award to the ICSID tribunal.

53 On 17 April 2020, the Watkins parties filed an originating application in this Court seeking recognition and enforcement of the ICSID tribunal's award. Spain filed a notice of conditional appearance to assert its immunity from the jurisdiction on 20 May 2020.

54 Given the immunity issues that were expected to arise, it was agreed that the Watkins proceeding would most sensibly proceed by way of a special case to be heard concurrently with then-pending appeals to the Full Court of the Federal Court in NSD328/2020 (Kingdom of Spain v Eiser Infrastructure Ltd & Anor) and NSD329/2020 (Kingdom of Spain v Infrastructure Services Luxembourg Sàrl) which concerned similar issues. A special case was stated on 22 June 2020 (and subsequently amended on 1 September 2020), the substance of which was concerned with whether Spain is entitled to immunity from the jurisdiction of the Federal Court under s 9 Immunities Act.

55 On 26 June 2020, Allsop CJ made a direction under s 20(1A) of the *Federal Court of Australia Act 1976* (Cth) that the original jurisdiction of the Court be exercised by a Full Court in relation to the question whether Spain is immune from the jurisdiction of the Court pursuant to the Immunities Act in the Watkins proceeding. A Full Court comprising Allsop CJ, Perram and Moshinsky JJ was constituted to hear the proceeding concurrently with the appeals in the Eiser Infrastructure and Infrastructure Services matters on 24 August 2020.

56 On 13 July 2020, the tribunal issued its decision on Spain's request for rectification of the award, dismissing Spain's request and ordering Spain to pay the Watkins parties' costs.

57 On 21 July 2020, Spain applied to ICSID for an annulment of the award and, in consequence, on 31 July 2020 the ICSID Secretary-General provisionally stayed the award.

58 Because of that intervening stay, the Watkins matter was not heard by the Full Court concurrently with the Eiser Infrastructure and Infrastructure Services appeals, but was rather adjourned on that day, 24 August 2020, to a future date.

59 On 21 February 2023, the ICSID ad hoc committee comprising Professor Lawrence Boo (President), Ms Olufunke Adekoya and Ms Dyalá Jiménez Figueres issued its decision on annulment in which the committee dismissed Spain's application to annul the award and lifted the stay on its enforcement.

60 On 19 May 2023, Spain made an application to ICSID for revision of the award. As a result of that application, on 7 June 2023 the ICSID Secretary-General granted a provisional stay of the award.

61 In the context of the renewed agitation of the RREEF and 9REN proceedings in this Court and the view of the parties that the Watkins proceeding should travel together with those proceedings, on 7 June 2023 Mortimer CJ revoked the s 20(1A) direction made by Allsop CJ. The Watkins proceeding was docketed back to me for final, contested hearing together with the RREEF and 9REN proceedings.

62 On 17 August 2023, the Watkins parties filed an application under r 41(5) ICSID Rules requesting dismissal of Spain's request for revision of the award.

63 On 21 December 2023, the Watkins parties and Blasket entered into a deed of assignment whereby the Watkins parties purported to irrevocably and unconditionally assign to Blasket the legal and beneficial title to all rights, interests and benefits of the Watkins parties under or in respect of the ICSID award (defined to include the award as well as the decisions on rectification, annulment and revision). The purported assignment was deemed to have taken place automatically upon the occurrence of any one of a number of triggering events which included, relevantly, the issuance of a decision that rejected or dismissed Spain's application for revision of the award.

64 On 22 January 2024, an ICSID tribunal comprising Professor Dr Pierre Tercier (President), Dame Elizabeth Gloster and Professor Hélène Ruiz Fabri issued its decision on the Watkins parties' application for dismissal of Spain's revision request. In that decision, the tribunal rejected Spain's request for revision of the award as manifestly without legal merit and noted that in accordance with r 54(3) ICSID Rules, the stay on the enforcement of the award was automatically terminated.

65 As a consequence of the issuance of that decision, the assignment referred to at [63] above became, on its terms, effective immediately (putting to one side Spain's challenge to that efficacy to which I will return). The Watkins parties and Blasket jointly notified Spain of the assignment on 26 March 2024.

66 Subsequently, on 2 April 2024 the Watkins parties filed an interlocutory application in identical terms to the RREEF application described above at [35]. On 3 April 2024, I made orders joining Blasket to the Watkins proceeding and substituting it for the Watkins parties on the same basis outlined in [36] above, ie retaining Spain's ability to contest the validity or efficacy of the assignment.

67 On 19 April 2024, with leave granted by consent, Blasket filed a further amended originating application seeking recognition and enforcement of the award and further relief arising from the ICSID tribunal's revision decision. Then on 9 May 2024, with leave granted on that day, Blasket filed a second further amended originating application.

The NextEra proceeding (NSD415/2023)

68 The applicants in the NextEra proceeding move on an originating application dated 11 May 2023. The **NextEra** applicants are NextEra Energy Global Holdings BV and NextEra Energy Spain Holdings BV, both incorporated in the Netherlands.

69 On 12 May 2014, the NextEra parties submitted a request for arbitration against Spain to ICSID in connection with a dispute arising out of regulatory measures implemented by Spain modifying the economic regime for renewable energy investments in Spain.

70 The ICSID arbitral proceeding is cited as *NextEra Energy Global Holdings BV and NextEra Energy Spain Holdings BV v Kingdom of Spain* (ICSID Case No ARB/14/11).

71 On 12 March 2019, an ICSID tribunal comprising Professor Donald M McRae CC (President), the Hon L Yves Fortier PC CC OQ QC and Professor Laurence Boisson de Chazournes issued a Decision on Jurisdiction, Liability and Quantum Principles. The tribunal found that it had jurisdiction over the parties' dispute and found Spain liable for breach of the fair and equitable treatment standard in Art 10(1) ECT.

72 On 31 May 2019, the ICSID tribunal issued an award in which it ordered Spain to pay to the NextEra parties €290.6 million in compensation for its breach of Art 10(1) ECT plus interest and costs.

73 On 26 September 2019, Spain applied to ICSID for annulment of the award. As a result, on 2 October 2019, pursuant to r 54(2) ICSID Rules, the acting Secretary-General informed the parties that the enforcement of the award had been provisionally stayed.

74 On 16 January 2020, Spain filed a request to continue the stay on enforcement of the award, which was opposed by the NextEra parties.

75 On 6 April 2020, an ad hoc committee comprising Professor Joongi Kim (President), Professor Lawrence Boo, and Mr Humberto Sáenz-Marinero issued a Decision on Stay of Enforcement of the Award. The committee decided that the stay of enforcement of the award should continue on a provisional basis on the condition that Spain provide an undertaking to the NextEra parties

that in the event that an annulment was not granted it would recognise the award as final and binding and would comply with it terms, and Spain would unconditionally and irrevocably pay the pecuniary obligations imposed by the award to the NextEra parties.

76 On 18 March 2022, the same ad hoc committee formed in accordance with the ICSID Arbitration Rules issued a Decision on Annulment. The Committee unanimously dismissed Spain's application for annulment of the award and ordered costs against Spain.

77 As mentioned, proceedings were initiated in this Court to enforce the award on 11 May 2023. Spain filed a notice of conditional appearance for the purpose of asserting its immunity from the jurisdiction on 14 November 2023. Spain has not complied with the award, or the annulment award, in whole or in part.

ISSUES IN DISPUTE AND SUMMARY CONCLUSIONS

78 At a high-level, Spain's case is put as follows:

(1) Australia's obligation to recognise and enforce an award under Art 54 only applies in relation to an award that is "binding" under Art 53, and Spain's waiver of foreign State immunity by signing up to the ICSID Convention is thus similarly limited.

(2) The awards in these proceedings are not binding under Art 53 for either or both of the following reasons:

(a) The relevant dispute mechanism procedures under the ECT and the ICSID Convention are inconsistent with the principle of autonomy of the EU system of courts under the foundational treaties of the EU to which Spain and the States of the investors are parties. There is therefore an apparent conflict between Spain's international obligations that it owes to Member States of the EU under the EU foundational treaties, on the one hand, and the obligations it appears to have under the ICSID Convention, on the other. That conflict ought to be resolved, it is argued, by applying the conflicts rule of "primacy" of the EU foundational treaties. If the rule of primacy is applied, it follows that Spain owes no public international law obligation to the States of the investors to comply with the purported awards; indeed, it may have a positive obligation *not* to comply as compliance may constitute prohibited State aid under the law of the EU.

(b) An alternative way to the same conclusion as to the purported awards' non-binding nature is the contention that Spain's agreement to the ICSID Convention has been modified by Spain's agreement to the ***Treaty of Lisbon*** *Amending the Treaty on European Union and Treaty establishing the European Union* (2007) such that the EU court system has replaced the dispute resolution mechanisms under the ICSID Convention with respect to intra-EU investment disputes. It is said that that replacement means that intra-EU ICSID arbitral awards are not "binding" on EU Member States under Art 53 ICSID Convention. That modification is said to have been effected either in accordance with the requirements for modification under customary international law as reflected in Art 41 of the *Vienna Convention on the Law of Treaties* (1969) (**VCLT**), or by application of Art 30 VCLT.

(3) As a consequence of there being no "award" which is "binding" within the meaning of Art 53 ICSID Convention, the Federal Court has neither jurisdiction (because Spain enjoys foreign State immunity) nor power to grant the relief sought by the applicants, even if there is a submission to the jurisdiction.

(4) If the Court were to find that certification of a purported award by the ICSID Secretary-General is sufficient to prove that an award is binding, or that it precludes a Court from inquiring into whether an award is binding, then s 35(4) IAA is constitutionally invalid for infringement of Ch III of the *Constitution*.

79 The last point is raised by Spain in the NextEra proceeding by way of a notice of a matter arising under the *Constitution* under s 78B of the ***Judiciary Act*** *1903* (Cth). No Attorney-General has sought to appear in response to the notice. The constitutional matters raised by the notice are put as follows:

(1) Whether, upon the party seeking to recognise or enforce an arbitral award furnishing a copy of it as certified by the ICSID Secretary-General, do either or both of Art 54 ICSID Convention as implemented in Australia under s 32 or s 35(4) IAA, require the Court to:

(a) conclude that Spain has waived its immunity by agreement under s 10(2) Immunities Act?

(b) recognise and/or enforce any such award as binding within the territories of Australia as if it were a judgment or order of that court?

(2) If yes to (a) or (b), are either or both of those provisions constitutionally invalid on the basis that they:

(a) impermissibly vest Ch III judicial power in the tribunal and/or the ICSID Secretary-General to decide:

(i) whether Spain has waived its immunity by agreement under s 10(2) Immunities Act?

(ii) the substantive rights and obligations which were the subject of such award?

(b) substantially impair the institutional integrity of the Court as a court exercising judicial power under Ch III and s 75(i) of the *Constitution* by requiring it to:

(i) determine that Spain has waived its immunity by agreement under s 10(2) Immunities Act?

(ii) recognise or enforce, as a judgment or order of the Court, such award?

80 It may be noted that question 2(b) refers to the Court exercising judicial power under s 75(i) of the *Constitution*. That provision provides for the original jurisdiction of the High Court "[i]n all matters … [a]rising under any treaty". This presents some difficulties. This head of jurisdiction has never been vested in the Federal Court – it is an omission from the otherwise broad scope of jurisdiction in s 39B *Judiciary Act*. From the agreed list of issues it is clear that the "matter" in contest between the parties is not limited to that arising under a treaty, but that it is also one "arising under … laws made by the Parliament", ie the IAA (s 39B(1A)(c)), and, self-evidently from the s 78B notice, one "arising under the Constitution, or involving its interpretation" (s 39B(1A)(b)). That of course draws attention to ss 76(i)-(ii) and 77(i) of the *Constitution*, rather than s 75(i). Were it otherwise, there would be a jurisdictional problem in circumstances where s 38(a) *Judiciary Act* provides that "matters arising directly under any treaty" are exclusive (of the State courts) to the High Court and, again, the Federal Court has no express jurisdiction under or by reference to s 75(i). In light of this, I will ignore the reference to s 75(i) in question 2(b). Of course, this renders moot the (to some) tantalising, and as yet unresolved, issue of what a matter "arising under" or "arising *directly* under" any treaty means: as to which, see Leeming M, *Cowen and Zines's Federal Jurisdiction in Australia* (5th ed, Federation Press, 2025) at 39-42; Australian Law Reform Commission, *The Judicial Power of the Commonwealth* (Report 92, October 2001) at [7.13]-[7.19]; and Leeming M, "Federal

Treaty Jurisdiction" (1999) 10(3) *Public Law Review* 173; Jones O, "Federal Treaty Jurisdiction: A belated reply to Mark Leeming SC" (2007) 18(2) *Public Law Review* 94.

81 The applicants agree that whether Spain is immune from the adjudicative jurisdiction of this Court is a central issue in dispute in these proceedings. However, the applicants approach that question from a different premise. The applicants contend that in circumstances where there were in fact arbitral proceedings before tribunals constituted by ICSID which resulted in duly certified awards, where none of the relevant awards is subject to any stay or other remedy under Arts 50-52 ICSID Convention, such remedies having been exhausted, and where the authenticity of the awards is undisputed, Art 54 ICSID Convention is not contingent upon any examination by the Court into the binding effect of the awards. Essentially, the applicants contend that the ICSID arbitration system established by the ICSID Convention is a self-contained or closed-loop system which cannot be disturbed by a court presented with a certified, authentic award, except perhaps where exceptional circumstances such as fraud or corruption arise and these proceedings are not such a case. On that basis, the applicants reject the proposition that Spain's waiver of immunity under the Immunities Act upon accession to the ICSID Convention could be qualified in the manner contended by Spain. This argument is the applicants' answer to whether the Court has power to enforce the awards under s 35(4) IAA, in that the award referred to there, on this analysis, need only be an award on its face as certified.

82 In any event, the applicants dispute that the conflicts rule of primacy applies or that there has been any modification of Spain's obligations under the ICSID Convention.

83 The applicants initially contended that Spain waived its foreign State immunity by conduct in the proceedings before this Court. In respect of the RREEF, 9REN and Watkins proceedings, that was said to have arisen by Spain having argued questions of power under the guise of immunity when in substance those questions go to the merits. It was said that to have adopted that course is inconsistent with the maintenance of the immunity. In the NextEra proceeding, the applicant relied on a letter written on behalf of Spain that contained no assertion of immunity. It was said that the letter, viewed objectively, amounted to a step in the proceeding which is inconsistent with the maintenance of the immunity. All those contentions were rightly abandoned during the course of the hearing.

84 There are two further issues peculiar to some of the proceedings and not others.

85 First, Spain contends that in the RREEF and Watkins proceedings, where Blasket is the purported assignee of the original investors', and hence award creditors', rights in and under the awards, the Court has no power under s 35(4) IAA to make orders in favour of Blasket to enforce the awards. That is said to be because the extent of the Court's power under s 35(4) IAA is to make an order "which gives the award the recognised status of a judgment" and which makes it "enforceable as such". It is said that there is no power under s 35(4) IAA to make an order that varies the terms, effect or beneficiaries of an award.

86 Secondly, in the RREEF proceeding, Blasket argues that Spain's reliance on the foundational texts and laws of the EU cannot apply in respect of the award in favour of RREEF Infrastructure (GP) Ltd which was incorporated under the laws of the Bailiwick of Jersey, one of the Channel Islands. That is because, so it is said, for most purposes – including, relevantly, EU law against State aid – the Channel Islands, as Crown Dependencies, are not part of the UK except to the extent that the UK is responsible for their external relations. It is to be noted that the events relevant to this issue pre-date the UK's exit from the EU, known as Brexit, with effect from 1 February 2020 (CET).

87 For the reasons that follow, I have concluded that Spain waived its immunity in all the proceedings, that the Court has power to recognise and enforce the awards in the proceedings, and that the awards must therefore be enforced as if they were judgments of the Court under s 35(4) IAA. The European Commission's application for leave to intervene in the proceedings should be dismissed.

88 I will give the parties the opportunity to bring in agreed or competing orders giving effect to these reasons and the opportunity to address me further on relief in the event that that is required.

THE EVIDENCE

Lay evidence

89 The lay evidence before the Court was comprised almost exclusively of affidavits by solicitors acting for various of the applicants both in the proceedings in this Court as well as in the underlying arbitral and annulment proceedings and ongoing recognition and enforcement efforts in other jurisdictions. The main purpose of most of these affidavits was to annex the various relevant arbitral materials and provide further information about the applicant investors.

90 Spain did not adduce any lay evidence aside from an affidavit of service by its solicitor in the NextEra proceeding regarding the s 78B notices.

91 The European Commission also relies on two lay affidavits in support of its application for leave to intervene (see further below at [351]).

92 No lay witnesses were required for cross-examination.

Expert evidence

The applicants' experts

93 The applicants rely on three expert reports each prepared by a different expert. Those experts and their respective reports are as follows:

(1) **Professor Piet Eeckhout** – Professor Eeckhout is a Professor of EU Law at University College London and Academic Director of the UCL European Institute. Professor Eeckhout holds a PhD in EU law from the University of Ghent. His academic interests revolve around EU law, in particular EU external relations law including the interaction between EU law and public international law. Professor Eeckhout has published extensively in this field and is the sole author of a leading monograph on EU external relations law. Professor Eeckhout's expert report in these proceedings is dated 1 December 2023. It covers relevant rules and principles of EU law and the conflict between the EU treaties and the ECT and ICSID Convention.

(2) **Mr Conor Quigley KC** – Mr Quigley of King's Counsel is a barrister of the Inner Bar of England and Wales. Mr Quigley was called to the Bar in 1985 by the Honourable Society of Gray's Inn, London and was admitted to the Inner Bar in 2003. He specialises in the area of European law, particularly in EU State aid law, and has served as a Research Fellow at the University of Oxford and King's College, London, a Senior Fellow at the University of Leiden and a Visiting Professor at the London School of Economics and Political Science. Mr Quigley's expert report in these proceedings is dated 30 November 2023. It principally covers matters of EU State aid law and the status of the Bailiwick of Jersey and EU law.

(3) **Professor Dan Sarooshi KC** – Professor Sarooshi of King's Counsel is a barrister at Essex Court Chambers and a Professor of Public International Law at the University of Oxford. Professor Sarooshi is also a Senior Research Fellow in Law at The Queen's College, Oxford. He was called to the Bar of England and Wales in 2005 and admitted

to the Inner Bar in 2018. He has been a Professor at Oxford since 2006. Professor Sarooshi is a specialist in public international law, investment treaty arbitration and public and constitutional law. Professor Sarooshi has prepared two expert reports in these proceedings. His first expert report is dated 30 November 2023 and deals principally with whether customary international law, the ICSID Convention or the ECT prohibit the assignment of the rights in relation to an ICSID award. Professor Sarooshi's second expert report is dated 21 March 2024, and deals principally with the EU law of primacy and its possible application in the NextEra proceeding.

Spain's expert

94 Spain relies on five expert reports each prepared by Professor Steffen Hindelang. Professor Hindelang is a Professor of International Investment and Trade Law at Uppsala University in Sweden. He is also a Director and co-founder of the CELIS Institute, a research enterprise dedicated to promoting better regulation of foreign investments, and senior fellow at the Walter Hallstein-Institute of European Constitutional Law at Humboldt-Universität zu Berlin. Professor Hindelang is a specialist in EU law, international and trade law and German public law.

95 Professor Hindelang's reports are identified as follows:

(1) Expert Report dated 15 August 2023 which deals principally with relevant rules and principles of the EU legal order, the principles of autonomy and primacy as articulated by the Court of Justice of the EU (**CJEU**) and EU State aid law;

(2) Supplementary Expert Report dated 5 September 2023 which deals with the question of the assignability of the rights in and relating to ICSID awards;

(3) Second Supplementary Expert Report dated 14 February 2024 which is a response to the reports of Professor Eeckhout, Mr Quigley and Professor Sarooshi;

(4) Expert Report in Chief dated 28 February 2024 which deals with matters previously dealt with in the first Hindelang report dated 15 August 2023 but in this instance in relation to the NextEra proceeding; and

(5) Expert Report in Reply dated 28 March 2024 which replies to Professor Sarooshi's second report of 21 March 2024 and the NextEra applicants' reply submissions of 22 March 2024.

Other expert reports

96 As mentioned, the affidavits comprising the lay evidence annexed materials which were before the tribunals in the various arbitral proceedings. That evidence included five expert reports of Professor Eeckhout dated 9 July 2020, 19 November 2020, 9 February 2021, 29 April 2021 and 27 July 2021, and two expert reports of Professor Hindelang dated 30 October 2020 and 30 April 2021. Also annexed were four expert reports of Professor Ricardo Gosalbo, instructed by Spain, dated 13 April 2020, 8 September 2020, 25 October 2020 and 11 March 2021. As these expert reports have not been filed for use as such in the present proceedings, no affidavits of their authors confirming them were read and the parties have not made reference to them, I have not had regard to them.

The status of the expert reports

97 The applicants object to parts of Professor Hindelang's various reports being received as expert evidence. Broadly, they submit that Professor Hindelang's opinions, and those of their own experts, on public international law should instead be received as submissions. The applicants particularise their objections to Professor Hindelang's evidence by reference to various categories which they submit are not properly the subject of expert evidence:

(1) Custom Objection: opinion as to content or application of customary international law;

(2) Treaty Objection: opinion as to interpretation of a treaty arising in the course of ascertaining the operation of Australian law;

(3) EU Law Objection: opinion of EU law possibly also expressing interpretation of application of the ECT or ICSID Convention;

(4) Foreign Law Objection: opinion of foreign law (eg US law, English law) including decisions of foreign courts outside area of expertise; and

(5) Form Objection: submission or conclusions as to content and effect of document, including from facts not in evidence, including opinion without foundation, and no specialised knowledge or expertise being applied.

98 The applicants did not seek to have any parts of Professor Hindelang's reports struck out or ruled inadmissible; rather, they sought rulings under s 136 of the *Evidence Act 1995* (Cth) that certain passages be treated as submissions, or that evidence be admitted only as an opinion as to the content of EU law and otherwise be treated as a submission.

99 In advance of the hearing, the parties agreed that I should deal with the expert evidence on the following basis:

(1) Subject to the applicants' objections to evidence that are pressed, all of the expert witness reports served by the parties be received as material capable of bearing on the legal and factual questions to be decided but on the basis that, save in relation to credit or expertise, it is not necessary for any party specifically to challenge an expert witness in cross-examination on any particular opinion or proposition, or to put to the witness any contrary opinion or proposition, for that party to be able to submit that the witness's opinion or proposition should not be accepted or that the contrary opinion or proposition should be accepted;

(2) The applicants' objections to evidence that are pressed should be dealt with (if necessary) in the Court's final judgment; and

(3) On that basis, no party requires any of the authors of the expert witness reports for cross-examination.

100 The parties were also agreed that the expert evidence should be treated as evidence in all proceedings notwithstanding the individual proceeding in which a particular report may have been filed.

101 I have ultimately not found the expert reports to be particularly helpful. That is no reflection on the experts, but rather reflects the approach of counsel before me to advance the arguments themselves with reference to the underlying authorities and other resources. No doubt counsel found the expert reports invaluable in preparing and advancing the parties' various contentions, but for the most part I have focussed on counsel's submissions rather than relying on the expert reports. Where those submissions reference the expert evidence, I have by necessity considered the content of that evidence where relevant. For that reason, I have not found it necessary to rule on any objections to the reports.

102 The dispute about the status of Professor Hindelang's reports raises the question whether propositions of public international law are always questions of law of the forum on which evidence is inadmissible, or whether there will be cases where propositions of public international law are susceptible of proof by evidence

103 There is no doubt that domestic law is not subject to proof by evidence and that "foreign law is a question of fact to be proved by expert evidence": s 143 Evidence Act and ***Neilson v***

Overseas Projects Corporation of Victoria Ltd [2005] HCA 54; 223 CLR 331 at [115] per Gummow and Hayne JJ. This rule is subject to s 174 Evidence Act (see *Deputy Commissioner of Taxation v* ***Shi*** [2021] HCA 22; 273 CLR 235 at [31] per Gordon J) and also is not applicable where the foreign laws in question are so well-known that their contents are "notorious" (***Mokbel*** *v The Queen* [2013] VSCA 118; 40 VR 625 at [26] per Maxwell ACJ, Buchanan and Weinberg JJA, citing *Saxby v Fulton* [1909] 2 KB 208). The latter exception may best be considered an incident of judicial notice (see s 144 Evidence Act).

104 The question then is as follows: do the principles governing the establishment of the content of international law follow those for domestic law or for foreign law, or does proof of international law have its own rules?

105 In ***Trendtex*** *Trading Corporation v Central Bank of Nigeria* [1977] QB 529, in obiter Stephenson LJ stated at 569 that:

> rules of international law, whether they be part of our law or a source of our law, must be in some sense "proved," and they are not proved in English courts by expert evidence like foreign law: they are "proved" by taking judicial notice of "international treaties and conventions, authoritative textbooks, practice and judicial decisions" of other courts in other countries which show that they have "attained the position of general acceptance by civilised nations": *The Cristina* [1938] AC 485, 497 per Lord Macmillan.

106 That decision (and the broader issue of proof of international law) was examined in detail by Perram J in *Australian Competition and Consumer Commission v PT Garuda Indonesia (No 9)* [2013] FCA 323; 212 FCR 406 (***Garuda No 9***) at [28]-[50]. Justice Perram distinguished what was said in *Trendtex* by noting that the Court there had considered sovereign immunity a matter of customary international law, as picked up by the common law of England (at [34]). That is, in cases where the common law overlaps with customary international law, "it was natural to think that the common law on the topic ought to align with the customary international law on the same issue" (at [38(a)]). While, of course, the common law does not require (or allow) proof by evidence, this meant that what was said in *Trendtex* was not, strictly speaking, relevant to the construction of a treaty, which was at issue in *Garuda No 9* (at [36]-[37]). Nor in its breadth was *Trendtex* convincing for the proposition that all international law was fully incorporated into domestic law (at [35]).

107 In saying this, Perram J partly disagreed with the position set out in Heydon JD, *Cross on Evidence* (9th ed, LexisNexis Butterworths, 2013) at 1383-1387 [41005], which regarded *Trendtex* as "as authority for the general proposition that public international law is part of

domestic law for the purpose of proving its meaning and content" (at [35]). Notably, that divergence was to an extent subsequently remedied: see Heydon JD, *Cross on Evidence* (10th ed, LexisNexis Butterworths, 2015) at 1471 [41005]. In the latest edition of Heydon JD, *Cross on Evidence* (14th ed, LexisNexis, 2023), *Garuda No 9* (at [38(a)]) is cited as authority for a number of propositions, including the narrower notion that where domestic common law is to the same effect as customary international law it does not require proof by expert evidence (at 1617 [41005]).

108 Justice Perram nevertheless observed more narrowly that "[g]iven its practical effect on domestic public law and the operation of s 51(xxix) of the Constitution, however, it is not inaccurate to view international law as perhaps one of the sources of domestic law" (at [44]) – noting that in referring to "public international law" Perram J is referring to "that part of the law of nations as consists of treaties" and thus excluding customary international law. It would be natural to expect that international law will be approached as a legal question in terms of proof at junctures where "local rules of interpretation and public law have the effect of picking up, or invoking, international law" (at [44]). His Honour therefore concluded his discussion in *Garuda No 9* by saying that "before an Australian court a question as to the interpretation of a treaty which arises in the course of ascertaining the operation of Australian law is to be approached as a question of law rather than as one of fact" (at [48]).

109 That approach was followed in *Ure v Commonwealth* [2015] FCA 241; 323 ALR 164 by Yates J in the context of determining the content of customary international law. His Honour considered that *Garuda No 9* stood only for the "more limited proposition" that treaty interpretation arising in the course of ascertaining the operation of Australian law was a question of law, and considered the dictum of Stephenson LJ in *Trendtex* persuasive in the exercise of giving content to customary international law: at [83]-[84]. On appeal from that decision, the Full Court (Perram, Robertson and Moshinsky JJ) in *Ure v Commonwealth* [2016] FCAFC 8; 236 FCR 458 discussed (at [29]-[41]) how customary international law was to be proved with reference to the International Court of Justice (**ICJ**) decision in the *North Sea Continental Shelf Cases* (*North Sea Continental Shelf (Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark) (Judgment)* [1969] ICJ Rep 3). While not explicitly addressing the point, the Full Court referred to "evidence" being required for the content of a rule of customary international law, in the well-settled form of State practice and opinio juris (ie the conviction felt by States that the practice is required by international law). Implicit in the approach the Full Court took was an acceptance that evidence

could be at least admissible on this point, and perhaps required in instances of uncertainty (see eg at [37]-[38]). See also, to similar effect, ***Barngarla*** *Determination Aboriginal Corporation RNTBC v Minister for Resources* [2023] FCA 809; 299 FCR 50 at [349]-[353] per Charlesworth J.

110 Further, in the appeal from Perram J's judgment on the merits in the PT Garuda competition litigation (*Australian Competition and Consumer Commission v PT Garuda Indonesia Ltd* [2016] FCAFC 42; 244 FCR 190), Dowsett and Edelman JJ made the following pertinent observation (at [254]), which aligns with the reasoning in *Ure* both at first instance and on appeal:

> It was common ground that propositions of international law could be established without expert evidence and simply by way of submissions. That assumption was not the subject of any dispute but as an absolute proposition it is highly questionable. For instance, the recognition that a developing international principle has become a requirement of international law can require evidence of widespread and representative State practice and opinio iuris (an intention to be bound). It may be difficult, for example, for a party to establish without either expert or lay evidence, a pattern of State behaviour and the reasons why States have acted in that way. However, it is not necessary to explore the extent to which the assumption is justified in this case.

111 On the basis of those authorities, the following propositions can be identified:

- International law sourced in treaties that are part of, or a source of, the law of the forum is not susceptible to proof by way of evidence.
- International law sourced in treaties that do not have that relationship to the law of the forum, such as treaties to which Australia is not party or which are not sought to be given expression in domestic law, is akin to foreign law and is to be proved or established in like manner.
- International law sourced in customary international law may be susceptible to proof by way of evidence, and evidence of State practice and opinio juris will likely be required where the state of the law on the point in issue is unsettled.

112 Hence, in general terms I do not regard the expert evidence of public international law in this case to be admissible as proof of that law, save perhaps in relation to State practice and opinio juris. Those aspects largely do not arise in this case, save on the sub-issues of modification and assignment – but, as will become apparent, the expert evidence on the ingredients of customary international law in those sections do not materially affect the analysis.

113 European law, in contrast, may be regarded a species of or akin to foreign law which is therefore provable both by way of expert opinion evidence and the mechanism provided for in s 174 Evidence Act. That being said, the obiter comments of Lord Leggatt JSC (Lord Reed PSC, Lord Lloyd-Jones, Lord Briggs and Lord Burrows JJSC agreeing on this issue – see at [6]) in ***Brownlie*** *v FS Cairo (Nile Plaza) LLC* [2021] UKSC 45; [2022] AC 995 at [148] are apposite:

> The old notion that foreign legal materials can only ever be brought before the court as part of the evidence of an expert witness is outdated. Whether the court will require evidence from an expert witness should depend on the nature of the issue and of the relevant foreign law. In an age when so much information is readily available through the internet, there may be no need to consult a foreign lawyer in order to find the text of a relevant foreign law. On some occasions the text may require skilled exegesis of a kind which only a lawyer expert in the foreign system of law can provide. But in other cases it may be sufficient to know what the text says.

114 His Lordship further observed that there was no utility to the rejection of "better, direct evidence when it is available just because it lacks the imprimatur of an expert witness": at [149]. In making these remarks, Lord Leggatt JSC was commenting on the situations in which the presumption of similarity to English law would be inapposite to apply, including where bare documentary evidence of foreign law is available.

115 That analysis is also applicable in Australia, where the presumption of similarity also applies: *Neilson* at [116] per Gummow and Hayne JJ; see *Damberg v Damberg* [2001] NSWCA 87; 52 NSWLR 492 at [118]ff per Heydon JA, Spigelman CJ and Sheller JA agreeing. In *Secretary, Department of Social Services v Vader* [2024] FCAFC 37; 302 FCR 352 it was said by Perry J, Charlesworth and Jackson JJ agreeing, with reference to the discussion from *Brownlie*, that "where the text of the foreign statute is sufficiently clear and precise, it may suffice to tender the statute pursuant to s 174(1) of the Evidence Act": at [45].

116 I say that European law "may be regarded" as a species of foreign law as it has the notable idiosyncrasy of being a supranational law system which is not local to any particular State, yet undoubtedly has been incorporated into the domestic legal systems of EU Member States. The source of European law is the EU foundational treaties, the particulars of which will come to be discussed, but European law has undeniable domestic effect including through lower-level instruments of European law sourced in the authority of the foundational treaties.

117 There may be a debate on whether European law is of a "foreign country" or not: see *Mokbel* at [25] and [27], which concerned the *Convention for the Protection of Human Rights and*

Fundamental Freedoms (1950) (not an EU instrument, but similarly supranational). There may also be a debate on whether European law is a subset of public international law more broadly: de Witte B, "EU law: Is it international law?" in Peers S and Barnard C (eds), *European Union Law* (4th ed, Oxford University Press, 2023) at 192ff.

118 It suffices to say that while international treaties and subordinate EU instruments could be regarded as a form of international law, for the purposes of proof it would not be a form of international law incorporated into or picked up by Australian law in the sense contemplated in the authorities. Thus, on either view, foreign domestic or international, some evidence, including by the mechanism of s 174 Evidence Act as if the EU were considered a "foreign country", would be admissible to assist the court on the content of European law: see eg the approach in *La Mancha Group International BV v Federal Commissioner of Taxation* [2020] FCA 1799; 112 ATR 660 at [6]-[17] per Davies J.

119 The approach of the parties in the present case has been, for the most part, to rely on relevant foreign legal sources to prove European law. I have had reference to the expert reports to assist where necessary in properly understanding those sources in context.

THE RELEVANT TREATIES AND LEGISLATION

The Energy Charter Treaty

120 The ECT is a multilateral treaty which was opened for signature in 1994 and entered into force in 1998. According to Art 2 ECT, its purpose is to establish a legal framework in order to promote long-term cooperation in the energy field, based on "complementarities and mutual benefits" in accordance with the objectives and principles of the European Energy Charter (adopted in the Concluding Document of the Hague Conference on the European Energy Charter signed at The Hague on 17 December 1991).

121 The ECT was designed to facilitate and protect investment in the energy sector. The Contracting Parties contemplated investments primarily between Western European, on the one hand, and Central and Eastern European and certain former Soviet States, on the other hand. At that time, a substantial number of Contracting Parties to the ECT were also EU Member States. That number increased further with the accession of Central and Eastern European States to the EU.

122 Article 10(1) ECT obliges Contracting Parties to encourage and create stable, equitable, favourable and transparent conditions for investors of other Contracting Parties, including to

accord to their investments fair and equitable treatment. Those are substantive standards of protection for investors. The awards in the proceedings are based on breaches of Art 10 ECT obligations.

123 Article 26 ECT deals with the settlement of disputes between an Investor and a Contracting Party. Article 26(1) provides that disputes between a Contracting Party and an Investor of another Contracting Party relating to an investment of the latter in the area of the former which concern an alleged breach of an obligation "shall, if possible, be settled amicably". Article 26(2) provides that in the absence of such a settlement after a period of three months, "the Investor party to the dispute may choose" to submit the dispute for resolution by one of three mechanisms. Sub-paragraph (a) is to the courts or administrative tribunals of the Contracting Party to the dispute. Sub-paragraph (b) is in accordance with any applicable previously agreed dispute settlement procedure. Pertinently to the present proceedings, sub-para (c) is "in accordance with the following paragraphs of this Article".

124 Article 26(3)(a) then provides that, subject to certain matters not presently relevant, "each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article".

125 Article 26(4) provides that in the event that an Investor chooses to submit the dispute for resolution under sub-para (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to one of three arbitral procedures. Those procedures are those provided by ICSID (with different provisions applying depending on whether both the domicile State of the Investor and the State in which the investment was made are parties to the ICSID Convention or if only one of them is), ad hoc arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law and, lastly, the Arbitration Institute of the Stockholm Chamber of Commerce.

126 In the present proceedings, each investor invoked the ICSID arbitral procedure under Arts 26(2)(c), (3) and (4)(a)(i). The election of the investors to exercise the ICSID dispute resolution option given to them by the ECT must be considered as giving rise to an enforceable obligation on the part of Spain to arbitrate under the ICSID Convention: see eg *Republic of Ecuador v Occidental Exploration and Production Co* [2005] EWCA Civ 1116; [2006] QB 432 at [32] per Mance LJ for the Court; *Eiser Infrastructure Ltd v Kingdom of Spain* [2020] FCA 157; 142 ACSR 616 at [179] (***Spain FCA***); *CCDM Holdings, LLC v Republic of India (No 3)* [2023] FCA 1266 at [7] per Jackman J and the further authorities cited there. By electing

to pursue the procedure provided for in Art 26(4)(a)(i) and giving their consents as required by that provision, each investor concluded, on the face of it, a binding agreement to arbitrate its respective dispute under the ICSID Convention.

The International Arbitration Act

127 Part IV of the IAA deals with the application of the ICSID Convention. Section 32 IAA provides that, subject to Pt IV, Chs II to VII of the ICSID Convention "have the force of law in Australia". Section 33 is particularly relevant:

> **33 Award is binding**
>
> (1) An award is binding on a party to the investment dispute to which the award relates.
>
> (2) An award is not subject to any appeal or to any other remedy, otherwise than in accordance with the [ICSID] Convention.

128 Section 35 deals with the recognition of awards. It designates the Supreme Court of each State and Territory and the Federal Court of Australia for the purpose of Art 54 ICSID Convention, ie as a competent court for the enforcement of an award (ss 35(1) and (3)). The awards in this case are sought to be enforced under s 35(4): "An award may be enforced in the Federal Court of Australia with the leave of that court as if the award were a judgment or order of that court."

The ICSID Convention

129 The background, purpose and operation of the ICSID Convention is canvassed in *Spain HCA* at [30]-[37]. It was explained (at [34], omitting references) that:

> The primary purpose of the ICSID Convention was, and remains, to promote the flow of private capital to sovereign nations, especially developing countries, by the mitigation of sovereign risk. The ICSID Convention mitigates risk by giving private investors, upon default by a country, an arbitral remedy which is intended to provide certainty.

130 Chapter I of the Convention establishes ICSID, ie the Centre, under the auspices of the International Bank for Reconstruction and Development (part of the World Bank Group) for the purpose of providing facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of the Convention (Preamble and Art 1(2)). Article 11 provides that the Secretary-General shall perform the function of registrar and shall have the power to authenticate arbitral awards rendered pursuant to the Convention, and to certify copies thereof. Article 3, together

with Arts 12-16, provides for ICSID to maintain a panel of conciliators and a panel of arbitrators.

131 Chapter II of the Convention deals with the jurisdiction of ICSID. Article 25(1) provides that the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State and a national of another Contracting State, "which the parties to the dispute consent in writing to submit to the Centre".

132 Article 26 provides that the consent of the parties to arbitration under the Convention "shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy". Article 27(1) provides that no Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State have consented to submit or have submitted to arbitration under the Convention, "unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute". That is to say, a Contracting State will not give diplomatic protection to one of its nationals on account of that national and another Contracting State having committed to an ICSID arbitration except after an award has been made in that national's favour and the other Contracting State has not honoured it.

133 Chapter III deals with conciliation. It need not be considered further for present purposes.

134 Chapter IV deals with arbitration. Any Contracting State or any national of a Contracting State wishing to institute arbitration proceedings under the Convention shall address a request to that effect in writing to the Secretary-General (Art 36(1)). An arbitral tribunal will thereafter be established (Art 37). Section 3, comprising Arts 41-47, deals with the powers and functions of the tribunal. Importantly for present purposes, Art 41 provides that the tribunal shall be the judge of its own competence and that any objection that the tribunal lacks jurisdiction or competence shall be considered and determined by the tribunal. Section 4, comprising Arts 48 and 49, deals with the award. Article 49(1) provides that the Secretary-General shall promptly dispatch certified copies of the award to the parties.

135 Section 5 of Chapter IV deals with the interpretation, revision and annulment of an award. Article 50 provides that if any dispute arises between the parties as to the meaning or scope of an award, either party may request interpretation of the award which will be submitted to the tribunal which rendered the award or, if that is not possible, to a new tribunal. The tribunal

may, if it considers that the circumstances so require, stay enforcement of the award pending its decision (Art 50(2)).

136 Article 51 provides that either party may request revision of the award "on the ground of discovery of some fact of such a nature as decisively to affect the award". Such an application is to be submitted to the tribunal which rendered the award or, if that is not possible, to a new tribunal. An application for revision must be made within 90 days after the discovery of the fact relied on "and in any event within three years after the date on which the award was rendered". Once again, the tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision on the revision application (Art 51(4)).

137 Article 52(1) provides that either party may request annulment of the award on one or more of the following grounds:

(a) that the Tribunal was not properly constituted;

(b) that the Tribunal has manifestly exceeded its powers;

(c) that there was corruption on the part of a member of the Tribunal;

(d) that there has been a serious departure from a fundamental rule of procedure; or

(e) that the award has failed to state the reasons on which it is based.

138 The application must be made within 120 days after the day on which the award was rendered, except if the annulment is requested on the ground of corruption the application must be made within 120 days after discovery of the corruption "and in any event within three years after the date on which the award was rendered" (Art 52(2)). In the event of an application for annulment, a new ad hoc committee of three persons drawn from the panel of arbitrators is appointed (Art 52(3)). The committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision on the annulment application (Art 52(5)).

139 Aside from the power of the tribunal to stay enforcement under Arts 50(2), 51(4) or 52(5), under r 54(2) ICSID Rules an award is provisionally stayed upon the Secretary-General's registration of a party's application for interpretation, revision or annulment with ICSID if such an application contains a request for a stay on enforcement (as occurred in relation to each of the awards here).

140 Section 6, comprising Arts 53-55, deals with the recognition and enforcement of the award. As these articles are at the centre of the parties' contentions, they bear being set out in full:

Recognition and Enforcement of the Award

Article 53

(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

(2) For the purposes of this Section, "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.

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.

Article 55

Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.

141 As explained in *Spain HCA* at [40], Arts 53-55 ICSID Convention, which have the force of law in Australia under s 32 IAA, "are a central plank in giving effect to the primary object of the ICSID Convention: to encourage private international investment including by mitigating sovereign risk and providing an investor with the 'legal security required for an investment decision'" (reference omitted).

142 Chapter V deals with the replacement and disqualification of conciliators and arbitrators. Chapter VI deals with the cost of proceedings. Chapter VII deals with the place of proceedings.

143 Chapter VIII, in Art 64, deals with disputes between Contracting States. It provides that a dispute arising between Contracting States concerning the interpretation or application of the Convention which is not settled by negotiation "shall be referred to the International Court of

Justice by the application of any party to such dispute, unless the States concerned agree to another method of settlement".

144 Chapter IX deals with amendments to the Convention. Article 65 provides that any Contracting State may propose an amendment to the Convention, and sets out a process to give notice of such a proposal. By Art 66, a proposed amendment must be considered by the Administrative Council (established under Arts 3 and 4) and if so decided by a majority of two-thirds of its members, the proposed amendment shall be circulated to all Contracting States for ratification, acceptance or approval.

145 Chapter X contains the final provisions to the Convention. They include, in Art 69, that each Contracting State shall take such legislative or other measures as may be necessary for making the provisions of the Convention effective in its territories. Article 70 also provides that the Convention applies to "all territories for whose international relations a Contracting State is responsible", except those excluded by the written notice of such Contracting States.

The Foreign States Immunities Act

146 As explained in *Spain HCA* (at [11]-[12]), the Immunities Act followed a report of the Law Reform Commission which drew from international legal rules and principles governing the existence of foreign State immunity from jurisdiction and the waiver of that immunity, and the consideration of those rules and principles by the International Law Commission. Part II of the Act provides for a general regime of immunity of foreign States from jurisdiction. Section 9 provides that, subject to the Act, "a foreign State is immune from the jurisdiction of the courts of Australia in a proceeding". The term "jurisdiction" is used in this context to describe "the amenability of a defendant to the process of Australian courts" so that Australian courts "will not by their process make the foreign State against its will a party to a legal proceeding": *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* [2012] HCA 33; 247 CLR 240 at [17]. As the High Court recently explained in *Greylag Goose Leasing 1410 Designated Activity Co v PT Garuda Indonesia Ltd* [2024] HCA 21; 418 ALR 475, "[t]he 'immunity' from 'jurisdiction' which the section confers is not an immunity from substantive law but is to be 'understood as a freedom from liability to the imposition of duties by the process of Australian courts'" (at [17]). See also *Firebird Global Master Fund II Ltd v Republic of Nauru* [2015] HCA 43; 258 CLR 31 at [35] per French CJ and Kiefel J.

147 Part II goes on to provide for a number of circumstance in which a foreign State is not immune from the jurisdiction of the Australian courts in a proceeding: ss 10-20. Relevantly for present purposes, s 10 provides as follows:

> **10 Submission to jurisdiction**
>
> (1) A foreign State is not immune in a proceeding in which it has submitted to the jurisdiction in accordance with this section.
>
> (2) A foreign State may submit to the jurisdiction at any time, whether by agreement or otherwise, but a foreign State shall not be taken to have so submitted by reason only that it is a party to an agreement the proper law of which is the law of Australia. ...

SPAIN HCA

148 Like the present proceedings, *Spain HCA* concerned the enforcement of an ICSID award in respect of a claim against Spain under the ECT. Spain asserted foreign State immunity under s 9 Immunities Act, and the investor contended that that immunity had been waived by Spain submitting to the Court's jurisdiction under s 10 Immunities Act.

149 The High Court identified the principle of international law to be that waiver of immunity, to be effective, is required to be "express" (at [22]-[23]). That should be understood as "requiring only that the expression of waiver be *derived* from the express words of the international agreement, whether as an express term or as a term implied for reasons including necessity" ([25], emphasis in the original). Any inference of waiver of immunity "must be drawn with great care when interpreting the express words of that agreement in context" ([26]). If an international agreement does not expressly use the word "waiver", "the inference that an express term involves a waiver of immunity will only be drawn if the implication is clear from the words used and the context" ([26]). The expression of consent must be "in a clear and recognisable manner" ([26]).

150 Against that background of international law, the Court held that there was no basis to interpret s 10(2) Immunities Act as excluding "the possibility of a waiver of immunity being evidenced by implications inferred from the express words of a treaty in their context and in light of their purpose" ([27]). "A high level of clarity and necessity are required before inferring that a foreign State has waived its immunity in a treaty because it is so unusual, and the consequence is so significant" ([28]). Putting the matter slightly differently, the Court said that waiver by implication only arises where the waiver is "unmistakable" ([29]).

151 The High Court reasoned (at [69]) that in light of the effect of the provision in Art 53 that awards shall be "binding" on Contracting States, together with the preservation in Art 55 of immunity from execution only (ie excluding recognition and enforcement), subject to the laws of Contracting States, "it would distort the terms of Art 54(1) to require separate conduct that amounted to a waiver of immunity before an award could be recognised and enforced against a foreign State". It will be recalled that Art 54(1) provides that each Contracting State "shall recognise 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". That supports the "primary provision" (*Spain HCA* at [71]), Art 53, which provides that each party, that is each Contracting State, "shall abide by and comply with the terms of the award" except to the extent to which the terms are stayed.

152 On that reasoning, the High Court held that by entering into the ICSID Convention, Spain waived – to the requisite high level of clarity and necessity, and unmistakably – its foreign State immunity in respect of proceedings to recognise or enforce an ICSID award (see at [8]).

153 The High Court went on (at [78]-[79]) to address a "final, although not fully developed" submission by Spain concerning the effect of two decisions of the CJEU, namely *Slovak Republic v* ***Achmea*** *BV* [2018] 4 WLR 87 and *Republic of Moldova v* ***Komstroy*** *LLC* [2021] 4 WLR 132. Those decisions, and the line of authority that they represent, are at the heart of much of Spain's case before me. I will return to them in some detail. In the meanwhile, it is necessary to record the High Court's conclusion with respect to the submission.

154 Identifying that *Komstroy*, applying *Achmea*, decided that the agreement to arbitrate in the ECT must be interpreted as not being applicable to disputes between a Member State of the EU and an investor of another Member State where the dispute concerned an investment by the investor in the first Member State, the High Court rejected Spain's contention that it was necessary to "take cognisance" of *Komstroy* in identifying whether Spain had agreed to submit to the jurisdiction of the Australian courts for the purposes of the Immunities Act (at [79]). That was on the basis that the relevant agreement of submission arose from Spain's entry into the ICSID Convention which included its agreement as to the consequences of an award rendered pursuant to that Convention, and not the ECT.

155 Having identified the legal and factual context to the enforcement applications, I now turn to consider the contentions of the parties.

IMMUNITY AS A PRELIMINARY QUESTION

156 Although these reasons for judgment determine issues of both immunity and power as argued by the parties, a procedural point arises as to whether it is appropriate to do so. A point initially arose as to whether by arguing both immunity and power Spain waived its immunity.

157 Spain accepts that in the "usual case", questions of foreign State immunity are determined as a preliminary matter: *Zhang v Zemin* [2010] NSWCA 255; 79 NSWLR 513 at [33] per Spigelman CJ, Allsop P and McClellan CJ at CL agreeing; *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1989] Ch 72 at 194G per Kerr LJ. However, it submits that the usual approach should not be followed in the present case and that Spain should be permitted to advance its case with respect to the Court lacking power to enforce the arbitral awards simultaneously with its immunity case without that constituting a waiver of immunity. That is because the arguments that it advances in support of its assertion of immunity from adjudicative jurisdiction and those that it wishes to advance in support of its case that the Court has no power to make the orders sought are not severable and therefore not conveniently determined separately.

158 Spain submits that it would be procedurally inefficient for the Court to determine the point underlying both the questions of jurisdiction and power, namely that the Court has no power to enforce awards that the award debtor is not bound to comply with as a matter of public international law, separately at the jurisdiction and then potentially later at the substantive stages of the process. The more efficient course, it submits, is to determine both the question of jurisdiction and the question of power at the same time following a single hearing.

159 The applicants initially resisted that course, saying that if a State takes a step as a party claiming immunity other than for the purposes of asserting that immunity it loses its immunity. However, I understood the applicants ultimately to accept that because Spain's contentions as to power, including its constitutional argument, are all directed to the maintenance of its immunity, it would not be irregular for the immunity and substantive points to be run together and that in adopting that approach Spain would not be regarded as having waived immunity (T336:3-4).

ICSID AS A CLOSED SYSTEM

160 The main theme underlining each of Spain's arguments is the contention that the awards in these proceedings are invalid or not binding, for various reasons, with various consequences. As such, it is convenient to commence with the responsive contention by the applicants that

there is no occasion to examine the validity of the awards with reference to Spain's contentions, including about a conflict between its obligations under the EU treaties and its obligations under the ECT and the ICSID Convention, because those contentions were made by Spain before the ICSID arbitral panels where they were rejected. The result, submit the applicants, is that the awards that emerged from the ICSID system are presumptively valid and binding on Spain and must be enforced by Australia.

161 It is common ground that there were, in fact, arbitral proceedings before ICSID tribunals or ad hoc committees (dealing with annulment applications) that delivered the awards that the applicants seek to enforce, and that those awards have been duly certified by the Secretary-General under Art 49(1). Copies certified by the Secretary-General have been tendered to the Court under Art 54(2).

162 It is also common ground that none of the awards is subject to any stay or other remedy under Arts 50-52 ICSID Convention, such remedies having been exhausted. The authenticity of the awards is not challenged by Spain, and Spain makes no contention that the awards or the certification of them was obtained by fraud or that the awards and certification of them are anything other than bona fide. Spain's contention is, in effect, that the tribunals and the ad hoc committees have made errors of law in accepting the validity of the references to them under Art 26 ECT.

163 Article 53(1) ICSID Convention provides that the "award" shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in the Convention. The "award" that is referred to is necessarily the "award" referred to in Art 48. It is the decision of the tribunal decided by a majority of the votes of its members (Art 48(1)), which is in writing and signed (Art 48(2)), which deals with every question submitted to the tribunal and states reasons (Art 48(3)) and which is certified and dispatched to the parties by the Secretary-General (Art 49(1)). The Convention provides for the resolution of disputes as to the interpretation of an award (Art 50), for a party to apply for the revision of an award (Art 51) and for a party to apply to annul an award (Art 52). Article 53(2) extends the meaning of "award" in Section 6 of Ch IV to include "any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52".

164 Thus, the awards against Spain that are the subject of the proceedings are "binding" on Spain under Art 53(1) both as a "party" to the award and a Contracting State to the ICSID Convention:

Spain HCA at [69] and [71]. Moreover, each Contracting State, including Australia, "shall recognise ... and enforce the pecuniary obligations imposed by" the awards (Art 54(1)).

165 The result is, as I explained in *Spain FCA*:

> [79] Sections 32-35 of the Arbitration Act give effect to what is referred to as the "closed" or "self-contained" system of remedies that parties can seek as set out in Arts 26, 27, 49(2) and 50-53 of the Investment Convention. These provisions cover the entitlement of parties subject to a Centre award to apply for the interpretation, revision or annulment of the award. Unlike under the 1958 New York Convention and the UNCITRAL Model Law, which are also given effect to by the Arbitration Act, the Investment Convention leaves no grounds for refusal of recognition and enforcement of a Centre award by national courts – not even on public policy grounds.
>
> [80] As explained in the Explanatory Memorandum to the ICSID Implementation Bill 1990 (Cth) (at 7), a Centre award is not subject to any appeal or to any remedy apart from those provided for in the Investment Convention. This ensures that the objectives of the Investment Convention will not be able to be frustrated through ancillary litigation. Arbitration under the Investment Convention "is to the exclusion of any other remedy".

166 That the ICSID Convention contains its own internal self-contained system of remedies was confirmed on appeal in *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl* [2021] FCAFC 3; 284 FCR 319 at [114] per Perram J, Allsop CJ and Moshinsky J agreeing (***Spain FCAFC***):

> No doubt the issues which the Commission wishes to ventilate are relevant to the jurisdiction of the arbitral tribunal but its jurisdiction (or perhaps more precisely the absence of its jurisdiction) is not a matter which the Court can consider under s 35(4) of the International Arbitration Act. *The sole issue for the competent court under Art 54(2) is whether the party seeking the recognition of the award has presented a certified copy of it*. This Court has also had to consider the additional legal question of whether a plea of foreign state immunity may be maintained in such a proceeding. Neither of those issues is affected by the meaning of Art 26 of the ECT or whether Art 26 is lawful under EU law.
>
> (Emphasis added.)

167 That approach is further confirmed in the UK by *Micula v Romania* [2020] UKSC 5; [2020] 1 WLR 1033 at [68]-[69] per Lord Lloyd-Jones and Lord Sales JJSC, Lord Reed PSC, Lord Hodge DPSC and Lady Hale agreeing (***Micula UKSC***):

> [68] ... It is a notable feature of the scheme of the ICSID Convention that once the authenticity of an award is established, a domestic court before which recognition is sought may not re-examine the award on its merits. Similarly, a domestic court may not refuse to enforce an authenticated ICSID award on grounds of national or international public policy. In this respect, the ICSID Convention differs significantly from the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. The position is stated in this way by Professor Schreuer in his commentary on article 54(1):

> "The system of review under the Convention is self-contained and does not permit any external review. This principle also extends to the stage of recognition and enforcement of ICSID awards. A domestic court or authority before which recognition and enforcement is sought is restricted to ascertaining the award's authenticity. It may not re-examine the ICSID tribunal's jurisdiction. It may not re-examine the award on the merits. Nor may it examine the fairness and propriety of the proceedings before the ICSID tribunal. This is in contrast to non-ICSID awards, including Additional Facility awards, which may be reviewed under domestic law and applicable treaties. In particular, the New York Convention gives a detailed list of grounds on which recognition and enforcement may be refused ..."
>
> …
>
> [69] Contracting states may not refuse recognition or enforcement of an award on grounds covered by the challenge provisions in the Convention itself (articles 50-52). Nor may they do so on grounds based on any general doctrine of ordre public, since in the drafting process the decision was taken not to follow the model of the New York Convention.

168 See also to similar effect: in the UK, *Infrastructure Services Luxembourg SARL v Kingdom of Spain* [2023] EWHC 1226 (Comm); [2023] 2 Lloyd's Rep 299 at [79] per Fraser J (***Spain EWHC***) (see also *Infrastructure Services Luxembourg SARL v Kingdom of Spain* [2024] EWCA Civ 1257; [2025] 2 WLR 621 at [80]-[82] per Phillips LJ, Sir Julian Flaux C and Newey LJ agreeing, dismissing the appeal) and in the US, *Mobil Cerro Negro Ltd v Bolivarian Republic of Venezuela* 863 F3d 96 (2d Cir 2017) at 102 per Carney J for the Court; *Valores Mundiales SL v. Bolivarian Republic of Venezuela* 87 F4th 510 (DC Cir 2023) at 515 per Edwards J for the Court; *Micula v Romania* 101 F4th 47 (DC Cir 2024) at 53 [6] per Rogers J for the Court.

169 Those authorities are powerful in their own right, but are given further significance by the principle that a treaty should have the same meaning for all of the States which are party to it: *Spain HCA* at [38] citing ***Povey*** *v Qantas Airways Ltd* [2005] HCA 33; 223 CLR 189 at [25] and [32]; see more recently *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co KG* [2024] HCA 4; 417 ALR 173 at [29] and *Evans v Air Canada* [2025] HCA 22; 423 ALR 155 at [6].

170 There is no dispute between the parties that the general principles of treaty interpretation apply to the ICSID Convention, as captured by Arts 31 and 32 VCLT:

> **Article 31**
>
> **General rule of interpretation**
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary

meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

   (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

   (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

   (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

171 Looking at the ordinary meaning of the terms in light of their object and purpose, I therefore accept the following submissions by the applicants. First, there is nothing in the text of the ICSID Convention to suggest that for an ICSID award to be "binding" and subject to the obligations imposed on Contracting States by Arts 53 and 54, the tribunal's determination of its jurisdiction must be proved to be correct. An ICSID award issued by a tribunal is binding and enforceable (subject to any stay on enforcement) unless and until it is annulled under Art 52. See "Article 53 – Binding Force" in Schill S W, Malintoppi L, Reinisch A, Schreuer C H, Sinclair A (eds), *Schreuer's Commentary on the ICSID Convention* (3rd ed, Cambridge University Press, 2022) Vol II at 1452-1454 (***Schreuer 3rd ed***).

172 Secondly, there is nothing in the text of the ICSID Convention that signifies any circumstances in which an "award" should somehow be treated as if it were not an "award". Article 49(2) expressly contemplates that an award issued under Art 48 may contain "clerical, arithmetical or similar" errors leading to rectification of the award, upon which such decision becomes "part of the award". That article also provides that the tribunal may "decide any question which it had omitted to decide", such decision too becoming "part of the award". There is no textual indication that the obligations in Arts 53 and 54 are conditional on the award rectification process being completed, or an omitted question being decided. The same is true in respect of interpretation, revision or annulment under Arts 50-52.

173 The self-contained system of ICSID arbitration is reinforced by s 33 IAA which provides that an ICSID award is binding and is not subject to any appeal or to any other remedy, otherwise than in accordance with the ICSID Convention (per Art 53), and s 34 IAA which provides that the ICSID Convention prevails over other laws relating to the recognition and enforcement of arbitral awards. It expressly excludes Pts II and III of the IAA including the defences available under Art V of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1958) (**New York Convention**) (ss 8(5)-(7A)) and Art 36 of the UNCITRAL **Model Law** on International Commercial Arbitration (given the force of law by s 16(1)).

174 As such, I accept the applicants' submission that it is not strictly necessary to further consider Spain's contentions that the award is not binding within the four corners of the ICSID Convention due to apparent conflicts with EU law given that there is no dispute that they are genuine, certified and authenticated awards. Also, all rights of re-examination of the merits of the awards have been exhausted within the self-contained system of ICSID arbitration as affirmed by appellate courts around the world.

175 Contrary to what has been argued by Spain then, the situation before the Court, insofar as the question of waiver is concerned, is not any different to that before the High Court in *Spain HCA* – the awards are binding under the ICSID Convention and by signing that Convention Spain waived its immunity in proceedings to enforce the awards. Spain's various contentions must nevertheless be considered, and determinations made on them, against the possibility that my conclusions with respect to the ICSID system being a closed system and that that answers Spain's case are wrong.

SPAIN'S NON-WAIVER OF IMMUNITY CONTENTION

Spain's submissions

176 Spain advances a formal case asserting that *Spain HCA* was wrongly decided in holding that its accession to the ICSID Convention constituted conduct submitting to the jurisdiction of Australian courts for the purposes of the recognition and enforcement of ICSID awards. As Spain accepts, I am bound to reject that submission in view of the rules of precedent to which a first instance court must adhere.

177 Spain also advances the submission that by acceding to the ICSID Convention it has not submitted to the jurisdiction of Australian courts for the purposes of the recognition and enforcement of ICSID awards in circumstances where Spain is not bound to comply with such awards as a matter of public international law. Spain also says that *Spain HCA* does not govern a situation such as the present where the question whether the relevant award is binding on the State is a matter in dispute.

178 The contention that a State's waiver of immunity in enforcement proceedings is limited to proceedings to enforce awards that are valid and binding was not advanced by Spain in the proceeding before the High Court in *Spain HCA*. The report of the argument notes (at 275 CLR 298) that Spain "does not say the European Court of Justice's finding that there is no jurisdiction in the ICSID tribunal means that the award cannot be recognised" in Australia. Instead, Spain submitted that the Court should "take cognisance" of *Komstroy* and "the reasoning" in the sense of "almost just taking judicial notice of the outcome … as being an additional indicia of lack of clarity in relation to what is said to be the waiver of immunity". It was explained by Spain's counsel in the High Court that *Komstroy* cast doubt on the "proposition that by entering into the ECT Spain has agreed with all other domestic courts of States that are party to the ICSID Convention that decisions, whatever their basis, will not be the subject of an immunity claim for the purposes of recognition and enforcement". As can be seen, the argument was not directed to the question of the Court's power on the basis that the awards are not binding, rather being directed to immunity. That has left a gap for Spain to argue in the proceedings before me that the awards are not binding, that the Court therefore has no power to enforce them and that Spain has not waived its immunity in such proceedings.

179 However, Spain acknowledges that the point made in *Spain HCA* "is not expressly stated to be limited to a case in which it is common ground that a binding ICSID arbitral award relevantly exists", and that the decision could apply more broadly. That is, the High Court may be

understood to have held that there is no relevant distinction between a case where an award is binding and a case where the binding status of an award is in contest (which is essentially the applicants' argument). If this is so and there is adjudicative jurisdiction, whether an award is enforced would turn on the Court's power to do so if the existence of a binding award is not established. Spain says that the appropriate course for this Court would be to assume the holding in *Spain HCA* operates "at large" and to reject the assertion of immunity on this ground, leaving it to the High Court to clarify the scope of its earlier reasoning.

Consideration

180 As mentioned, in light of the evidently self-contained nature of the ICSID dispute resolution system and repeated judicial emphasis of that fact, the actual merits of Spain's contention that the awards are invalid, or not "binding", is not able to be sustained. The consequence is that the corollary submission that Spain has not waived immunity for the enforcement of such non-binding awards, and that the Court therefore has no jurisdiction in a proceeding to enforce them, does not strictly arise for determination. On the premise that the awards are binding on Spain, the proceedings are not outside the territory of what the parties accept was decided by the High Court. It follows that Spain's contention of non-waiver of immunity to jurisdiction must be rejected.

181 I will nevertheless consider that alternative contention, that the proceedings are not governed by the holding in *Spain HCA*, for completeness.

182 The crux of how Spain seeks to distinguish the ruling in *Spain HCA* is the fact that there was no dispute in *Spain HCA* that the award before the Court was binding, whereas that is squarely in issue in the present proceedings (notwithstanding what I have concluded above). Hence, Spain's contention could have particular significance for the question of waiver under s 10 Immunities Act. That is because, as explained above in relation to *Spain HCA*, waiver of immunity under s 10 requires a "high level of clarity and necessity"; it must be unmistakable. Spain's contention that it did not waive immunity by entering into the ICSID Convention because of the principles of EU law expressed in *Achmea* and *Komstroy* was rejected by the High Court "because the relevant agreement arose from Spain's entry into the ICSID Convention, which included its agreement as to the consequences of an award rendered pursuant to the ICSID Convention" (at [79]).

183 The award creditors in *Spain HCA* were companies incorporated in Luxembourg and the Netherlands, both EU Member States. Hence, *Achmea* and *Komstroy* could have had an effect

on the presumed-binding nature of awards rendered under the ICSID Convention in the same way that it is contended that they do in the present proceedings. As I have explained, Spain relied on the CJEU decisions to make that point to the High Court, albeit obliquely. The Court expressly rejected the argument (at [79]). I therefore consider that what was held in *Spain HCA* to be "at large", and not limited to situations where the binding force of the awards is common ground. Therefore, I am bound to reject Spain's contention that *Spain HCA* does not govern the present proceedings *because* it is disputed that the relevant awards are binding on Spain.

184 It is nevertheless necessary to go on and consider the various bases on which Spain contends that the awards are not binding so that it can, at higher levels of the court hierarchy, advance the case that *Spain HCA* does not govern such a case.

SPAIN'S LACK OF POWER CONTENTION

Spain's submissions

185 As mentioned, Spain submits that the Court lacks the power under the IAA to enforce the pecuniary obligations imposed by the awards in this case because they are not "awards" within the meaning of Art 54 ICSID Convention. This is essentially because it argues that the awards in this case are not binding upon Spain under public international law due to the apparent conflict with its obligations as a Member State of the EU. That is with reference to *Achmea* and *Komstroy* which established, as recognised in *Spain HCA* (at [78]), that the agreement to arbitrate in the ECT must be interpreted as not being applicable to disputes between a Member State of the EU and an investor of another Member State where the dispute concerns an investment by the investor in the first Member State.

186 Spain advances the following propositions (giving further detail to the summary of the argument at [78(2)(a)] above):

(1) there is an apparent conflict between Spain's international obligations under the EU foundational treaties to other EU Member States and those that it appears to have to other EU Member States under the ECT (and, arguably, appears to have under the ICSID Convention);

(2) as a matter of public international law, that apparent conflict is resolved in favour of the EU foundational treaties by applying the conflicts rule of "primacy" that has been agreed as between EU Member States;

(3) in the result:

(a) Spain owes no public international law obligation to comply with the awards. Put in another way, the awards are not binding on Spain as a matter of public international law; and

(b) Australia owes no public international law obligation to recognise or enforce the awards: Article 54 ICSID Convention does not oblige Australia to recognise and/or enforce against Spain a purported award that is not binding on Spain as a matter of public international law, citing *Kingdom of Spain v Infrastructure Services (No 3)* [2021] FCAFC 112; 392 ALR 443 at [6] per Allsop CJ, Perram and Moshinsky JJ agreeing (***Spain FCAFC No 3***).

Consideration

The EU Treaties

187 There are two principal treaties concluded between the Member States of the EU which currently govern the constitutional basis of the EU: the *Treaty on European Union* (**TEU**) and the *Treaty on the Functioning of the European Union* (**TFEU**).

188 What is now the TFEU was originally signed in Rome in 1957 as the *Treaty establishing the European Economic Community* (**TEEC**), also referred to as the Treaty of Rome. It created the European Economic Community (**EEC**). The TEU was originally signed at Maastricht in 1992 and was also known as the Maastricht Treaty. The TEU renamed the EEC to the "European Community" and as such the TEEC became the **TEC**.

189 Subsequently, in 2007, the Treaty of Lisbon (which entered into force in 2009) amended both the TEU and the TEC, including renaming the TEC as the TFEU.

190 Article 13 TEU identifies the institutions of the EU, including the European Commission and the CJEU. Article 19 TEU provides that the CJEU shall include the Court of Justice, the General Court and specialised courts and that it shall ensure that in the interpretation and application of the "Treaties" (defined in Art 1 as the TEU and the TFEU) the law is observed.

191 Article 267 TFEU provides that the CJEU has jurisdiction to give preliminary rulings concerning the interpretation of the Treaties and the validity and interpretation of acts of the institutions, bodies, offices or agencies of the EU. Article 344 TFEU records an undertaking by Member States "not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein".

Achmea and Komstroy

192 *Achmea* concerned a bilateral investment treaty (**BIT**) between two EU Member States – the Kingdom of the Netherlands and the Slovak Republic. A proceeding was brought by Slovakia before the Oberlandesgericht (Higher Regional Court), Frankfurt am Main to set aside an award rendered by a German arbitral tribunal against it in favour of a Netherlands corporation. The Court dismissed the proceeding. Following this, Slovakia appealed to the Bundesgerichtshof (Federal Court of Justice) which made a referral to the CJEU. The referral was for a preliminary ruling under Art 267 on whether Arts 267 and 344 TFEU preclude the application of the arbitration clause in the intra-EU BIT (at [31]). Germany was the seat of the arbitration and German law was therefore applicable to the arbitral procedure (at [52]).

193 The CJEU held that the arbitration agreement in the BIT was such as to call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Art 267 TFEU, and was therefore incompatible with the principle of sincere cooperation enshrined in Art 4(3) TEU (at [58]). Further, Arts 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as the arbitration agreement in the BIT, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept (at [60]).

194 *Komstroy*, like the present proceedings, concerned the arbitration agreement in the ECT to which the EU was itself a Contracting Party as well as Member States of the EU and other non-EU States. The parties to the underlying dispute were not EU Member States or nationals of EU Member States – they were a Ukrainian corporation (Energoalians) and the Republic of Moldova. An award was made in Paris which Moldova sought to annul in the Cour d'appel de Paris (Paris Court of Appeal). The CJEU held it had jurisdiction pursuant to Art 267 TFEU as the conclusion of the ECT by the Council of the EU on behalf of the EU was "an act of one of its institutions" (at [21]-[24]).

195 One of the matters considered by the CJEU on referral by the Cour d'appel de Paris was the efficacy of the arbitration agreement in the multilateral ECT as between a Member State of the EU and an investor of another Member State. The CJEU held that the exercise of the EU'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 EU such that the full effectiveness of that law is not guaranteed (at [62]). Such a possibility would call into question the preservation of the autonomy and of the particular nature of the law established by the Treaties, ensured in particular by the preliminary ruling procedure provided for in Art 267 TFEU (at [63]). It was reasoned that despite the multilateral nature of the ECT (extending to non-EU Member States), the arbitration agreement within it is intended, in reality, to govern bilateral relations between two of the Contracting Parties, in an analogous way to the provision of the BIT at issue in *Achmea* (at [64]).

196 The CJEU concluded that although the ECT may require Member States to comply with the arbitral mechanisms for which it provides in their relations with investors from third States who are also Contracting Parties to that treaty as regards investments made by the latter in those Member States, preservation of the autonomy and of the particular nature of EU law precludes the same obligations under the ECT from being imposed on Member States as between themselves (at [65]). Thus, the arbitration agreement in 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 (at [66]).

197 For completeness, in *European Commission v* ***European Food*** *SA*, Grand Chamber, ECLI:EU:C:2022:50 (Case C-638/19 P) (25 January 2022), the CJEU (at [145]) held that from the time of Romania's accession to the EU (and hence the position applicable to all EU Member States), "since … the system of judicial remedies provided for by the EU and FEU Treaties replaced [the] arbitration procedure [pursuant to a Sweden/Romania BIT and conducted under the ICSID Convention], the consent given to that effect by Romania, from that time onwards, lacked any force".

198 To similar effect, in the related decision of *DA v Romanian Air Traffic Services Administration* ***(Romatsa)***, Tenth Chamber, ECLI:EU:C:2022:749 (Case C-333/19) (21 September 2022), the CJEU reiterated (at [36] and [40]) that the judicial system of the EU "replaced the mechanism for resolving disputes [in the ICSID Convention] which may concern the interpretation or application of EU law" effective from a Member State's accession to the EU foundational treaties.

State aid

199 The conflict between EU law and international arbitral obligations is also framed by Spain in terms of prohibited "State aid". Article 107(1) TFEU provides that, unless otherwise provided:

> any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

200 Articles 107(2) and (3) specify particular exceptions including "aid having a social character" or aid promoting development to correct economic disturbances or inequality. Article 108 permits State aid only when notified to and approved by the European Commission.

201 In *Decision C(2017) 7384, State aid SA.40348 (2015/NN) – Spain Support for electricity generation from renewable energy sources, cogeneration and waste* [2017] OJ C 442/1, the European Commission in assessing Spain's premium economic scheme found on a preliminary basis as follows (at [165]):

> The Commission recalls that any compensation which an Arbitration Tribunal were to grant to an investor on the basis that Spain has modified the *premium* economic scheme by the notified scheme would constitute in and of itself State aid. However, the Arbitration Tribunals are not competent to authorise the granting of State aid. That is an exclusive competence of the Commission. If they award compensation, such as in *Eiser v Spain*, or were to do so in the future, this compensation would be notifiable State aid pursuant to Article 108(3) TFEU and be subject to the standstill obligation.

202 Later, in *Decision 2025/1235 of 24 March 2025 on the measure State aid SA.54155 (2021/NN) implemented by Spain – Arbitration award to Antin* [2025] OJ L 2025/1235, the European Commission confirmed that the payment of compensation by Spain pursuant to an award rendered in favour of Antin Infrastructure Services Luxembourg Sàrl would constitute unlawful State aid (at [185]ff and [249]).

203 The consequence of this is that if this view of unlawfulness applies to the awards in the present proceedings (which the applicants dispute in detail, referring to the analysis of Mr Quigley, who also holds the opinion that the European Commission's approach is erroneous), Spain could become subject to enforcement proceedings before the CJEU leading (in due course) to the imposition of pecuniary penalties until the relevant payments are recovered by Spain. That conflict between payment of an award and prohibition on State aid is relied on by Spain ultimately for the contention that the awards are not binding and do not oblige either Spain to comply with them or Australia to enforce them. The existence of this conflict can be assumed in Spain's favour as the issue is essentially moot, for reasons that will become apparent below.

Conflicts

204 So either by reference to intra-EU disputes resolution or State aid, Spain's first proposition (at [186] above) is accordingly established, ie there is an apparent conflict between Spain's international obligations to Member States of the EU under the EU foundational treaties, on the one hand, and its obligations to the Contracting States to the ECT and the ICSID Convention, on the other. As it was put by Fraser J in *Spain EWHC* at [80], "[o]ne can well understand that Spain finds itself on the horns of a juridical dilemma, with its obligations under the ECT for dispute resolution (which treaty plainly incorporates the ICSID Convention) now found by the CJEU to conflict with the law of the EU as set out in the EU Treaties".

205 However, its second proposition (that that conflict is resolved in favour of EU law by the EU law principle of primacy) is made good only within the EU system and not on the broader international plane (ie outside the EU system); in other words, the apparent conflict is resolved in favour of the EU foundational treaties, but only within the EU system. I reject the proposition that because of the conflict that Spain finds itself in between its obligations as a Member State of the EU and a Contracting State to the ICSID Convention, it owes no obligation in international law under the latter Convention.

206 The CJEU, in *Achmea* and *Komstroy*, made it clear that the resolution that it reached was with reference only to EU law; nothing is said by the CJEU to the effect that EU law, including principles of EU constitutional law, have primacy over international law beyond the EU system. Indeed, the CJEU's preliminary ruling jurisdiction under Art 267 TFEU is limited to questions of EU law. Its rulings on the question of incompatibility are limited in their application to the EU system and do not apply on the international plane. Also, the CJEU did not make any ruling as to the validity of the arbitration agreements in question. Such a question of international law is not within its jurisdiction.

207 I accept as correct Professor Eeckhout's analysis on this point of EU law (which, as such, is admissible as discussed earlier), namely that:

> the ECJ's jurisdiction is limited to matters of EU law. The ECJ is the ultimate interpreter of the EU Treaties. It needs to ensure that they are observed by the Member States and by the EU institutions. But the ECT does not give the ECJ jurisdiction to rule on any conflicts between its provisions and the EU Treaties, under international law, as opposed to EU law. The ECJ is, for the purpose of interpreting and applying the ECT, simply not an international court. It has the function of a supreme domestic court, no more. It is, for purposes of the ECT, the highest court of one of the Contracting Parties, not the court tasked with enforcing the treaty between the Contracting Parties, including as between an investor from an EU Member State and

another Member State.

208 This was echoed by the Federal Supreme Court of Switzerland in *Royaume d'Espagne c A*, 1re Court de droit civil [1st Civil Law Court], 4A_244/2023 (3 April 2024) at [7.8.2], in which the Court explained (concerning the ECT rather than the ICSID Convention) that the CJEU could not have the final word on the existence of a conflict between the EU foundational treaties and Art 26 ECT outside the bounds of the EU system.

209 As the Swiss Federal Supreme Court also commented (at [7.8.3.1]), "it does not follow from [Art 31(3)(c) VCLT] that other international commitments made by certain States that are parties to the ECT should prevail in the event of conflict with the provisions of the said treaty. Indeed, the norms of a multilateral treaty must, in principle, be interpreted in the same way for all the contracting parties, and not receive a different interpretation depending on the other agreements concluded by some of them, failing which the certainty of the law would be undermined".

210 Professor Eeckhout also explains that the resolution within the EU system on the basis that EU law must be applied even if a Member State is under a conflicting domestic or international law obligation (omitting citations):

> does not mean, however, that the conflicting international law obligation becomes invalid as a matter of international law, or that EU law governs the international law conflict, or that a court or tribunal applying public international law must give primacy to the EU Treaties. Rather, as evidenced by many ECJ rulings, the Member State concerned needs to act on the international plane, so as to remove the violation of EU law. In other words, the Member States must take the appropriate steps under international law to remove the conflicting international law obligation. In the meantime the conflicting clause remains valid and operative. In this respect, EU law of course complies with general and obvious international legal principles: an ECJ ruling could hardly remove an international obligation a Member State has entered into under a multilateral treaty with non-Member States (such as the ECT, or the ICSID Convention).

211 That the primacy rule within the EU system does not lead to invalidity but rather to an obligation by the Member State to take steps to withdraw from the conflicting obligation on the international plane is illustrated by *Commission of the European Communities v Republic of Austria*, Grand Chamber, ECLI:EU:C:2009:118 (Case C-205/06) (3 March 2009). Prior to its membership of the EU, Austria had concluded treaties with non-EU countries each of which contained a clause under which each party guaranteed to the investors of the other, without undue delay, the free transfer, in freely convertible currency, of payments connected with an investment. Those clauses were held to be incompatible with the EU foundational treaties

because they left no scope for the Council of the EU to adopt measures restricting the free movement of capital to or from third countries. It was held that Austria was under an obligation to take appropriate steps to eliminate the incompatibility under Art 307 of the Treaty of Rome (now Art 351 TFEU) and that it had failed to do so (at [45]). The consequence of incompatibility was not that the BITs were invalid, even under EU law.

212 The result, in my view, is that as a matter of public international law, Spain is obliged to the other Contracting States to the ICSID Convention to comply with the ICSID awards against it; it is no answer, on the international plane, for Spain to say that to do so would be in conflict with its EU obligations (including as to State aid). The effect of those EU obligations, as explained by the CJEU in its decisions, sound "internationally" in that they affect the manner in which EU Member States deal with each other. They may require EU Member States to not seek compliance from or enforcement against each other with respect to provisions of treaties to the extent they are in conflict. They may even require withdrawal from the conflicting treaty regimes entirely. However, that does not mean such treaties are a nullity; their provisions continue to have effect in international law until such a withdrawal takes effect. The extent of any disapplication goes only as far as EU law, ie essentially domestic (albeit supranational) law. This applies to both the ECT and the ICSID Convention.

213 Spain's international law obligations to comply with ICSID awards are owed not only to other EU Member States party to the dispute resolution regime, but also to non-EU Member States such as Australia. Contrary to Spain's submission, Australia is concomitantly obliged under Art 54 to the other Contracting States to the ICSID Convention to recognise and enforce the awards. More to the point, the investors are entitled to enforcement of the awards under s 35(4) IAA and Art 54 ICSID Convention as given the force of law in Australia by s 32 IAA. Where an investor from an EU Member State seeks enforcement of an ICSID award in an Australian court in accordance with Australia's obligations under the Convention as given the force of law in Australian domestic law, it is no answer for Spain to say that it has some or other defence available to it under EU law, for it is not Australia which is under any supervening requirement of essentially foreign domestic public law to not comply. In any event, the effect of the CJEU judgments, assuming the Court was even competent to modify obligations in international law (which it is not, for the reasons already discussed), was not to modify the ICSID Convention, even amongst EU Member States. The reasoning of the CJEU in *Komstroy* is limited to the (dis-)application of parts of the ECT. That is also borne out in the post-hearing documents discussed below.

214 At the level of foreign State immunity, the position remains that by entry into the ICSID Convention, Spain waived its immunity in proceedings in an Australian court for the enforcement of ICSID awards (as decided in *Spain HCA* and explained earlier).

215 After judgment was initially reserved in these matters, Spain applied for and was granted leave to reopen its case in order to tender, amongst other things:

(1) *Agreement on the Interpretation and Application of the Energy Charter Treaty between the European Union, the European Atomic Energy Community and their Member States* (COM(2024) 257 final) (26 June 2024) (**the EU inter se agreement**); and

(2) *Declaration on the Legal Consequences of the Judgment of the Court of Justice in Komstroy and Common Understanding on the Non-Applicability of Article 26 of the Energy Charter Treaty as a Basis for Intra-EU Arbitration Proceedings* [2024] OJ L 2024/2121 (26 June 2024) (**the EU inter se declaration**).

216 Spain draws particular attention to the following statements in both documents:

(1) the view of the 26 Member States and the EU that "the principle of primacy constitutes a conflict rule in their mutual relations" with the result that "an international agreement concluded by the Member States … may apply in intra-EU relations only to the extent that its provisions are compatible with the EU treaties" (Recitals 17 and 18);

(2) the view of the 26 Member States and the EU that Arts 267 and 344 of the TFEU, as interpreted by the CJEU in *Achmea* and *Komstroy*, must be understood as precluding an understanding of Art 26 of the ECT that allows for intra-EU arbitration proceedings (Recitals 7 to 14);

(3) the mutual understanding of the 26 Member States and the EU that the subject matter of the EU inter se agreement and EU inter se declaration covers, inter alia, investor-State arbitration proceedings under the ICSID Convention (Recital 31);

(4) the expression of regret by the 26 Member States and the EU that purported arbitral awards in intra-EU matters are the subject of enforcement proceedings such as the present proceedings (Recital 25); and

(5) the mutual understanding of the 26 Member States and the EU that the ECT relevantly only governs bilateral relations (Recital 27).

217 It does not seem to me that the EU inter se agreement or EU inter se declaration materially add to Spain's case.

218 First, they are dated 26 June 2024, long after the events that are relevant to the proceedings.

219 Secondly, not all EU Member States are parties to the agreement and the declaration. In that regard, Hungary, an EU Member State and a party to the ECT, published a declaration stating that the "withdrawal of the applicability of Article 26(2)(c) of the Energy Charter Treaty in intra-EU arbitration proceedings may be ensured in accordance with international law by a future amendment of the Energy Charter Treaty through bilateral or multilateral treaty between all or certain parties to the treaty, in accordance with Article 40 or 41 of the Vienna Convention on the Law of Treaties". To the extent that the agreement and declaration comment on the substantive position at international law for the ECT, respectfully, the position articulated by Hungary is the correct position.

220 Thirdly, in the same way as alluded to before, the agreement and the declaration do not, and do not purport to, modify the ICSID Convention even among EU Member States. The recitals and articles comprising the documents refer only to the need for EU Member States to prospectively act in accordance with the newly clarified EU law. Recital 22, for example, states that EU Member States "should cooperate with one another" to ensure that a tribunal is made aware of the documents in order to avoid the tribunal exercising jurisdiction in an intra-EU dispute, while Recital 25 then states "that settlements and arbitral awards in intra-EU investment arbitration cases that can no longer be annulled or set aside and were voluntarily complied with or definitively enforced should not be challenged". The suggested prophylactic at Recital 30 to prevent the issue of further intra-EU awards is for tribunals to decline jurisdiction or for ICSID to not register any future intra-EU proceedings – but it is not said that the ICSID Convention must operate differently, notwithstanding that Recital 30 refers to Member States ensuring "the unenforceability of existing awards" which, again, operates at the level of EU law and its application intramurally and not as an incident of international law more broadly for Contracting States.

221 Finally, the agreement and the declaration purportedly go to the question of the interpretation and applicability of the ECT which is relevant to the jurisdiction of ICSID tribunals established under the ECT and is not a matter for the enforcing court, as explained in relation to the ICSID closed loop system. Further, where an award is rendered in favour of an investor in a Member State in accordance with the provisions of the ICSID Convention and presented for enforcement in a non-EU jurisdiction, the enforcing court would of course not be subject to

any kind of direction (such as ensuring unenforceability) contained in the documents which are addressed to EU parties only.

222 Hence, Spain's case on power cannot succeed. While undoubtedly there is a conflict between its obligations under EU law and those owed to some of the Contracting Parties under the ECT (and, as contemplated, Contracting States under the ICSID Convention), that in no way affects the existence of Spain's obligations under public international law such that the ICSID awards cannot be considered binding. That being so, it follows that there are relevantly awards capable of being, and indeed, required to be, enforced by Australian courts. The fact that payment by Spain consequential to the enforcement of those awards may lead Spain to be in breach of the prohibition on State aid in Art 107(1) TFEU is, again, an incident of EU law only which is of no relevance to the respective obligations of Spain and Australia in public international law.

SPAIN'S MODIFICATION CONTENTION

223 Having rejected Spain's "conflict" contention, I now turn to address Spain's alternative route to reaching the same conclusion that the awards in this proceeding are not binding on it, being its "modification" argument. In short, Spain contends that the awards are not binding because Art 53 ICSID Convention was modified as between EU Member States by the Treaty of Lisbon, and that therefore the arbitral tribunals had no jurisdiction and the Court does not have the power to recognise the "purported" awards.

Spain's submissions

224 Spain's contention under this head is premised on the proposition that an ICSID award derives its binding nature under public international law from the agreement of two sovereign States (being the State of the investor and the respondent State), which is embodied in Art 53 ICSID Convention and can subsequently be changed through the sovereign will of those two States. It submits that as between EU Member States, the Treaty of Lisbon (as the later treaty) effected a modification of Art 53 ICSID Convention (as the earlier treaty) such that an intra-EU arbitral award referred to in Art 53 is not binding on the EU Member State.

225 Spain's principal submission relies on the principles of customary international law. Spain submits that two or more parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone. Spain thus submits that by the Treaty of Lisbon in 2007, Spain concluded an agreement as between the EU Member States inter se which (among other things) modified the ICSID Convention so that any intra-EU ICSID awards would not be

binding. It is said that the relevant modification is to Art 53, such that intra-EU ICSID awards are not binding on the parties to those awards, and no obligation arises to abide by and comply with the terms of those awards. That modification is said to arise because the EU judicial system with the CJEU at its apex has replaced the ICSID dispute resolution procedures as between EU Member States and their nationals: see *European Food* and *Romatsa* cited above at [197]-[198]. Spain does not contend that there has been any modification of Art 54 (T108:34-36).

226 Spain submits that there are three requirements of customary international law (which are also reflected in Art 41 VCLT) for the modification of a treaty, and that each is satisfied in this case. The first is that modification is not expressly prohibited by the relevant treaty, being the ICSID Convention in this case (Art 41(1)(b)). The second is that the modification does not affect the enjoyment by the other parties of their rights or the performance of their obligations under the ICSID Convention (Art 41(1)(b)(i)). The third is that the modification does not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the ICSID Convention as a whole (Art 41(1)(b)(ii)).

227 Spain submits that any agreement by it to have waived immunity by signing up to Art 54 ICSID Convention is only in respect of awards that are binding under Art 53. Because of the modification of Art 53 for which it contends, it submits that there are no binding awards and hence Spain has not waived immunity in respect of proceedings to enforce the "awards" that are sought to be enforced in these proceedings. It submits that that position is not precluded by *Spain HCA* because it was not in issue in that case.

228 Spain submits in the alternative that if the customary international law requirements for modification of Art 53 ICSID Convention are not met then Art 30 VCLT with respect to the application of successive treaties relating to the same subject matter would apply. Spain submits that the relevant provision is Art 30(4)(a), ie the parties to the later treaty do not include all the parties to the earlier treaty and the contended for modification is as between States parties to both treaties. That arises because the Republic of Poland is an EU Member State but is not a Contracting State to the ICSID Convention. In that event, by reference to Art 30(3), the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

229 Spain submits that the relevant provisions of the two treaties concern the same subject matter, namely "the jurisdiction of adjudicative bodies". Spain submits that two treaties relate to the

"same subject matter" if, as here, simultaneous application of both would lead to incompatible results, citing Orakhelashvili A, "Article 30" in Corten O and Klein P (eds), *The Vienna Conventions on the Law of Treaties* (Oxford University Press, 2011) Vol I at 776 [30].

230 Lastly, Spain notes, against the backdrop of the holding in *Spain HCA*, that if it is successful on its modification contention then its waiver of immunity arising by way of entry into the ICSID Convention will necessarily be limited to "extra-EU ICSID awards". That is, it will be able to rely on s 9 Immunities Act to the extent that a proceeding in Australia is for the enforcement of an intra-EU ICSID award.

Consideration

231 It is as well to recall that Spain's modification contention is only relevant if I am wrong in my conclusion that the investors are entitled to enforcement under s 35(4) IAA and Art 54 ICSID Convention as given the force of law by s 32 IAA regardless of whether within the EU system, or as between EU Member States, the ECT/ICSID arbitral procedure is valid. That is to say, even if Art 53 ICSID Convention is properly to be regarded as modified as between EU Member States as contended for by Spain, on the analysis developed above it does not matter for present purposes, whether as to waiver of immunity or to power, given that regardless it would only affect the obligations as between EU Member States. Nonetheless, I have dealt with it given the extensive submissions made on it by the parties.

232 Also, Spain's modification contention presupposes that Art 53 can be modified and that if it is, then Art 54 does not give rise to enforceable obligations because Art 54 is dependent on a valid and binding award under Art 53. I have already rejected that contention by reference to the self-contained operation of the ICSID Convention above. If an award is rendered pursuant to the terms of the Convention, then Art 54 must operate to ensure its enforceability until such time that the award is annulled or rectified.

Inter se modification of treaties under customary international law

Introduction

233 It is necessary to identify the precise parameters of what has been argued by Spain regarding the inter se modification of the ICSID Convention. Within the VCLT, it is Art 41 which governs the inter se modification of treaties. Strictly speaking, Art 4 provides that the VCLT only applies to treaties which are concluded by States after its entry into force. For a treaty such as the ICSID Convention which predates the VCLT (1965 versus 1969), it is Spain's position that

the customary international law rules on treaty modification inter se apply. The applicants accept that the VCLT essentially codifies those customary rules, meaning that there is no difference between the elements in the customary rules and those in Art 41. They have framed their arguments on that basis.

234 By way of context, Art 41 VCLT is in the following terms:

> **Article 41**
>
> **Agreements to modify multilateral treaties between certain of the parties only**
>
> 1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
>
> (a) the possibility of such a modification is provided for by the treaty; or
>
> (b) the modification in question is not prohibited by the treaty and:
>
> (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
>
> (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.
>
> 2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

235 Spain, however, submits that "[v]iews as to whether and to what extent Article 41 of the VCLT reflects customary international law are not completely uniform". For example, there is commentary suggesting that the obligation to notify contained in Art 41(2) "appeared innovatory when the ILC took up its study on the matter": see Villiger M E, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill, 2008) at 538 [18]. Other commentary says that Art 41 merely reflects principles of customary law rather than codifying the law itself: see Boeck M d, *EU Law and Investment Arbitration* (Brill, 2022) at 88.

236 The problem with Spain's reliance on customary international law (as meaningfully distinct from Art 41 VCLT) is that it is difficult to understand what content to give it. Certainly, the authorities are in agreement that the concept of inter se modification existed in customary international law. Yet, Spain contests the existence of the sub-rules contemplated in Arts 41(1)-(2). In Professor Hindelang's first report, on which Spain relies, he considers it doubtful that the notification requirement in Art 41(2) was part of the customary law. However, he then accepts that "the principles in section (1) of Article 41 of the VCLT – by and large – reflect customary international law". In his third report, he again states that Art 41 "now reflects

customary international law". Even so, in his fifth report he says that customary international law may admit modification "even if there are third parties to the modifying treaty", which (as will be discussed in further detail below) is a requirement of the text of Art 41(1).

237 It may well be the case that in the drafting stages of the VCLT, particular elements of what would become Art 41 were indeed "innovatory". However, as Villiger states (at 538 [18]), the principles as articulated in Art 41 "have since not been called into question by States, for which reason the provision as a whole may be considered as having come to reflect customary international law". That is accepted by Spain and Professor Hindelang.

238 The relevance of all this is that the modifying treaty relied on by Spain is the Treaty of Lisbon. That was concluded in 2007, long after the conclusion of the VCLT, and to which Art 41 would apply. It would be an odd situation if States parties in 2007, by entering into a subsequent treaty to modify an older regime as claimed by Spain, did so on an understanding that the contemporaneous rules of treaty modification would not apply. That would be a powerful factor tending towards regarding Art 41 as the preferable choice of rule, to the extent that there actually is a divergence from customary international law as claimed (which on the materials is not an entirely convincing proposition).

239 Commencing the Art 41 analysis, it is to be observed that the article reflects a compromise between the needs of a limited number of parties wishing to regulate their relations inter se and of allowing the other parties to continue applying the treaty regime in its initial form. "It recognizes the right of parties to a multilateral treaty to create a special regime through an *inter se* agreement but, by placing strict conditions on the exercise of that right, seeks to protect the general regime of the treaty": International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (Report, 13 April 2006) at [303] (***ILC Fragmentation Report***). That the conditions reflected in Art 41 should be applied strictly is supported by the view of the International Law Commission in the drafting sessions of the VCLT: Waldock H, *Sixth Report on the law of treaties* (Report, 14 June 1966) at 87 [1]; *Yearbook of the International Law Commission* (United Nations, 1966) Vol I Pt II at 124 [35]]

Article 41(1) – sub-group of parties to the treaty

240 The first difficulty with the application of Art 41 VCLT to the present circumstances is that Art 41 only applies when the States parties to the later treaty which is said to modify the earlier treaty are a sub-group of the States parties to the earlier treaty. That limitation arises from the

opening words of Art 41(1), ie "Two or more *of the parties to a multilateral treaty* may conclude an agreement to modify the treaty as between themselves" (emphasis added). That understanding is explained and endorsed by the commentators: *ILC Fragmentation Report* at [295]; Simon D and Rigaux A, "Article 41" in Corten O and Klein P (eds), *The Vienna Conventions on the Law of Treaties* (Oxford University Press, 2011) Vol II at 987 [2]-[3]; von der Decken K, "Article 41" in Dörr O and Schmalenbach K, *Vienna Convention on the Law of Treaties: A Commentary* (2nd ed, Springer, 2018) at 778 [4]. Poland is not a Contracting State to the ICSID Convention, but it is a party to the TFEU. For that reason alone, Art 41 has no application.

241 Spain's answer to that point is that the agreement to modify, at least, Art 53 ICSID Convention is the agreement reflected in the TFEU but, in this respect, is to be regarded as concluded only between the EU Member States which are also Contracting States to the ICSID Convention, ie all of them except Poland. I do not accept that submission because of its high level of artificiality. One is looking here for an intention, express or implied and ascertained objectively, in an agreement concluded amongst a sub-group of ICSID Convention Contracting States to modify the Convention as between them by making it inapplicable, or Art 53 to be ineffective, as between EU Member States. What one has is the TFEU concluded by such a sub-group plus Poland which does not mention the ICSID Convention or indeed anything about arbitral procedures and the application of EU law in arbitrations outside the EU system. Then, many years later, the CJEU develops jurisprudence about the autonomy of the EU judicial system which conflicts with the ICSID Convention arbitral procedures in an intra-EU context. In my view, that is insufficient a basis to find that the EU Member States other than Poland had an intention to modify the ICSID Convention as between them.

Article 41(2) – notice to the other parties

242 That observation raises the next difficulty. It is that Art 41(2) VCLT requires that the parties to the modifying agreement notify the other parties to the treaty to be modified "of their intention to conclude the agreement and of the modification to the treaty for which it provides". Not only did the EU Member States not do that, but they could not possibly have done so because they had no conception that they were concluding an agreement to modify the ICSID Convention.

Article 41(1)(b)(i) – obligations erga omnes partes

243 There is another clear answer to Spain's contention on modification which is that the rights and obligations in the ICSID Convention, including Art 53 on which Spain particularly relies, are

erga omnes partes and are therefore not susceptible to bilateral modification. That is to say, the second requirement for modification under customary international law that Spain identifies (as captured in Art 41(1)(b)(i) VCLT) is not satisfied. That requires some explanation.

244 Professor James Crawford as Special Rapporteur to the International Law Commission in his *Third report on State responsibility* (Report, 4 August 2000) (at [106]) explained that there are three types of multilateral obligations. First, there are obligations to the international community as a whole (erga omnes). This is the nature of obligation referred to by the ICJ in the *Barcelona Traction Case* (*Barcelona Traction, Light and Power Company Ltd (Belgium v Spain) (Judgment)* [1970] ICJ Rep 3 at [33]). The core cases of obligations erga omnes are those non-derogable obligations of a general character which arise either directly under general international law or under generally accepted multilateral treaties (eg in the field of human rights). They are thus, in Professor Crawford's words, "virtually coextensive with peremptory obligations (arising under norms of jus cogens)": *Third report on State responsibility* at [106(a)]. Secondly, and pertinent for present purposes, there are obligations owed to all the parties to a particular regime (erga omnes partes), ie where "all the States parties have a common legal interest". They include, in particular, those obligations which are expressed (or necessarily implied) to relate to matters of the common interest of the parties. When such obligations are said to arise from a treaty, it is a matter of treaty interpretation whether that is in fact so. Thirdly, there are obligations to which some or many States are parties, but in respect of which particular States or groups of States are recognised as legally interested.

245 Professor Crawford explained (at [92]) that obligations erga omnes partes "concern obligations in the performance of which all the States parties [to the particular regime] are recognized as having a common interest, over and above any individual interest that may exist in a given case". He also noted that "there is a wide diversity of modern multilateral treaties concerned to vindicate collective interests".

246 Contrary to the submission by Spain, in the exercise of treaty interpretation aimed at identifying whether any particular obligations are bilateral or multilateral and hence erga omnes partes, bilateralism is not the default position. Although not necessarily so, "a multilateral treaty will characteristically establish a framework of rules applicable to all the States parties": International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (Report, 2001) at Art 42 118 [8]. Article 48(1)(a) of that document identifies an obligation erga omnes partes as one that is "owed to a group of States

... and is established for the protection of a collective interest of the group". The commentary explains that such obligations "are not limited to arrangements established only in the interest of the member States but would extend to agreements established by a group of States in some wider common interest"; "the arrangement must transcend the sphere of bilateral relations of the States parties"; obligations are erga omnes partes if "their principal purpose will be to foster a common interest, over and above any interests of the States concerned individually" (at 126 [7]).

247 Also, the proper characterisation of an obligation does not depend on its nature or the importance of the interest protected (eg fundamental human rights), but on the "legal indivisibility" of its contents, "namely by the fact that the rule in question provides for obligations which bind simultaneously each and every State concerned with respect to all the others": Arangio-Ruiz G, *Fourth report on State responsibility* (Report, 17 June 1992) at [92].

248 The nature of obligations erga omnes partes, and the circumstances in which they arise, was considered by the ICJ in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar) (Preliminary Objections)* [2022] ICJ Rep 477. The Gambia's complaint against Myanmar was that the latter had breached its obligations under the Genocide Convention in respect of actions against members of the Rohingya group. Myanmar submitted that The Gambia lacked standing to bring the case because it was not an "injured State" and it had failed to demonstrate an individual legal interest (at [93]). The ICJ rejected that contention, explaining that all the States parties to the Genocide Convention have a common interest to ensure the prevention, suppression and punishment of genocide. That "common interest implies that the obligations in question are owed by any State party to all the other States parties to the relevant convention; they are obligations *erga omnes partes*, in the sense that each State party has an interest in compliance with them in any given case" (at [107]). For the purpose of the institution of proceedings, "a State does not need to demonstrate that any victims of an alleged breach of obligations *erga omnes partes* under the Genocide Convention are its nationals" (at [109]). Also, the fact that a particular State has a particular interest because of the adverse effect of the alleged breaches on it "does not affect the right of all other Contracting Parties to assert the common interest in compliance with the obligations *erga omnes partes* under the Convention" (at [113]). See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel) (Provisional Measures)* [2024] ICJ Rep 3 at [33]. The position is that "treaties protecting common interests imply, with respect to some provisions, the existence of

obligations *erga omnes partes*": *Obligations of States in Respect of Climate Change (Advisory Opinion)* (International Court of Justice, General List No 187, 23 July 2025) at [441].

249 Turning now to the ICSID Convention, as mentioned above (at [141]), in *Spain HCA* at [40] it was recognised that the primary object of the ICSID Convention is to encourage private international investment including by mitigating sovereign risk and providing an investor with the "legal security required for an investment decision". That object, taken together with the establishment of the ICSID and the various procedures for the closed-loop arbitration system, and the scheme of Arts 53 and 54 that restates the customary international law position that each Contracting State party to an award "shall abide by and comply with the terms of the award" and that all the other Contracting States shall recognise and enforce the pecuniary obligations imposed by an award (*Spain HCA* at [71]-[72]), demonstrates that all Contracting States have an interest in each other's observance of their obligations under the Convention. See also *Republic of India v CCDM Holdings LLC* [2025] FCAFC 2; 307 FCR 308 at [69] per SC Derrington, Stewart and Feutrill JJ in relation to the New York Convention.

250 Spain relies in particular on Art 53 as not imposing obligations on States parties other than the award debtor State and submits that its obligation "to abide by and comply with the terms of the award", as a party to the award, is owed only to the award creditor (the investor) and the award creditor's State of nationality (the investor's State). I do not accept that submission.

251 First, Art 53 is as much part of the overall scheme of the Convention, in particular Ch IV which deals with the arbitration process from the request for arbitration to enforcement of the award, as any other article. It would be an inexplicable result if, under Art 54, the enforcing State had an obligation to all States parties to enforce the award against the award debtor State, but the award debtor State owed no obligation to all States parties (other than the investor State) to abide by and comply with the award once recognised by the enforcing State. Spain's construction of Art 53 would therefore denude Art 54 of some of its efficacy in a manner inconsistent with the overall scheme, especially where Arts 54(4) and 55 preserve the operation of immunity from execution in an enforcing State. As explained in *Spain HCA* (at [40]), Arts 53-55 "are a central plank in giving effect to the primary object of the ICSID Convention" – mitigation of sovereign risk by the provision of legal security for investments.

252 Secondly, there is nothing in Art 53 to suggest that the obligation that it imposes *on* the parties to the award to abide by and comply with its terms are owed only *to* each other. If the award debtor State does not comply with an award, that imposes a burden on other States parties

where the investor seeks to have the award enforced under Art 54. Aside from the larger common purpose and interest sought to be advanced by the ICSID Convention in the protection of international investments from sovereign risk for the common good, each Contracting State has a legal interest in each other Contracting State meeting their obligations under Arts 53 and 54. When one of the States parties refuses to pay an award against it, the efficacy and potentially the viability of the whole ICSID system is threatened; it does not work as it was designed to work, investor protection against sovereign risk is weakened and confidence declines.

253 Article 64, which provides for the settlement of disputes between Contracting States concerning the interpretation or application of the Convention by referral to the ICJ, presupposes that there may be such disputes. Most obviously such disputes may arise between an investor's State of nationality, on the one hand, and another Contracting State, on the other, that is said to not be complying with an award as required by Art 53 (an award debtor State) or not enforcing an award under Art 54 (an enforcing State). But the language of Art 64 is not limited to those Contracting States – it is broad and open. It allows for disputes involving other Contracting States suggesting that they too have a legal interest in the performance by all States parties of their treaty obligations.

254 Article 69, which requires that "[e]ach Contracting State shall take such legislative or other measures as may be necessary for making the provisions of this Convention effective in its territories" demonstrates the multilateral obligations owed between States. That is clearly an obligation owed by each Contracting State to each other Contracting State. A failure by a Contracting State to make the Convention effective in its territories, and thus to not enforce awards under Art 54, would result in ICSID awards not being able to be enforced in that Contracting State. That would in turn place an additional burden on other Contracting States where any award would then have to be enforced. See Schreuer C, "Challenges Resulting from the EU's Participation in International Dispute Settlement" in Bungenberg M and Renisch A (eds), *New Frontiers for EU Investment Policy* (Springer, 2023) at 8.

255 The point is explained with particular force by Aron Broches ("the principal architect" of the ICSID Convention – see *Spain HCA* at [30]) in "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States" (1972) 136 *Recueil des cours de l'Academie de Droit International de La Haye* 331 at 379-380:

> Any party to the Convention has a clear legal interest in seeing its provisions observed,

> whether or not its immediate interests or those of its nationals are affected. Failure by Contracting States to comply with awards, or to recognize and enforce awards as required by the Convention, are violations of the Convention which endanger the achievement of its purposes and the security of investments made in reliance on ICSID arbitration agreements. Hence each Contracting State may, as Article 64 provides, bring alleged violations before the Court for a declaratory judgment and, where the applicant has suffered material injury, for an award of damages.

256 The structure of the Convention as a whole also supports the conclusion that it creates a set of multilateral rights and obligations in the nature of erga omnes partes. It creates an international organisation, the "Centre", and confers international legal personality upon it (Art 1). It empowers tribunals to exercise the jurisdiction of the Centre (Art 25) and to produce awards (Art 48). It provides a system of review (Arts 49-52), which is closed and exclusive (Art 53(1)). It then establishes a uniform, self-contained regime for the recognition and enforcement of arbitral awards (Art 54) and requires implementation by each Contracting State into its domestic law (Art 69). Default by Contracting States can be called to account (Arts 27 and 64).

257 The erga omnes partes nature of the obligations in the ICSID Convention was recognised by the UK Supreme Court (**UKSC**) in *Micula UKSC*. Lord Lloyd-Jones and Lord Sales JJSC, with whom the other members of the Court agreed, identified (at [101]) that a question that required decision in the case was whether the UK owed obligations under the ICSID Convention to Contracting States other than the investor's State (Sweden in that case). The Court concluded (at [104]) that the specific duties in Arts 54 and 69 ICSID Convention are owed to all other Contracting States, and that the Convention scheme is one of mutual trust and confidence which depends on the participation and compliance of every Contracting State. The Preamble (at [104]) and the structure of the Convention (at [105]) were held to support that conclusion. In particular, it was held that the "obligations of contracting states in articles 53, 54 and 69 are expressed in unqualified terms, without limit as to the persons to whom they are owed" (at [105]), contrary to Spain's submission that the Art 53 obligation to "abide by and comply" with the award is owed only to the investor's home State. Further support was found in the travaux préparatoires (at [107]) and in various other features of the scheme that are not presently relevant (at [106]). That is both high authority and convincing.

258 Against that, Spain relies on the subsequent decision of the CJEU in *European Commission v United Kingdom*, Fifth Chamber, ECLI:EU:C:2024:231 (Case C-516/22) (14 March 2024) (***European Commission v UK***) in which the judgment of the UKSC was challenged by the European Commission. The Commission alleged that the UK failed to fulfil its obligations under Art 4(3) TEU and Arts 108(3), 267 and 351 TFEU by the judgment of the UKSC in

Micula. The CJEU had jurisdiction notwithstanding the intervening occurrence of Brexit via the *Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and European Atomic Energy Community* (2019) (**Withdrawal Agreement**) which entered into force on 1 February 2020. This was because under the terms of the Withdrawal Agreement, EU law applied to the UK during a "transition period" that ended on 31 December 2020 (Arts 126 and 127), and also expressly provided for the Commission to bring proceedings before the CJEU concerning alleged failures by the UK to fulfil its obligations under the EU treaties or the Withdrawal Agreement within 4 years after the end of the transition period (Art 87). The *Micula UKSC* judgment was handed down by the UKSC on 19 February 2020 (ie within the transition period) and the proceeding was instituted by the Commission on 29 July 2022 (ie within the scope of Art 87 Withdrawal Agreement). The UK did not contest the proceeding which went ahead on a default basis with no contradictor (at [49]).

259 The CJEU framed the relevant issue as whether the ICSID Convention, as regards the enforcement of the arbitral award, imposes on the UK obligations which it is bound to fulfil towards third countries and which those countries are entitled to rely upon as against the UK (at [70]). The CJEU held that the ICSID Convention, "despite its multilateral nature, is intended to govern bilateral relations between the contracting parties in an analogous way to a bilateral treaty" (at [75]), noting also that the CJEU had previously held that Art 26 ECT had a similar bilateral intention in *Komstroy* at [66]. It reasoned that the interest that the UKSC had identified that third-party Contracting States have in the enforcement of all Contracting States' obligations under the Convention is "a purely factual interest [that] cannot be equated with a 'right' within the meaning of Article 351 TFEU" (at [76]).

260 The reasoning given by the CJEU was identified as that set out by the Advocate General at [133]-[137] and [147]-[149] of their Opinion for the Court. Paragraphs [133]-[137] of the Opinion merely identify the different categories of multilateral obligations as identified above. The reasoning given for why the UKSC was considered wrong is in three paragraphs, [147]-[149], where the Advocate General identified three issues with the UKSC's approach.

261 First, the Advocate General stated that the UKSC did not address the significant question of whether each Contracting State to the ICSID Convention would be able to invoke the UK's international responsibility for a refusal to enforce "the *award in question*" (emphasis in original) and to act against the UK through the procedures provided for in international law (at

[147]). By this, the UKSC "failed to identify any *corresponding right* of non-member States" (emphasis in original) to the UK's obligations under Art 54 ICSID Convention (at [145]). That criticism overlooks that the UKSC made specific reference to Art 64 as providing a separate route for resolution of disputes between Contracting States by permitting an aggrieved State to refer such a dispute to the ICJ (at [105] of *Micula UKSC*). The UKSC reasoned that that feature of the Convention regime provides a strong indication that a Contracting State which has obligations under that Convention in relation to an award owes those obligations to all other States party to the Convention as well as to any party to the award (at [105] of *Micula UKSC*).

262 The second point made by the Advocate General is that the standard applied by the UKSC to identify an obligation owed to a third State "was quite low" and that on "close scrutiny", and with the exception of two statements in the travaux referred to by the UKSC, none of the international and academic sources relied on by the UKSC "seems specific or conclusive on the matter" (at [148]-[149]). With respect, those statements in the travaux that are referred to by the UKSC are significant and cannot be merely brushed aside – they are authoritative statements by the Chairman of successive sessions of the Consultative Meetings of Legal Experts (see at [107] of the *Micula UKSC*). Nor can the commentary of Professor Schreuer in his authoritative text on the ICSID Convention, relied on by the UKSC (at [105]). What is said in these authoritative commentaries directly addresses the issue in contest – that the Art 53 obligation exists "*vis-à-vis*" other parties to the Convention (see eg the 2nd edition of Professor Schreuer's commentary at 1100 [13] referring to the travaux, quoted by the UKSC). The UKSC cannot be said to have "applied" a "quite low" standard in order to arrive at the conclusion that the obligations in Arts 53 and 54 were erga omnes partes; instead, the UKSC reached this conclusion by having regard to the orthodox principles of interpretation of treaties, guided by the terms, object and purpose of the ICSID Convention itself. The latest edition of Professor Schreuer's commentary does not depart from this position: *Schreuer 3rd ed*, Vol II at 1448 [15] and 1462 [57].

263 Finally, the Advocate General raised issue with the UKSC "confining its assessment to a single procedural question arising out of the dispute" (ie whether the UK was required to enforce the award) and how it thereby "lost sight of the basic legal relationship which gave rise to the dispute", being Romania as the award debtor State and Sweden as the home State of the investors (at [150]-[153]). While the Advocate General stated that the UKSC left the Romania-Sweden BIT out of the equation, this ignores that the question before the UKSC arose, in fact, not under the Romania-Sweden bilateral relationship, but under the ICSID Convention

regarding the UK's obligations to other ICSID Contracting States. While it may be true, as the Advocate General states, that it was "the BIT that laid down the *substantive* obligations that Romania had undertaken towards Sweden" (emphasis in original), the dispute in the UKSC concerned *the UK's obligations* under the ICSID Convention. It is hard to see how the "basic legal relationship" to that dispute was in the BIT.

264 In the circumstances, I am not persuaded by the CJEU or the Advocate General on this point, noting that it is not a point of EU law or EU treaty interpretation and is therefore not a point on which the CJEU would be regarded as any more authoritative than the UKSC.

265 Spain also relies on *NextEra Energy Global Holdings BV v Kingdom of Spain* 112 F4th 1088 (DC Cir 2024) as providing further support for the proposition that the obligation to abide by and comply with the terms of the award in Art 53 ICSID Convention is not an erga omnes partes obligation but is instead one owed bilaterally such that it is capable of being modified inter se in a way that is not incompatible with the effective execution of the object and purpose of the ICSID Convention as a whole. I do not find the case helpful to support the proposition for which it is cited. The judgment deals with two primary questions (at 1099ff). The first is whether the *Foreign States Immunities Act* 28 USC § 1602 et seq (**FSIA**) gives the District Courts jurisdiction to enforce (or decline to enforce) the arbitration awards at issue in that case against Spain – they are the same awards as in the present NextEra and 9REN proceedings. The Court held that it did not have to consider whether Spain had waived foreign State immunity under the waiver exception in the FSIA because the exception for immunity provided in respect of arbitral awards applied to give the District Courts jurisdiction (at 1100). Notably, in doing so the Court overturned the decision in *Blasket Renewable Investments LLC v Kingdom of Spain* 665 FSupp 3d 1 (DDC 2023), where Leon J held Spain to be immune on the basis that "Spain's standing offer to arbitrate was void" meaning there was no valid arbitration agreement. The applicants note the primary decision is one of the few non-EU domestic court decisions to have accepted the intra-EU objection for the purposes of jurisdiction.

266 The second question is whether, assuming it had jurisdiction, the District Court abused its discretion by enjoining Spain from seeking anti-suit relief under foreign law in foreign courts. The Court (by majority per Pillard and Rogers JJ, Pan J dissenting on this point) found error in the exercise of the District Court's discretion in providing the anti-anti-suit relief. That was because, first, it had not considered the injunction was to run against a foreign sovereign (at 1107 [23]-[24]) and, second, failed to identify domestic interests strong enough to warrant the

anti-suit injunctions (at 1109 [27]). In the context of discussing the latter point, the Court reasoned that the US "has no direct interest in the underlying dispute between the Dutch and Luxembourgish companies and Spain" (at 1109 [27]) on which Spain now particularly relies. There is nothing in the reasoning of the Court that addresses the nature of the multilateral obligations embodied in the ICSID Convention. Rather, the Court weighed the US's obligation to uphold the ICSID Convention and its strong interest in doing so against the interests in allowing the foreign litigation to proceed, and found in favour of the latter (at 1110).

267 However, before the Court, and particularly referenced with approval in the dissenting judgment of Pan J, was an amicus brief on behalf of 12 international scholars including Professor Schreuer. The international scholars comprise some of the leading global experts in the fields of public international law, investor-State disputes and the ICSID Convention. Their experience and expertise are documented in the brief. They state that the obligations under Art 54 ICSID Convention are "owed to every other Contracting State" and that non-enforcement of the awards against Spain "would place the United States in breach of its Article 54 obligations and seriously undermine the operation and legitimacy of the investor-state dispute settlement framework established by the Convention" (at 8). They explain that (at 21):

> Mandatory enforcement of all awards is part of the Convention's fundamental design, as recognized from ICSID's inception. Because all 158 ICSID Contracting States share an interest in the operation of the system and even where the enforcing state does not have an interest in each particular dispute settled through that system, it follows that each Contracting State's obligation to enforce all ICSID awards is owed *erga omnes partes*, that is, to all other ICSID Contracting States.
>
> (Citations omitted.)

268 The international scholars further explain that in the event that an ICSID award debtor does not comply with the award, the award creditor can then turn to any other member State of the ICSID Convention for enforcement. "The ICSID enforcement framework thus depends on each Contracting State being 'obliged to directly enforce every arbitral award, regardless against which state'" (at 22). That reasoning is persuasive.

269 For those reasons, the relevant obligations in the ICSID Convention are erga omnes partes so the obstacle to modification in Art 41(1)(b)(i) VCLT is not overcome.

Article 41(1)(b)(ii) – non-derogation from object and purpose

270 Essentially for the same reasons, the requirement in Art 41(1)(b)(ii) that the modification does not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole is not satisfied.

Conclusion

271 For those reasons, Spain's principal modification argument must fail.

Article 30 VCLT

Introduction

272 Spain's alternative argument relies on Art 30 VCLT which provides as follows:

> **Article 30**
>
> **Application of successive treaties relating to the same subject matter**
>
> 1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.
>
> 2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
>
> 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
>
> 4. When the parties to the later treaty do not include all the parties to the earlier one:
>
> (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.
>
> 5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

273 Article 30 employs the concepts of the "earlier treaty" and the "later treaty". That raises a point of some nicety as to what date in relation to a treaty is to be employed when working out which is the earlier and which is the later. Is it the date of signature, the date of the treaty being opened for signature, the date of accession or ratification, or the date that it entered into force? These

matters are considered in Vierdag E W, "The Time of the 'Conclusion' of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions" (1988) 59(1) *British Yearbook of International Law* 75. The Deputy Chairman of the UK delegation to the Vienna Conference on the Law of Treaties, Sir Ian Sinclair, took the view that "the relevant date is that of the adoption of the text and not that of its entry into force": Sinclair I, *The Vienna Convention on the Law of Treaties* (2nd ed, Manchester University Press, 1984) at 98, referred to with approval by Vierdag at 95. It would seem that the appropriate date in this context is the date of signature, or the opening of the treaty for signature, which are usually very close together. I will use the date of signature, although in these proceedings it does not appear to matter which of those dates is used.

Any incompatibility does not affect Australia

274 The first difficulty for Spain on its alternative argument is that, like its principal argument, any modification applies only "as between States Parties to both treaties" (Art 30(4)(a) VCLT). For the reasons already given, the obligations in Arts 53 and 54 ICSID Convention are not merely bilateral obligations between the investor's State and the host State. Rather, the provisions implicate international obligations of all States parties, including Australia. But even if the obligations are bilateral, the EU foundational treaties cannot modify the obligations as between Australia and Member States of the EU, including, relevantly, Spain and the investor's home States, because Australia is not a party to any of the EU treaties. That is the result of Art 30(4)(b) VCLT.

The earlier treaty and the later treaty

275 The second difficulty is that the Treaty of Lisbon, or TFEU, is not the relevant treaty for the application of the lex posterior rule in Art 30 VCLT. That is because the principles that Spain relies on for such modification as expressed in *Achmea* and *Komstroy* are derived from pre-existing EU constitutional norms found in the Treaty of Rome which predates the ICSID Convention – the Treaty of Rome was concluded in 1957 and the ICSID Convention in 1965.

276 Relevantly, as discussed above, the principle of the preservation of the autonomy and of the particular nature of the law established by the EU foundational treaties, and thus the prohibition on the application of EU law outside the judicial system of the EU, relies on Art 267 TFEU and Art 344 TFEU. Article 267 TFEU was previously Art 234 TEC, and before that it was Art 177 TEEC (Treaty of Rome). Article 344 TFEU was previously Art 292 TEC, and before that it was Art 219 TEEC. I do not accept that the Treaty of Lisbon created or relevantly reaffirmed

the principles in question. The principles of the autonomy of EU law and of mutual trust were part of EU law since the inception of the EEC in 1957 in the TEEC and reaffirmed in 1992 through the TEC as amended by the Maastricht Treaty. They are not dependent on the 2007 amendments. They were inherent in the EU legal system from 1957, the relevant articles merely being moved around and renumbered in the TEC and then the TFEU. I accept the opinions of Professor Eeckhout and Professor Sarooshi in that respect.

277 Spain signed the *Treaty concerning the accession of the Kingdom of Spain and the Portuguese Republic to the European Economic Community and to the European Atomic Energy Community* to join the EU as a Member State on 12 June 1985. However, Spain signed the ICSID Convention on 21 March 1994. Thus, as concerns Spain, the ICSID Convention is the later Convention.

278 The same is true of the relevant investor States, namely the Netherlands and Luxembourg – both were original members of what was then the EEC in 1957. The Netherlands signed the ICSID Convention on 25 May 1966, while Luxembourg signed on 28 September 1965. To the extent that the position of the Bailiwick of Jersey is relevant on the basis that for these purposes it became subject to the EU treaties and the ICSID Convention along with the UK (a matter to which I will come), the UK signed the ICSID Convention on 26 May 1965, whereas it did not sign the *Treaty concerning the accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and to the European Atomic Energy Community* (**UK Accession Treaty**) to join the EEC until 22 January 1972.

279 The position is thus that as between Spain, the Netherlands and Luxembourg, the ICSID Convention is the later treaty with the result that it cannot have been modified under Art 30 VCLT by principles of EU constitutional law. Australia is not affected by the EU treaties, so as between Spain, Luxembourg, the Netherlands, the UK and Australia, the ICSID Convention must be treated as unmodified. For the UK, in spite of the EU foundational treaties being later in time to the ICSID Convention, post-Brexit it is no longer a party to the former such that there is no longer a succession of treaties for the purposes of Art 30.

280 But in any event, the position of the UK is only relevant because one of the investors, RREEF Infrastructure (GP) Ltd, was incorporated in the Bailiwick of Jersey and Spain contends that Jersey is to be regarded as part of the UK for these purposes. For reasons I will come to, I have not been persuaded that that contention is correct.

281 For the reasons already given in relation to Spain's contentions about "power" (see above at ([215]-[221]), the EU inter se agreement and declaration do not alter the analysis.

Relating to the same subject matter

282 The third question is whether the EU foundational treaties and the ICSID Convention are treaties "relating to the same subject matter". The difficulty with the test propounded by Spain, namely if simultaneous application of both would lead to incompatible results, is that that requirement then plays no role at all; the lex posterior principle would simply be applied with the later treaty taking preference. However, it is also possible to err the other way by employing arbitrary labels to treaty subject matter and thereby avoid real conflicts, eg characterising one treaty as dealing with environmental conservation and another with economic development.

283 The *ILC Fragmentation Report* (at 254) explains that "the test of whether two treaties that deal with the 'same subject matter' is resolved by assessing whether fulfilment of an obligation under one treaty affects the fulfilment of obligations under another". That is a similar test to that propounded by Orakhelashvili as relied on by Spain and cited above at [229].

284 I accept that the test for the same subject matter is one of incompatible obligations. However, in this case it is hard to identify just what the incompatible obligations are. The EU foundational treaties "are constituent instruments of an institution which is an international organisation but also a union of States with a customs union and much more": *Adria Group BV v Republic of Croatia (Decision on Intra-EU Jurisdictional Objection)* (ICSID Arbitral Tribunal, Case No ARB/20/6, 31 October 2023) at [175]. The CJEU in *Komstroy* held that the obligations that EU Member States have pursuant to intra-EU arbitration agreements are inconsistent with principles of the EU system derived from the EU foundational treaties. That is to say, the obligation of EU Member States under Arts 267 and 344 TFEU to not submit a dispute concerning EU law to a forum outside the dispute resolution mechanisms of the EU (ie courts or tribunals that do not have the CJEU at their apex) is inconsistent with the obligation in Art 26 ECT to submit those disputes to extra-EU arbitral process. However, there are no particular obligations on EU Member States under the EU treaties that the CJEU has identified as being in conflict with the obligations of those States *under the ICSID Convention*, which on its own does not require parties to refer disputes to ICSID arbitration: see Art 25(1). The incompatibility is therefore not at the level of obligations per se between the EU treaties and the ICSID convention. For those reasons, I do not consider that the requirement of "the same subject matter" in Art 30 is met.

285 However, if the inconsistency identified with the ECT could be regarded as extending to obligations in the ICSID Convention, a proposition which I am not persuaded on, the other elements of Art 30 VCLT are still not met, for the reasons explained above.

Conclusion

286 For those reasons, Spain's case in reliance on Art 30 VCLT fails.

ASSIGNMENT

Introduction

287 It will be recalled that in the RREEF proceeding, the applicant is now (since 26 June 2023 – see at [35] above) Blasket Renewable Investments LLC, a limited liability company incorporated under the Delaware *Limited Liability Company Act* 6 Del Code Ann § 18-101 et seq. The RREEF parties, on the "Assignment Effective Date" (27 October 2022), "on a joint and several basis, irrevocably and unconditionally assign[ed] to [Blasket] with full title guarantee the legal and beneficial title to the Assigned Rights, which assignment [Blasket] accept[ed]". "Assigned Rights [means] all of the rights, interests and benefits of the Assignors under or in respect of the Award."

288 By cl 18.1 of the deed of assignment, the deed "and any non-contractual obligations arising out of or in connection with it are governed by, and shall be construed in accordance with, English law".

289 By letter dated 18 January 2023, the RREEF parties and Blasket notified Spain of the assignment.

290 Also, in the Watkins proceeding, the applicant is now (since 3 April 2024 – see at [62] above) Blasket. On 21 December 2023, the Watkins parties assigned "the legal and beneficial title to the Assigned Rights" to Blasket. "[T]he term 'Assigned Rights' [means] all of the rights, interests and benefits of the Assignors under or in respect of the Award." The governing law of the deed of assignment is English law in identical terms to the RREEF-Blasket deed above. Spain was given notice of the assignment by letter dated 26 March 2024.

291 As mentioned above, while I have already made orders joining Blasket and substituting Blasket for the RREEF and Watkins parties in each proceeding, those orders were made on the basis that they would not prevent Spain from disputing the validity or efficacy of the purported assignments at trial, which it now does.

292 Since the circumstances, and text, of both assignments are relevantly the same, I will deal with this issue with reference to the RREEF proceeding – whatever is said and found in relation to it holds also for the Watkins proceeding.

Submissions

293 At a high level, Spain's submission is that the IAA confers no power to make the orders sought in the RREEF proceeding because the award sought to be enforced do not impose on Spain any obligation in favour of Blasket.

294 This contention is supported by a series of propositions which can be summarised as follows:

(1) There is no binding obligation upon Spain under Art 53 ICSID Convention to pay Blasket, as opposed to the RREEF parties, as Art 53 obliges the parties to abide by and comply with "the terms of the award", which impose an obligation on Spain to pay the RREEF parties, not someone else.

(2) Blasket does not have standing under Art 54 ICSID Convention to seek recognition or enforcement of the RREEF awards as it was not a "party" to the awards.

(3) In the absence of a binding obligation upon Spain to pay Blasket invoked by a person with standing to seek such relief, the power under s 35(4) IAA is not enlivened. In any event, s 35(4) does not include a power to enforce an award as if the award were in favour of a putative assignee.

295 Alternatively, Spain contends that it has not waived its immunity from the adjudicative jurisdiction of this Court in proceedings brought by a non-party to an award, noting the "high level of clarity and necessity" required for waiver (*Spain HCA* at [28]).

296 Blasket relies in the first instance on s 33(1) IAA as creating a right in domestic law in favour of the RREEF parties, which right is capable of assignment. That right is said to arise independently under s 32 IAA which gives "the force of law in Australia" to Art 53(1) ICSID Convention. Also, under s 35(4) IAA, an award may be enforced "as if the award were a judgment or order of [the Court]".

297 Blasket submits that although the ICSID Convention is an international instrument, under Australia's dualist approach to international conventions it gives rise to rights and obligations in domestic law only through being implemented by domestic statute. It argues that Spain's obligation to pay under Art 53 ICSID Convention is a debt governed by Australian law under

ss 32 and 33 IAA. Thus, the rights that the RREEF parties had against Spain to recover such payment, and Spain's corresponding obligation, are rights available in domestic law. Blasket refers to *Povey* at [3], [12], [14] and [60].

298 Spain responds by contending that even in Australia's dualist system, the issue at hand is one of public international law when one examines the nature of the rights sought to be assigned as well as relevant choice of law rules: namely does the ICSID Convention permit the assignment of the benefit of the ICSID awards? It submits that the applicants have not established that the answer to that question is "yes".

Consideration

Introduction

299 The question of whether Blasket can enforce the RREEF awards in this court as assignee raises two separate questions:

(1) Were the rights purportedly assigned in the deeds of assignment rights capable of assignment?

(2) If so, were those rights validly assigned?

(See Collins L and Harris J, ***Dicey, Morris & Collins*** *on the Conflict of Laws* (16th ed, Sweet & Maxwell, 2022) at 1414, Rules 143(b) and (a) respectively.)

300 As to question (2), it appears there is no dispute. Assuming the answer to question (1) is "yes", any question of the validity of the assignment would be a question of English law, as per the governing law clauses in each of the deeds. Spain does not raise any English law issue regarding validity in this respect, and thus it is common ground that if the rights under or in respect of the awards constitute property capable of assignment, Spain's assignment case will fail.

301 As to (1), this directs attention to which system of law governs the question. This is the main point on which the parties diverge. Spain contends that the question of the assignability of arbitral awards is a question of international law, while the applicants contend that it is relevantly a matter of Australian law and the IAA (although, it should be noted that the applicants nonetheless argue that there is no prohibition on the assignment of ICSID awards under the ICSID Convention or in public international law).

302 On either approach, I have reached the conclusion that Blasket is the proper assignee of the rights under and in respect of the award against Spain that were previously held by the assignors, the RREEF parties, and that Blasket can enforce the awards in this Court.

303 It is convenient to address the question of whether the relevant rights are assignable with reference, first, to international law and then to domestic law.

International law

304 It is worth recalling that the property the subject of the purported assignment in this case is "all of the rights, interests and benefits of [the RREEF parties] under or in respect of [the RREEF awards]". Contrary to the applicants' submissions on this point, these are rights created on the international plane, out of the consent to arbitration by the parties under Arts 26(3)(a) and 26(4)(a)(i) ECT and Arts 25(1) and 26 ICSID Convention. The awards are the outcome of such consent. There is nothing in the awards or the deeds that suggest that any of the rights arising under the awards require any role for Australian law or the domestic law of any one of the myriad countries where the awards might be enforced. As such, the better view is that the question of whether the rights in respect of the awards are property capable of assignment is one governed by international law.

305 This position accords with the views in leading private international law texts as to the relevant choice of law rule, which both sides cite in their submissions. For example, in *Dicey, Morris & Collins*, Rule 143(1)(b) is that "the law governing the right to which the assignment relates determines its assignability" (at [25R-057]). The same position is apparent from Davies M, Bell A S, Brereton P L G and Douglas M, *Nygh's Conflict of Laws in Australia* (10th ed, LexisNexis, 2020) at [33.68] where it is said that "most English textwriters support the proposition that the question of whether an intangible is assignable at all was at common law determined by the law under which the right was created", citing the position from *Dicey, Morris & Collins*. See also to similar effect Mortensen R, Garnett R and Keyes M, *Private International Law in Australia* (5th ed, LexisNexis, 2023) at [25.39]: "the issue of whether an intangible interest may be assigned at all is governed by the law in accordance with [which] the right is created. So, the assignability of a cause of action or right to sue is determined by the law of the place in which the cause of action arose, not by the law governing the assignment."

306 Applying this, the law under which the rights seeking to be assigned (being the original rights in respect of the award itself) were created, is the ICSID Convention, notwithstanding that

those rights are also given effect in domestic law. The rights to enforcement arise from Art 54 ICSID Convention.

307 In *Blue Ridge Investments LLC v Republic of Argentina* 902 FSupp 2d 367 (SDNY 2012), Gardephe J held that "party" in Art 54(2) includes an assignee as a "party" seeking recognition or enforcement. Given the many different uses of "party" in the ICSID Convention, and that where a specific party is intended that is generally made clear (eg Arts 25, 32, 64 and 67), I accept that interpretation as correct (the issue was not considered by the Court of Appeals: see *Blue Ridge Investments LLC v Republic of Argentina* 735 F3d 72 (2d Cir 2013) at 82 per Cabranes J for the Court).

308 Spain notes the District Court applied 22 USC § 1650a(a) which, while resembling s 35(4) IAA, contains the additional wording that an award "shall be given the same full faith and credit as if" a judgment of the court. Spain submits that the consequence is that this has the effect of turning an ICSID award into the equivalent of an out-of-jurisdiction judgment (eg from the Californian or Texan courts relative to New York), "before the court does anything". It follows that for the purposes of assignability, the award is treated as if it were a product of US law, albeit from another state jurisdiction. By contrast, Spain says it cannot be assumed that the assignability of an award can be governed by Australian law in the same way. The distinction of the monist approach in the US versus the dualist approach in Australia is also cited in support. Separately, Spain criticises Gardephe J's apparent failure to consider the narrower meaning of "the parties" in Art 53.

309 None of this detracts from the force of Gardephe J's interpretation of "party" in the ICSID Convention. His Honour's decision may have ultimately turned on municipal law, but only after concluding that "[n]othing in Article 54(2) suggests that it was intended to communicate that only a 'party to the arbitration' can seek enforcement of an ICSID Convention award, nor does any other provision in the Convention suggest such a restriction". In other words, it was certainly not the case that no attention was given to the relevance of public international law as contained in the treaty terms on the question of assignability. As discussed immediately below and following, there is no basis in public international law to read into the ICSID Convention a prohibition on assignment. Nor am I persuaded there was error in considering that the operation of "party" in Art 54(2) might be wider than the use of "the parties" in Art 53 (in the sense of those immediately party to the award as claimed by Spain). As I have already concluded in these reasons, there is force to the view that Art 53 applies widely to the

Contracting States as an erga omnes partes obligation and not only to those parties to the award. On that basis, the assignee, relevantly Blasket, has the right of recognition and enforcement under the ICSID Convention itself, which is an answer to Spain's argument regarding standing. Those rights are then enforceable by Blasket under ss 33 and 35 IAA.

310 More generally, there is no public international law rule prohibiting the assignment of an award between a private party and a State, or the assignment of awards more broadly. As Professor Sarooshi addresses in his report, the existence of a rule of customary international law to that effect – as evidenced by both State practice and opinio juris – is doubtful. There is a paucity of authoritative consensus which establishes such a prohibition. In fact, the converse is illustrated by the judicial decisions which have accepted the in-principle assignability of such investor-State awards under municipal law: see eg *CC/Devas (Mauritius) Ltd v Republic of India (No 2)* [2023] FCA 527 at [33] per Jackman J (***India FCA No 2***); *Belize Social Development Pty Ltd v Government of Belize* 5 FSupp 3d 25 (DDC 2013) at fn 12 per Leon J citing *Global Distressed Alpha Fund I LP v Red Sea Flour Mills Co Ltd* 725 FSupp 2d 198 (DDC 2010); *Gebre LLC v Kyrgyz Republic*, 2022 ONSC 4137; *FG Hemisphere Associates c République Démocratique du Congo*, Cour d'appel de Paris [Paris Court of Appeal], No 18-10217, 7 December 2021 (cf *Société CC/Devas c République d'Inde*, Cour d'appel de Paris [Paris Court of Appeal], No 24-00152, 10 September 2024, which may tend to a different view, but cannot be authoritative on its own as to the existence of a customary rule). Relevantly, Professor Sarooshi refers to a practitioner survey in which 32 jurisdictions responded in the affirmative to the question of assignment of award debts as at 1 January 2022. As Jackman J observed in *India FCA No 2* at [33], "it is the role of municipal law to fill this gap as a general principle of law widely accepted across different municipal systems" in the sense set out at Art 38(1)(c) of the *Statute of the International Court of Justice* (1945). That was clearly the approach taken by Gardephe J in the circumstances of *Blue Ridge*.

311 Returning to the terms of the treaty itself, there is nothing in the ICSID Convention suggesting any prohibition on assignment of rights under an award. There is no express provision concerning assignment, and any attempts to read in an implied prohibition to Art 54 would be inconsistent with its ordinary meaning as well as the object and purpose of the Convention. Similar considerations apply with respect to the ECT, and the ECT has no bearing on the issue of recognition and enforcement of an award pursuant to the ICSID Convention.

312 Spain submits that there cannot be an assignment of the rights at the level of international law because of Art 27(1) ICSID Convention which provides that no Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute between one of its nationals and another Contracting State that is subject to ICSID arbitration, "unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute". Spain submits that where, as in the RREEF and Watkins proceedings, there has been a purported assignment and the assignee is a national of a third State, the suspension of diplomatic protection should logically operate in relation to the third State, but Art 27 does not provide for that – it being clear that it is only the parties to the "dispute" and the investor's State that are implicated by Art 27. Spain submits that that is a telling contextual factor that supports the proposition that an award under the Convention cannot be assigned.

313 I am not persuaded by that submission. Diplomatic protection is suspended in relation to the dispute from its inception if the parties "shall have consented to submit or shall have submitted" the dispute to ICSID arbitration. Diplomatic protection is no longer suspended from when the award debtor State "shall have failed to abide by and comply with the award rendered in such dispute". At issue is the assignment of the rights in and in respect of the award. By then, the suspension of diplomatic protection has either already ended or it has nearly ended – the only time remaining being for the award debtor State to abide by and comply with the award before it is properly regarded as having failed to do so. It is hard to imagine what basis there would be for diplomatic protection in that period because the investor would have an award in its favour that the award debtor State had not yet failed to comply with and abide by. If the award has been effectively assigned during that period, then the investor no longer has any need or basis for diplomatic protection and the award debtor State has no need for the suspension of such diplomatic protection. Whether the assignee is entitled to any diplomatic protection, whether before the award debtor State has failed to comply with the award or thereafter, is a matter that falls outside the Convention.

314 In the circumstances, I do not consider that Art 27 ICSID Convention has any bearing on the assignment question.

315 Beyond Art 27, Professor Hindelang observes on diplomatic protection that States are "caught in a complex web of political and legal relationships and constraints" and that they are therefore loath to expose themselves to the risk of a shift in the identity of the State capable of providing that diplomatic protection to the counterparty. That is, the home State of an award creditor may

resort to countermeasures such as asset freezes in order to support its national obtain compliance with an award against an award debtor State. As a practical and political matter, the award debtor State has an interest in knowing from where those countermeasures may originate. I am equally not persuaded by this. Professor Hindelang appears to advance this as a broad consideration which supports a restrictive view of assignability of ICSID awards; however, this factor is too far removed from the immediate operation of the treaty regime suggested by the text analysed above to bear on its interpretation.

316 Insofar as this is said to be expressive of customary international law, some support is drawn from two decisions of ICSID tribunals – however, the decisions comment on limitations to assignment in very different legal contexts and not concerning awards. They concern, respectively, the severability of ICSID claims from ownership of assets (in that claims do not automatically accompany a purchase of the underlying investment) and the ineffectiveness of assignment as a means of curing a lack of jurisdiction to bring an ICSID claim (where a party's home State was not party to the ICSID Convention, so that party sought to assign the claim to its subsidiary in another State which was party to the Convention): cf *Daimler Financial Services AG v Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/1, 31 October 2023) at [144]-[145] and *Mihaly International Corporation v Democratic Socialist Republic of Sri Lanka (Award)* (ICSID Arbitral Tribunal, Case No ARB/00/2, 15 March 2002) at [24].

317 The object and purpose of the Convention would be better served by allowing assignment by award creditors. Recalling that the High Court in *Spain HCA* described the primary object of the Convention as including the mitigation of sovereign risk and provision of legal security (at [40]), it could hardly be the case that assignability would detract from this purpose from the perspective of investors. Assignment to third parties enables award creditors to recover the value of compensation due to them in circumstances where full recovery from award debtor compliance is not feasible or expected to be protracted – circumstances which resemble the present proceedings in light of Spain's potential EU law obstacles to payment: see Gaillard E and Penushliski I, "State Compliance with Investment Awards" (2020) 35(3) *ICSID Review* 540 at 590.

318 Spain also submits that if it has waived its foreign State immunity in proceedings for the enforcement of ICSID awards on the basis found by the High Court in *Spain HCA*, that waiver or submission is only in proceedings brought by the original award debtor and not by an

assignee. Spain submits the rights that are sought to be enforced arising under Arts 53 and 54 ICSID Convention vest only in the award creditor.

319 In truth, that submission is merely another way of saying the same thing. If, as I have found, the ICSID Convention allows, or does not prohibit, the assignment of the rights in an award in either of the way that I have postulated, then, by becoming a Contracting State to the ICSID Convention Spain has waived its foreign State immunity in respect of the enforcement of an ICSID award whether that enforcement is sought by the original award creditor or by a subsequent assignee.

320 Spain submits that that approach is highly problematic and prejudicial to Spain because if Spain pays Blasket, the assignee, under that analysis there would be nothing to stop the RREEF parties, the assignors, from still enforcing the award somewhere else. I do not accept that foreign legal systems are so unsophisticated as to ignore a payment to Blasket as discharging the obligation to the RREEF parties. Under Art 62, all Contracting States to the ICSID Convention are required to make it effective in their territories, with the result that one can expect other Contracting States to recognise payment to the assignee under an assignment that is recognised under the law of another Contracting State as discharge of the obligation. Spain's objection in this respect is not peculiar to assignments. The RREEF parties could have sought enforcement of the award in all ICSID Contracting States. If satisfaction of the award in whole or in part was achieved in one State, that could doubtless be raised in defence to enforcement in another Contracting State. The same is true of the position Spain finds itself in where all the rights in respect of an award have been assigned – if it has paid the assignor prior to receiving notice of the assignment or it has paid the assignee thereafter, it is hard to imagine that that could not be raised in defence to not having to pay twice.

Domestic law

321 Alternatively, the question of assignment can be approached from the perspective of the rights that exist in the domestic law of the forum. As submitted by Blasket, the award in favour of the RREEF parties against Spain could have been enforced in this Court "as if the award were a judgment or order of [the Court]" (s 35(4) IAA). That provision is the fulfilment of Australia's obligation to the other States parties to the ICSID Convention under Art 69 to make the Convention effective in its territory. "The phrase 'as if' contains the command to treat the different as real: the award as a judgment, and the incidents and consequences that flow as if

the award were a judgment": *Spain FCAFC No 3* at [9] per Allsop CJ, Perram and Moshinsky JJ agreeing.

322 Initially, the RREEF parties as the award creditors had that right of enforcement of the award as if it was a judgment (even though it was not). That is to say, on the relevant award being made (and subsequently not subject to any further application for rectification or annulment), there existed rights of enforcement of the award in Australian domestic law. On this limb of the case, there is no dispute that the RREEF parties had that right. The "Assigned Rights" under the deed of assignment are defined sufficiently broadly to include such rights of enforcement, ie "all of the rights, interests and benefits of the Assignors under *or in respect of* the Award" (emphasis added). Under Australian law, the rights of enforcement which pertain to an arbitral award are choses of action capable of being assigned. More specifically, under the law of New South Wales, such property can be assigned under s 12 of the *Conveyancing Act 1919* (NSW) or in equity: see *Austino Wentworthville Pty Ltd v Metroland Australia Ltd* [2013] NSWCA 59; 93 ACSR 297 at [14], [30] and [81] per Barrett JA, Beazley P and Meagher JA agreeing; *Norman v Federal Commissioner of Taxation* [1963] HCA 21; 109 CLR 9 at 27-28 per Windeyer J. With respect to the exercise of federal jurisdiction, s 12 Conveyancing Act is picked up and applied under s 79 *Judiciary Act* as federal law: *Microsoft Corp v PC Club Australia Pty Ltd* [2005] FCA 1522; 148 FCR 310 at [128] per Conti J. As mentioned above, the requirements for a valid assignment are met, and the assignment of the rights of enforcement that exist in domestic law is valid.

323 With reference to this general law, Spain refers to the principle that "the benefit of a contractual obligation cannot be assigned in cases where the identity of the person to whom the obligation is owed is a matter of importance to the person on whom the obligation rests": *Leveraged Equities Ltd v Goodridge* [2011] FCAFC 3; 191 FCR 71 at [362] per Jacobson J, Finkelstein and Stone JJ agreeing, citing ***Tolhurst*** *v Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 KB 660 at 668 per Lord Collins MR. In *Tolhurst*, notwithstanding the general principle of assignability at will, Lord Collins MR contemplated that consent could be required where "there are mutual obligations still to be enforced and where it is impossible to say that the whole consideration has been executed" (at 669). His Lordship referred to "contracts involving special personal qualifications in the contractor", such as a commission for an artist. That is already a very different circumstance from an award rendered in favour of an investor. It is difficult to see how the "character, credit, and substance" or "special personal qualifications" of the assignee to an award would be of much relevance to an award debtor –

the obligation to pay would remain the same. Nor is there anything further for an award creditor or its assignee to "perform" such that Spain would have such an interest. I reject the submission that the rights of enforcement enjoyed by RREEF were of such a personal nature as to not be assignable.

324 Spain's further argument focusses on Art 53 ICSID Convention rather than Art 54. Spain submits that its obligation to abide by and comply with the terms of the award under Art 53 is an obligation that it owes the original award creditors, the RREEF parties, and not the assignee, Blasket, and that the corresponding right cannot be assigned. Even if that analysis is correct and the RREEF parties' rights under Art 53 cannot be assigned, that has no bearing on the analysis at the level of Art 54. As explained, the RREEF parties had the rights of enforcement of the awards under Art 54 and s 35(4) IAA in Australian domestic law and there is no reason why those rights could not be assigned.

325 But in any event, by the operation of s 32 IAA, Spain's obligation (to the RREEF parties) under Art 53(1) to abide by and comply with the terms of the award had domestic legal effect. The RREEF parties were entitled to enforce that obligation in Australia under the domestic statutory law. There is no reason why such a statutory right could not be assigned.

Conclusion

326 For those reasons, I find that the assignments by the RREEF parties and Watkins to Blasket are valid and enforceable and that Blasket is entitled to pursue enforcement of the awards under s 35(4) IAA.

THE BAILIWICK OF JERSEY

Introduction

327 The issue here only arises in the RREEF proceeding, if I am wrong on my findings in relation to investor companies that are nationals of Member States of the EU. In that event, Blasket submits that Spain's arguments do not apply to RREEF Infrastructure (GP) Ltd, which is incorporated under the laws of the Bailiwick of Jersey, as it is not a Member State of the EU. On that basis, Blasket submits that it is entitled to enforce the award in the RREEF proceeding.

328 Jersey is one of the Channel Islands, a British Crown Dependency. The Channel Islands are not part of the UK except to the extent that the UK is responsible for their external relations. They have their own parliaments, laws and courts.

329 Article 355(5)(c) TFEU provides that the foundational treaties of the EU apply to the Channel Islands and the Isle of Man "only to the extent necessary to ensure the implementation of the arrangements for those islands set out in the Treaty concerning the accession of new Member States to the European Economic Community and to the European Atomic Energy Community signed on 22 January 1972". Article 1(1) of Protocol No 3 of the UK Accession Treaty provides that EU rules on "customs matters and quantitative restrictions ... shall apply to the Channel Islands and the Isle of Man under the same conditions as they apply to the United Kingdom".

330 The EU rules on customs matters and quantitative restrictions are now embodied in Arts 28-37 TFEU – in Part 3 Title II "Free Movement of Goods". It is only for the purpose of those provisions of EU law, relating to the free movement of goods, that Jersey and the UK are to be treated as one EU Member State (remembering that the relevant events were pre-Brexit so the UK is to be treated as a Member State). I accept, for the reasons explained by Mr Quigley, that Jersey is not to be treated as an EU Member State for any other purpose and no other provisions of EU law apply to Jersey.

331 Professor Hindelang opines that the application in Jersey of EU rules relating to free movement of goods renders its dispute with the RREEF Jersey company an intra-EU dispute attracting the application of the intra-EU objection because it is sufficient that a tribunal *may* have to apply and interpret EU law. Spain submits that "it would undermine the principle of autonomy for a dispute between a national of Jersey and a member state of the EU to be determined by a tribunal outside the EU system in the same way that that principle would be undermined in relation to a dispute between a national of a member state of the EU strictly so-called and a member state". On that basis, Spain submits that the award in favour of the RREEF Jersey company raises the same conflict in apparent obligations as the other awards in favour of nationals of Member States of the EU.

332 In answer to Blasket's submission that there was no issue of EU law relevant to or applicable in the dispute under the ECT between the RREEF parties and Spain, Spain submits that it is not for tribunals sitting outside of the EU system, "and certainly not for this Court", to decide whether EU law was or was not relevant to the determination of the dispute; "[i]t follows that it is neither here nor there whether Blasket, RREEF Jersey, a tribunal sitting outside the EU system or even this Court think that EU law was or was not relevant to the determination of the dispute between RREEF Jersey and Spain. What matters, and what creates the relevant conflict, is that the CJEU has been denied the ability to decide that issue."

Consideration

333 Mr Quigley explains, with reference to *Iannelli & Volpi SpA v Meroni* (C-74/76) [1977] ECR 557 at [9]-[10], [12], that whatever the scope of the free movement of goods restrictions are under the relevant articles of the TFEU, they do not include obstacles to trade covered by other provisions of the Treaty. Therefore, even if EU law preventing quantitative restrictions on imports and exports is applicable in Jersey, the State aid prohibition in Arts 107-108 TFEU cannot be contained within the scope of free movement of goods and thus are not applicable in Jersey. I accept that analysis.

334 Professor Hindelang refers to *Jersey Produce Marketing Organisation Ltd v States of Jersey* (C-293/02) [2005] ECR I-9543; [2006] All ER (EC) 1126 at [46]-[47] in support of a submission that resolving a dispute between Jersey and Spain may concern the application or interpretation of EU law. However, what was said in that judgment is restricted to the application of the rules on customs matters and quantitative restrictions and not broader questions of EU law such as State aid. The relevant paragraphs are:

> [46] It must be observed, next, that it is stated in Article 1(1) of Protocol No 3 that the Community rules on customs matters and quantitative restrictions are to apply to the Channel Islands and the Isle of Man "under the same conditions as they apply to the United Kingdom".
>
> [47] Such wording suggests that, for the purposes of the application of those Community rules, the United Kingdom and the Islands are, as a rule, to be regarded as a single Member State.

335 The CJEU was not stating as a generally applicable rule that the Channel Islands and the UK are treated as a single Member State outside of this context. Thus disputes not involving the free movement of goods, arising with a claimant or defendant that is incorporated in Jersey cannot be said to be intra-EU disputes. That includes the dispute between the RREEF parties and Spain.

336 As Jersey was not a Member State of the EU, and it was not to be treated as a Member State of the EU save in respect of EU rules concerning the free movement of goods which are not implicated in the dispute between the RREEF parties and Spain, there was no occasion for the application of EU law in that dispute. I reject the submission that only the CJEU can make that assessment. Spain asserts that the relevant dispute falls within the *Achmea/Komstroy* principles. In those circumstances, it is for this Court to make the determination of whether that is so which turns on whether the EU foundational treaties and EU law were required to be applied in that

dispute. They were not, because the dispute did not raise any issue with regard to the EU rules concerning the free movement of goods.

337 For those reasons, if called upon to decide the question, I would find that RREEF Infrastructure (GP) Ltd is not to be treated as a national of an EU Member State in relation to the award in its favour against Spain.

THE CONSTITUTIONAL POINT

Introduction

338 In the NextEra proceeding, Spain raises a constitutional issue as outlined above (at [78(4)] and [79]).

339 The starting point is Spain's submission, in essence, that it did not validly agree to the arbitrations because Art 26 ECT under which it purportedly agreed does not apply to intra-EU disputes. Put differently, it submits that Art 26 was not an offer by it to arbitrate under the ICSID system that was capable of acceptance and thereby create a binding agreement to arbitrate. It then advances the following propositions:

(1) The tribunal's power to quell the dispute between the parties depends on their agreement, usually embodied in a contract; the award is not binding of its own force: ***TCL*** *Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* [2013] HCA 5; 251 CLR 533 at [29] per French CJ and Gageler J quoting *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* [2001] HCA 16; 203 CLR 645 at [31].

(2) A process, as contended for by the applicants, that disentitles the Court when called upon to exercise judicial power to inquire into whether there was an agreement between the parties such as to give the tribunal the requisite power, has the effect of vesting the judicial power of the Commonwealth in the tribunals and the annulment committees which is contrary to Ch III of the *Constitution*: ***Brandy*** *v Human Rights and Equal Opportunity Commission* [1995] HCA 10; 183 CLR 245 at 269-270.

(3) The conclusiveness of an arbitral award does not offend those principles provided that there is an agreement between the parties for their dispute to be determined by arbitration and there is an ability to challenge the tribunal's conclusion that there is such an agreement in a Ch III court: *TCL* at [17] per French CJ and Gageler J.

(4) In order to save Pt IV of the IAA from such constitutional invalidity, it should be interpreted so as to allow the Court under s 35(4), in particular with reference to the use of "may", to inquire into whether there was agreement between the parties to submit their dispute to arbitration: s 15A of the *Acts Interpretation Act 1901* (Cth).

Consideration

340 The starting point is that Spain is a Contracting State to the ICSID Convention, as is Australia. There is no dispute about that. Spain therefore agreed with, relevantly, Australia, that the closed loop ICSID system would apply in relation to it. It thus agreed not to litigate jurisdictional issues – such as whether it concluded an enforceable agreement to arbitrate – in an enforcing court in Australia as those issues are to be determined, by its agreement, in the closed loop system by a tribunal. Therefore, notwithstanding Spain's contention that its agreements to arbitrate with the investors under Art 26 ECT are invalid as a consequence of EU law, for the purposes of proceedings in Australian courts it has waived its foreign State immunity in respect of proceedings for the enforcement of the awards.

341 For that reason, the contention that by the ICSID system the question of whether Spain enjoys foreign State immunity, or whether it has waived it, is removed from the ambit of decision-making by the Court and left in the hands of the ICSID system is a false premise and must fail. It cannot be the case that the tribunal or the Secretary-General has any role with respect to determining if there has been waiver of immunity under Australian law. I reject Spain's contention. This means the answer to question 2(a)(i) of Spain's s 78B notice (extracted at [79] above) is "no".

342 The answer to question 1(a), ie whether "upon the party seeking to recognise or enforce an arbitral award furnishing a copy of it as certified by the Secretary-General" of ICSID the Court is required by Art 54 or s 35(4) to conclude that Spain has waived foreign State immunity, is "no". That is because, as held in *Spain HCA* (as discussed earlier in these reasons), it is Spain's entering into the ICSID Convention that requires the conclusion as to it having waived its immunity, not the presentation of the certified copy of the award. Spain has waived its immunity in a proceeding in which enforcement of an ICSID award is sought. In such a proceeding, an issue to be determined will be whether there is an ICSID award. That issue can be determined with reference to a certificate from the Secretary-General (Arts 49(1) and 54(2)), but the waiver of immunity comes before that.

343 The answer to question 1(b) is "yes". As already canvassed at length in these reasons, Australia as a Contracting State is obligated to give effect to Art 54(1) ICSID Convention, as incorporated into Australian law under s 32 IAA. Section 35(4) is the means by which the enforcement of an award occurs by order of the Federal Court.

344 Turning to question 2, at its core, Spain argues that the jurisdiction conferred on this Court in an application for enforcement under s 35(4) and Art 54 is incompatible with Ch III of the *Constitution*, either because it impairs the institutional integrity of the Court or because it impermissibly vests the judicial power of the Commonwealth in arbitral tribunals. Those are the same arguments that were advanced and rejected in *TCL* albeit that that was in relation to the enforcement of an award under Art 35 Model Law and s 8 IAA with reference to the New York Convention. See *TCL* at [3] per French CJ and Gageler J and [56]-[57] per Hayne, Crennan, Kiefel and Bell JJ. Although the circumstances in which a court may refuse to enforce an ICSID award are far narrower than those under the New York Convention and the Model Law, there are nevertheless a multiplicity of such circumstances. The role of the Court in enforcing an ICSID award is not one of merely rubber-stamping the award in an administrative-type act. There are a number of matters that the Court may have to inquire into and determine depending on what issues are raised by the parties.

345 In relation to the award, the following matters might require determination: Is the award on which the applicant claims really an ICSID award as referred to in Art 53(2)? Is the purported award genuine? Is there a certificate from the Secretary-General as referred to in Arts 49(1) and 54(2)? Is the purported certificate genuine? Has the award been annulled under Art 52? Is the award stayed under Arts 50(2), 51(4) or 52(5)?

346 In relation to the parties, the following matters might require determination: Are the parties to the case the parties to the award? If the applicant is not a party to the award, does the applicant nevertheless have the right to enforce the award because it is the assignee of the rights to do so, or on some other basis? If by assignment, is the assignment valid and enforceable? If the applicant is a party to the award, does the applicant still have the right to enforce the award or has it transferred that right to another party, perhaps by assignment? If by assignment, is the assignment valid and enforceable?

347 In relation to the relief, the following matters might require determination: Is the relief that is sought the right relief as available under s 35(4) and does it enforce "the pecuniary obligations imposed by that award" under Art 54(1)? Has the award already been paid, whether wholly or

in part? What interest, if any, is to apply, both before judgment and thereafter? What costs orders should be made, both on the basis of any costs award by the tribunal and in the enforcement proceeding?

348 In making those determinations and in enforcing the award, or refusing to enforce it, the court is exercising judicial power (*TCL* at [32] per French CJ and Gageler J and [104] per Hayne, Crennan, Kiefel and Bell JJ). In doing so, it quells a controversy between the parties and creates a new charter of rights and obligations expressed in the judgment of the court (*TCL* at [32]-[33] per French CJ and Gageler J). The existence of the multiplicity of circumstances in which a claim for enforcement of an award may fail, and the requirement that the enforcing court inquire into and make determinations in relation to those circumstances (ie "a determination of questions of legal right or legal obligation": *TCL* at [33]), is an entirely appropriate and proper exercise of judicial power; the relative narrowness of those circumstances does not impair the integrity of the court as a Ch III court: *TCL* at [103]-[104].

349 Insofar as Spain's point about delegation of judicial power is concerned, as between Spain and Australia, Spain has agreed that the claims made by the investors, including any question of the validity of the agreement to arbitrate, be determined in the ICSID system. That consensual foundation to the determination of those claims does not result in an unconstitutional delegation of judicial power: *TCL* at [106], [108]. *Brandy* is entirely different because there the exercise of power was not by agreement but by the coercive force of the legislation with the result that it was an unconstitutional delegation of judicial power: *TCL* at [108].

350 The result is that the answers to questions 2(a)(ii) and (b) are "no".

THE EUROPEAN COMMISSION'S APPLICATIONS TO INTERVENE

351 As mentioned, the European Commission applied by interlocutory applications for leave to intervene in all the proceedings pursuant to r 9.12 FCR. It read two affidavits of Leo Flynn, Principal Legal Adviser to the Commission in Brussels, Belgium (at an address in the aptly named Rue de la Loi). The affidavits deal with EU rules in relation to State aid and the Commission's role in relation to the possible contravention of those rules by Spain in the principal proceedings in the event that it pays the awards in these proceedings. By the parties' consent, Mr Flynn's affidavits were taken as read by Spain in the event that the Commission was denied leave to intervene.

352 The Commission also relies on brief written submissions on its intervention which, in two pages, contain the submissions that it makes in the proceedings in the event that leave to intervene is granted. Mr Nick Gallus, who appeared for the Commission on the intervention application, did not seek to make any oral submissions, either on the interlocutory applications or the substantive proceedings. Rather, he was available to answer any questions from the Court if there were any. There were not.

353 The Commission seeks leave to make two submissions:

(1) That Spain's submissions constitute an accurate description of EU law, such that EU law ensures that there was no agreement to arbitrate under the ECT, and any payment of the awards would be illegal State aid.

(2) That the ECT awards are already being investigated as illegal State aid, and any payment by Spain would subject it to significant ongoing fines until the payment was recovered.

354 In addition to those two submissions, the Commission highlights relevant aspects of the CJEU's decision in *European Commission v UK*, which concerned *Micula UKSC* (as discussed above).

355 Under r 9.12(2) FCR, the Court may have regard to the following considerations in determining whether to grant leave to intervene:

> (a) whether the intervener's contribution will be useful and different from the contribution of the parties to the proceeding; and
>
> (b) whether the intervention might unreasonably interfere with the ability of the parties to conduct the proceeding as the parties wish; and
>
> (c) any other matter that the Court considers relevant.

356 Regarding r 9.12(2)(a), the Commission submits that its proposed contribution will be useful and different from the contribution of the parties as its proposed submissions reflect the EU's official position, with the Commission being the external representative of the EU which speaks on its behalf before international and non-EU domestic courts and tribunals. Additionally, it submits that it has additional authority specific to the question of State aid pursuant to Art 108(2) TFEU which grants the Commission exclusive authority to identify illegal State aid and determine its compatibility with EU law.

357 As to r 9.12(2)(b), the Commission submits that it will not unreasonably interfere with the proceedings as its submissions are short and are capable of being addressed by the parties without imposing a significant burden.

358 The Commission raises two further matters supporting its application for leave to intervene. First, it argues that the EU has a substantial interest in the outcome of these proceedings, as they concern (according to the Commission) attempts by EU investors to enforce awards obtained against an EU Member State in contravention of EU law. Second, it notes that the Commission frequently intervenes in proceedings both within the EU and in other countries on matters of State aid, including in many similar arbitration-related proceedings against Spain before the US District Court for the District of Columbia.

359 Spain, in support of the Commission's applications for leave to intervene, states that as the "guardian" of the EU foundational treaties, the Commission is in a better position than Spain to make submissions as to the systemic consequences of the applicants' contentions.

360 The applicants oppose the Commission's applications for leave to intervene.

361 The Commission's first proposed submission merely affirms that Spain's submissions on EU law accord with what the Commission says is the content and effect of EU law. That does not add anything to the case or offer any assistance. In the main, I have not come to a different view on the state of EU law in these reasons; rather, the crux has been the effect of EU law on public international law binding Australia.

362 As to the Commission's second proposed submission about State aid, I accept the applicants' submission that it concerns matters that do not arise at the stage of the proceedings in this Court. As Perram J noted in *Spain FCAFC* at [114], while the questions raised are no doubt interesting, as explained above, they are irrelevant on an application for recognition and enforcement of an arbitral award in circumstances where I have concluded, notwithstanding the identified consequences extant in and arising from EU public law, the Court is bound to give effect to the award in accordance with public international law and Australian domestic law. In any event, the Commission's submission is no different from Spain's.

363 Finally, I have dealt with the *Micula* saga above, including the most recent decision of the CJEU. The Commission's submission adds nothing beyond what Spain has contributed in that regard.

364 In the circumstances, I would dismiss each of the Commission's interlocutory applications to intervene with costs.

CONCLUSION

365 In the result, I find that Spain waived its foreign State immunity in all the proceedings for enforcement of the awards under s 10 Immunities Act. Also, Spain's defences on the merits in all the proceedings fail. There should be judgments in favour of the applicants on each of the awards. As I understand the position (ie without deciding), assuming that no recoveries have otherwise been made, that means that the capital judgments in each proceeding will be:

(1) The RREEF proceedings: €59.6 million

(2) The 9REN proceeding: €41.76 million

(3) The Watkins proceeding: €77 million

(4) The NextEra proceeding: €290.6 million

366 To those amounts there will need to be added pre-judgment interest and costs of the arbitral proceedings where those were ordered.

367 As the applicants have been successful in these proceedings, they should have their costs.

368 I will allow the parties to bring in agreed or competing orders to give effect to these reasons and to deal with any outstanding matters of quantification, interest and costs. If necessary, I will also allow for further submissions to be made on those issues. In the meanwhile, the proceedings should all be listed for case management on a mutually convenient date within a few weeks from the publication of these reasons.

I certify that the preceding three hundred and sixty-eight (368) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Stewart.

Associate: 

Dated: 29 August 2025