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Case No: CL-2021-000481

Neutral Citation Number: [2024] EWHC 82 (Comm)

IN THE MATTER OF THE ARBITRATION (INTERNATIONAL INVESTMENT DISPUTES) ACT 1966

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
COMMERCIAL COURT (KBD)

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 25 January 2024

Before :

LORD JUSTICE FRASER

- -

Between :

(1) OPERAFUND ECO-INVEST SICAV PLC
(a company incorporated in Malta)
(2) SCHWAB HOLDING AG
(a company incorporated in Switzerland)
Claimants

- and –

KINGDOM OF SPAIN
Defendant

JUDGMENT

Lucian Ilie (Instructed by Duane Morris) for the Claimants
Tariq Baloch and Cameron Miles (Instructed by Simmons & Simmons LLP) for the Defendant

Hearing Dates: 4 and 5 December 2024
Draft judgment distributed to parties on 12 January 2024

Lord Justice Fraser:

1. This judgment is in the following parts:
   A. Introduction
   B. Procedural Background
   C. The Issues on the Applications
   D. Part 1: Issues of State Immunity and Jurisdiction
   E. Part 2: Issues of Non-Disclosure
   F. Discussion on Part 2
   G. Conclusions

A. Introduction

2. This is a judgment upon two applications, which are related, and both go to enforceability of the same arbitration award. The first application is by the defendant, the Kingdom of Spain ("Spain") dated 6 January 2023, to set aside an Order of Cockerill J made on 14 September 2021 ("the Registration Order") which registered an arbitration award ("the Award") which the two claimants had obtained following an arbitration against Spain. The Registration Order was amended pursuant to the slip rule but nothing turns on that. The arbitration was one that had been conducted under the Convention which established the International Centre for Settlement of Investment Disputes ("the ICSID Convention"), and I therefore refer to the Award as an ICSID award. This case has remarkable similarities, so far as the basic facts and challenges to the court's jurisdiction are concerned, to another case, also involving registration of a different ICSID award against Spain by two other separate claimants in an entirely separate dispute. That other case was heard by me in March and April 2023 and the judgment in that case is ***(1) Infrastructure Services Luxembourg SARL (2) Energia Termosolar BV v Kingdom of Spain*** [2023] EWHC 1226 (Comm). In that case I dismissed Spain's application to set aside that registration order, finding against it on all its arguments challenging the jurisdiction of the court. I deal with the relevance of that case at [5], and then also [13] and following, below. My first-instance judgment, and its current status as being under appeal, are directly relevant to some of the central issues in the instant case. The second application is by the second claimant and I come to that in more detail at [6] and [15] below.

3. Both the dispute in this case, and the dispute in the earlier different case, arose under the Energy Charter Treaty or ECT. The terms of the ECT were agreed by the European Energy Charter Conference in 1994. The treaty was approved (in its provisional form) on 15 December 1994; Spain signed the ECT, and its accession to the treaty entered into force on 16 April 1998. For completeness I will record that the signatories of the ECT are numerous, and include a great many countries which are now Member States of the EU, and also those who will never be Member States, such as the United States and the Russian Federation. Whether any particular country is a Member State of the EU or not is relevant to some of Spain's arguments on jurisdiction. The ECT expressly incorporated the ICSID Convention as a means of dealing with disputes.

4. Because the Award in question in this case was one made under the ICSID provisions, this means the application to the Commercial Court by the claimants for registration in this case, and the Registration Order itself, were made under the Arbitration (International Investment Disputes) Act 1966 ("the 1966 Act"). Ordinarily, arbitration awards that are more routinely encountered are sought to be registered and enforced in

this jurisdiction under the New York Convention, and therefore the Arbitration Act 1996 ("the 1996 Act") will apply. That is not the case here, and this case is therefore somewhat different. There are many reported cases relating to registration of awards under the New York Convention, but only very few in relation to ICSID awards. The underlying dispute in this case between the claimants and Spain which was referred to arbitration arose under the ECT, and the claimants proceeded to arbitration under the ICSID Convention as permitted and required in that treaty. The Award was made in 2019 and is in excess of €33 million if one takes into account interest, costs and expenses (the latter two being expressed in US dollars). The precise sums are set out in Schedule A to the Registration Order and the amount of damages awarded recorded at paragraph 3 of that order is €29.3 million. Originally damages were also awarded in US dollars, but this was corrected to Euros under the procedure available under the ICSID Convention for such corrections to be made.

5. The application to Cockerill J to register the Award, which is what led to her making the Registration Order, was made *ex parte* by the claimants under CPR Part 62.21(2)(b) and CPR 74.3(2)(b). The Order expressly granted Spain liberty to apply to have it set aside, which is the usual term included in any order that is made without notice to any party. Spain consequently applied to have the whole Order set aside. That application was in January 2023 and was therefore some months before the hearing (and therefore obviously also the judgment) in the ***Infrastructure Services*** case took place. The judgment in that case disposed of the jurisdictional arguments based on state immunity raised by Spain, and found against Spain. Almost identical legal arguments are advanced in this case by Spain as the ones that I dismissed in the ***Infrastructure Services*** case.

6. The terms of the Registration Order in the instant case are also subject to an application before me by the second claimant, Schwab, to have paragraph 2 in particular varied; that application is dated 24 November 2023. That application seems to have been issued by Schwab as part of a tactical move to deal with the fact that the court accepted, in case management terms, that at least some of the arguments Spain was advancing to set aside this Registration Order could not be fairly resolved in advance of the appeal being heard and resolved in the Infrastructure Services case. I will deal with that below.

7. There are two broad areas or grounds upon which Spain seeks to set aside the Registration Order in this case. In outline terms only, the first part is grounds related to Spain's state immunity and the jurisdiction of the court to register the Award at all. The second part is alleged non-disclosure by the claimants in the application for registration that was made to the Commercial Court.

8. The claim for state immunity is broadly based upon lack of jurisdiction both on the part of the ICSID arbitral panel that made the Award, and also the court to register it. The foundations of these arguments are decisions of the Court of Justice of the European Union ("the CJEU") which are said by Spain to be authority, both in the law of the European Union ("the EU") and also international law, to found the absence of jurisdiction. This case therefore raises questions of sovereign immunity, recognition by the High Court of ICSID Convention awards, and the effect and operation of the 1966 Act, including potentially issues of international law. I shall explain the non-disclosure issues in Section E of this judgment below at [48] and following.

9. The judgment in ***(1) Infrastructure Services Luxembourg SARL (2) Energia Termosolar BV v Kingdom of Spain*** [2023] EWHC 1226 Comm, in which Spain challenged the registration of the different ICSID award in that case on broadly the

same grounds as in this case, was handed down on 24 May 2023. I considered all of Spain's arguments of law, both those of international law challenging the jurisdiction of the ICSID tribunal, and those of English law concerning Spain's claim of state immunity, at a four day hearing. In my reserved judgment, I dismissed the application to set aside the registration order, which had also been made by Cockerill J. Spain sought permission to appeal and I refused permission on 25 July 2023, the delay between handing down and the refusal of permission being caused by reasons of availability both of the court and of counsel. Spain had sought permission to appeal against my findings on its jurisdiction arguments, but did not seek permission to appeal my findings on non-disclosure. If that were where the matter had rested, then all of Spain's arguments concerning the same issues in this case would of course have been heard, but given the law is the same as it was in that case, and the arguments were the same, the outcome may well have been the same. This would have led to Spain's application to set aside the Registration Order on jurisdictional grounds being dismissed for the same reasons.

B. Procedural Background

10. However, on 5 October 2023 Spain was successful in obtaining permission to appeal in that earlier case from the Court of Appeal itself, and Males LJ gave Spain permission to appeal on all its grounds (which were broadly the same as those advanced before me). These grounds were those relating to state immunity and jurisdiction. Spain had not sought permission from me to appeal my findings on non-disclosure, and did not seek permission from the single Lord Justice to appeal that part of the judgment either. The appeal in respect of which Males LJ gave permission will be heard by the Full Court in June 2024. This therefore means that there is the prospect that what I decided on Spain's arguments on jurisdiction, and Spain's claim to state immunity to prevent registration, may turn out to be incorrect, and the appeal may succeed. If it does, then the registration order in that case would be set aside on appeal.

11. This means that from October 2023 when the Court of Appeal gave Spain permission to appeal, all the parties in the instant case have known that my judgment on state immunity, jurisdiction and Spain's challenge to the registration of ICSID awards generally is not, in any sense, the end of the matter so far as the Commercial Court is concerned in that potentially difficult legal area. Under the doctrine of *stare decisis*, a first instance judgment is not binding on other judges of the Commercial Court in any event, and mine in that earlier case would only have persuasive status anyway. The decision of the Court of Appeal, however, will bind all the first instance judges in the High Court, and will be applied and followed. Therefore following the judgment of the Court of Appeal in 2024 in the appeal in the ***Infrastructure Services*** case, the position concerning jurisdiction of the ICSID organs, registration of ICSID awards, the Convention and the 1966 Act, and state immunity of Spain generally will be entirely clear and free from any doubt.

12. It was no doubt therefore for this reason that Foxton J, the Judge in Charge of the Commercial Court (he having succeeded Cockerill J in this post) considered that efficient progress in this case had to take account of that pending appeal. He therefore held a case management hearing and heard oral submissions from the parties on 31 October 2023. A transcript is available of that hearing and is in the bundle. His goals were two-fold: to postpone some of the issues in this case, until after Spain's appeal in the ***Infrastructure Services*** case had been decided; and to dispose of some other issues now in this case if that were possible, before that appeal, that were specific to this case.

13. The first claimant, Operafund Eco-Invest SICAV plc ("Operafund"), is domiciled in Malta, which is an EU country. The second claimant, Schwab Holding AG ("Schwab") is domiciled in Switzerland, which is not. Because Switzerland has close links with the EU in some respects, one of Spain's arguments which it had sought to advance in this case (but which had not arisen in the ***Infrastructure Services*** case) was that because of this, Schwab was "caught" by the same EU-specific arguments as an EU-domiciled claimant would be under an ICSID award. It was thought by at least one of the parties – and certainly explained in this way to Foxton J – that whether that contention were right or wrong, this was a question of law and would not be affected by, or dependent upon, the findings of the Court of Appeal in the ***Infrastructure Services*** case. The first part of that explanation is correct; this certainly is a question of law. The second part is not; I will explain this further at [34] and following below.

14. It was therefore considered on 31 October 2023 that this specific matter or issue might potentially be disposed of without waiting for the decision of the Court of Appeal in the ***Infrastructure Services*** case. In that case, the first claimant is domiciled in Luxembourg and the second claimant in the Netherlands, both countries within the EU. For that reason, therefore, Schwab is in a different position to both of them, and also to Operafund, in terms of domicile because it is not within the EU. Spain wished to argue that this made no difference because a Swiss entity – for treaty reasons between Switzerland and the EU - should be treated in the same way as an EU entity.

15. Additionally, Schwab wished to argue that it could proceed individually and separately from Operafund, because (it maintained) it would not be affected by any decisions by the Court of Appeal regarding whether, or if, an EU-domiciled entity were, by reason of that fact, prevented from proceeding in England and Wales from registering an ICSID award against Spain.

16. There are, additionally in this case, arguments concerning alleged non-disclosure by both claimants on their application to register the award. These could potentially be disposed of in this case, well in advance of the appeal hearing in June 2024, so that the parties would know what the answer was in that unrelated group of issues or sub-issues in any event.

17. For all those reasons, there was discussion before Foxton J as to the parties proceeding on a variety of assumptions, namely that Spain would succeed on its state immunity and jurisdiction arguments before the Court of Appeal, and also as to whether assumptions should be made that it would fail on those arguments. The intention was that in this way, once the appeal judgment becomes available in the ***Infrastructure Services*** case, the parties in this case would be able to proceed in a cost-effective and proportionate way in terms of registration of this award. They would at least clearly know where they stood.

18. However, what transpired after the hearing before Foxton J became far more complicated than he could have intended, and it also appeared that he had not been fully informed by the parties as to all the separate and different grounds under which Spain is appealing the earlier judgment in ***Infrastructure Services***.

19. Firstly, there was discussion on 31 October 2023 as to what assumptions the court should make on the outcome of the appeal, and how the issues should be framed. The parties were simply unable to agree the different assumptions, and the different issues. There was some email correspondence with the court following the hearing on 31 October 2023, and also a letter from Spain's instructing solicitors to the court including

a draft order. That order was not in fact made and/or sealed, and the wording of it was not agreed by the claimants. After the case was assigned to me to hear, which was some days before the hearing on 4 and 5 December 2023, through my clerk the parties were asked to agree and provide a list of what they said the issues were to be resolved at the hearing. This was not possible because they could not reach agreement. Therefore no such agreed list – which need not have been a long list, as there were essentially issues in only two areas, jurisdiction/state immunity and non-disclosure – was produced, although the non-disclosure issues were partly agreed. In my judgment, it was particularly important that agreement be reached on the jurisdiction issues and the assumptions, in circumstances where Spain maintained that it had good and valid objections to the jurisdiction of the court based on its state immunity. This is not one of those situations where the court can take two sets of different issues and draft the actual issue or issues itself, and impose them on both parties. This is because, so far as what I term Part 1 is concerned, namely issues of state immunity and jurisdiction, where one party (here Spain) challenges the jurisdiction of the court, that has to be resolved first. The court simply has no jurisdiction to impose issues on Spain for resolution if Spain will not agree to this, unless and until jurisdiction has been decided. The court can, if Spain agreed, resolve questions for the parties in order to assist. But absent that express agreement, I take the view that where Spain is claiming sovereign immunity and until jurisdiction is resolved, that is as far as the court could go.

20. At the hearing itself before me, Mr Baloch for Spain did his best to explain to me what Spain contended the issues and assumptions to be, and this took almost one hour for him to do, by reference to a number of emails, including the draft order provided to Foxton J, and the letters passing between the parties. It is no criticism of him that it took this long – there were a large number of pieces of correspondence, and many different ways of framing these. However, even at the end of that exercise, it was clear that there was no agreement, and no clarity. This was confirmed on the second day of the hearing when, the parties, having again been invited by me at the end of the first day to consider the situation further, produced their own separate issues.

21. Additionally, on 24 November 2023 Schwab had issued its own separate application ("the Schwab application"). This was to vary the second sentence of the Order of Cockerill J in order "to remove the restriction on the Second Claimant [ie Schwab] taking enforcement steps pending the disposal of the Defendant's application to set aside or vary the Registration Order". That was supported by evidence in Part C of the form N244(CC) (the application notice) which was signed by Mr Alexander Geisler of Duane Morris. He had earlier provided a witness statement in conventional form as a separate witness statement (as opposed to an entry in Part C of an application form) dated 27 March 2023 resisting Spain's application to set aside the Registration Order. In that earlier statement, he had expressly stated that he was acting for both claimants and was authorised to make the statement on their behalf. He did not say anything similar in the evidence in Part C of form N244(CC) that he gave supporting the Schwab application.

22. His explanation in the Part C evidence for the application to vary was, essentially, that part of paragraph 2 of the Registration Order must have been included by mistake in the draft Order provided to the court, in error by the claimants' solicitors who had made the registration application (at that point PCB Byrne LLP, a different firm to Duane Morris) and that there was no reason for such an inclusion, and every reason for no such inclusion. Paragraph 2 of the Registration Order stated:

"Within 2 months and 21 days after service of this order, the Respondent may apply to set aside or vary this order. No measures to enforce the Award shall be taken until after the end of that period, or until any application made within that period has been finally disposed of."

The Schwab application sought to remove the second sentence which I have underlined.

23. Mr Geisler in Part C explained that such a passage as the second sentence was standard under registration for an award under the New York Convention and CPR Part 62.18(10)(b); but was not required and was not appropriate under an ICSID award and CPR Part 62.21(5). He therefore asked the court to remove part of the words in the second paragraph, or as he put it "I respectfully ask the Court to remove the Enforcement Restriction, at least insofar as it applies to the Second Claimant". I shall return to this point below. The intention behind this variation was explained to the court by counsel Mr Ilie as permitting Schwab to proceed with enforcement *now*, prior to the appeal in the ***Infrastructure Services*** case being heard and decided.

24. There is another difficulty that arose during the hearing. The two claimants, Operafund and Schwab, issued a joint application to register the Award, and were represented by a single firm of solicitors which sought the Registration Order. That order was then made. Mr Ilie of counsel appearing at the hearing before me told me on the first day (in response to a direct question on the point) that he was acting for Schwab only. This was relevant because one of the points being argued by Spain on the so-called Unitary Award Issue (explained further below at [37]) was that to allow Schwab to proceed with enforcement of the award alone, and without the involvement of Operafund, was contrary to the Award's terms, could have an impact on Operafund, and also that Operafund's position on Schwab's application was unclear. The point was also made that this could potentially be to the financial detriment of Operafund. I had made the observation that there was no notice of discontinuance from Operafund seeking no further involvement in the proceedings, which was a correct observation. Also, in paragraph 39(b) of Spain's skeleton argument, the reference was made to Schwab being "the only Claimant presently before the court". Although this was with reference to the full and frank disclosure point, it is still important, and certainly it appeared to be the case on the first day that Operafund was not present and arguably not represented.

25. However, the position changed by the next day when Mr Ilie told me he was acting for *both* claimants. The exchange on the second day initially confirmed the position of the day before, and was as follows.
"Judge: As I understand it you are appearing both today and yesterday for Schwab?
A: Schwab only, and --
Judge: Schwab only, right."

26. A little later, however, it was necessary to pursue this point a little further.
"Judge: Therefore, on the face of the judgment for today's hearing and yesterday, the correct recitation is that Operafund did not appear and did not make submissions, is that correct?
A: That's correct."

27. However, after Mr Baloch for Spain had observed that the skeleton argument had referred to "claimants" in the plural, it became necessary to pursue the point further.
"Judge: I'm actually looking at a fairly fundamental point, the party for whom you're instructed and for whom you're appearing, and that is, I understand -- I'm just seeking

confirmation -- that is Schwab? Or is that both?
A: I've been instructed to say "both", my Lord.
Judge: It's both?
A: Both.
Judge: Whereas yesterday you appeared to think it was Schwab?
A: My apologies, that was my feeling, my Lord, from my submission.
Judge: So you are appearing for Operafund today then?
A: Apparently, yes."

28. There was no witness statement which clearly stated, on behalf of Operafund, that it either supported the application said to be brought on behalf of Schwab alone, to have the Registration Order altered or varied so that Schwab could proceed with enforcement alone, or if not, what its separate position was. This is not mere pedantry on the part of the court; it is an important procedural point. If the result of an arbitration (as here, explained further below under Part D) is to award a certain amount of money to two claimants, without particularising any split between them, and a defendant or court grants (say) some or even all of that to the second claimant, it rather goes without saying that the portion paid to the second claimant does not also have to be paid by a defendant to the first claimant too. This interpretation of what is a common-sense position is reinforced by section 1(5) of the 1966 Act which clearly states:
"If at the date of the application for registration the pecuniary obligations imposed by the award have been partly satisfied, the award shall be registered only in respect of the balance, and accordingly if those obligations have then been wholly satisfied, the award shall not be registered".

29. The separate position of Operafund must be properly explained to the court. It would be wrong just to make an assumption, in the absence of specific evidence on the point, and in particular given the confusion that appeared to reign at the hearing regarding which party was being represented by counsel, to proceed as though Operafund must consider itself wholly unaffected by any change in the terms of the order to its potential detriment and to the benefit of its co-claimant. If this were the only point that arose on the Schwab application, I would still decline on the evidence before the court to make any order on the Unitary Award Issue. However, as will be seen below, it is not.

C. The Issues on the Applications

30. These can be grouped into two parts. The first part includes challenges to the jurisdiction by Spain based on lack of jurisdiction of the ICSID tribunal and Spain's claim of state immunity. The Schwab application forms part of a sub-set of the first part of the issues, because Spain does not accept that the court has jurisdiction (in any event) to make an order in anything other than the terms of the Award itself. The second part consists of other challenges by Spain to the Registration Order based upon a breach or breaches of the duty of full and frank disclosure by the claimants in the application for registration of the ICSID Award that led to the Registration Order being made.

31. In order properly to consider the way that issues are grouped within Part 1, issues of state immunity and jurisdiction, however, it is convenient here to summarise the issues that are the subject of the appeal in the ***Infrastructure Services*** case. These were helpfully summarised in the list of issues provided by Spain on 5 December 2023, the second day of the hearing, although they could equally usefully be taken from Spain's Grounds of Appeal.

32. This list of issues by Spain stated the following by way of introduction:

> 'The questions of:
> A: whether section 1(1) of the State Immunity Act 1978 ("SIA") applies to proceedings for the registration of an ICSID award under section 1(2) of the Arbitration (International Investment Disputes) 1966 Act ("1966 Act");
> B: whether the ICSID Convention constitutes a submission by the Defendant to the jurisdiction of the English courts under section 2 of the SIA; and
> C: whether the CJEU's decisions disapplying arbitration agreements in the intra-EU context under investment and multilateral investment treaties mean there is no valid arbitration agreement for the purposes of section 9 of the SIA (the "Intra-EU Argument");
> are all the subject of an appeal to the Court of Appeal in ***Infrastructure Services Luxembourg and Energia Termosolar v Kingdom of Spain*** (the "ISL Matter"). These three questions shall hereafter be referred to as the "ISL Issues" '.

33. In very brief outline only, in that case Spain raised a number of arguments concerning lack of jurisdiction on the part of ICSID itself, including (but not limited to) one that turned upon the ***Infrastructure Services*** claimants being domiciled in the EU. That argument, which is listed under "C" in the preceding paragraph (either in whole or in part, depending upon how Spain approaches the phrase "in the intra-EU context" in "C"), was called the "Intra-EU argument". It was sought to be augmented by Spain in the instant case by a further argument that Schwab itself was also affected by the Intra-EU argument, because, although it is not domiciled in the EU, it is domiciled in Switzerland, and Switzerland has treaty relations with the EU. This argument was set out, in summary form, in paragraph 18 of the witness statement made by Dr Stuart Dutson of Simmons & Simmons LLP, Spain's solicitors, in support of setting aside the Registration Order where he stated:

> "Spain's position is that s 9(1) of the SIA [ie the State Immunity Act 1978] nevertheless fails to displace its immunity in respect of Schwab because Schwab is, in any event, subject to EU law. I note that, as a consequence of its agreements with the EU and as a matter of international law, Switzerland benefits from certain EU rights and is therefore governed by EU law on the issues relevant to these proceedings."

34. In paragraph 71 of the same statement he continued "s9 SIA does not apply in the present case. Section 9 SIA will not apply because there was never a valid arbitration agreement between the Claimants and Spain, given that the arbitration clause in the ECT does not apply between EU Member States (including Spain and Malta) and/or as between EU Member States and Switzerland for the reasons outlined at paragraph [18] above". Spain was therefore at that stage attempting to group the impact of what it called "the Intra-EU argument" as also impacting Schwab, notwithstanding that Schwab is Swiss, rather than EU, domiciled. That was the position at the hearing before Foxton J. However, in a letter to the court dated 20 November 2023, Spain's solicitors stated that it no longer intended to pursue the previously held position that Schwab was affected by the Intra-EU Argument. This was because of a pending judgment from the CJEU, namely ***Nord Stream 2 AG v European Union***, and the arguments advanced within that case by the EU. That judgment is still awaited, hence there is no reference for it yet, but the case reference is PCA Case No. 2020-07. The case is between an entity that is a national of Switzerland and the EU, and due to the arguments advanced

by the EU itself in that case, Spain in this case has accepted that it is not tenable to advance any contention that the Intra-EU argument also impacts Schwab.

35. That separate issue (which could have been disposed of now, were it still to be advanced) therefore fell away. The issue therefore became one of whether Schwab could proceed with any action on the ICSID Award on its own, to the exclusion of Operafund – what the parties called the Unitary Award Issue – and whether there had been full and frank disclosure by the claimants on the registration application that led to the Registration Order. However, what the parties failed to grasp, in my judgment, was that the Unitary Award Issue was not the *only* issue within Part 1 concerning jurisdiction and state immunity that would have an impact on Schwab.

D. Part 1: Issues of State Immunity and Jurisdiction

36. The parties were agreed (or seemed to be, at least so far as Operafund and Spain were concerned) that the jurisdictional challenges, including the Intra-EU argument, mounted by Spain in the instant case should not be argued before me in December 2023, and should wait until the decision of the Court of Appeal in the ***Infrastructure Services*** case was known. Schwab did not agree that it was affected by the Intra-EU argument at all, and sought to have the Unitary Award Issue resolved in its favour, which it seemed to believe would mean it could proceed to enforce the Award under the Registration Order.

37. Spain framed the Unitary Award Issue as follows.

> Version 1: Assuming that the Intra-EU Argument succeeds against the First Claimant ("Operafund") and that the Defendant is immune from the Court's adjudicative jurisdiction under s 1(1) of the State Immunity Act in respect of Operafund, whether the ICSID award granting OperaFund and Schwab a single damages sum can be registered in favour of Schwab only, to the exclusion of Operafund.

38. The claimants framed it as follows.

> Version 2: Assuming that the Intra-EU Argument succeeds against the First Claimant ("Operafund") and that the Defendant is immune from the Court's adjudicative jurisdiction under s 1(1) of the State Immunity Act in respect of Operafund, does such immunity extend to Schwab given that the ICSID Award granted Operafund and Schwab a single damages sum (the "Unitary Award Argument")? If not, does the Court have the power to register partially the award in favour of Schwab only (to the exclusion of Operafund) given the Unitary Award Argument? If so, should the Order of Mrs Justice Cockerill dated 14 September 2021 be varied and in what terms?

39. It should be noted that the words in parentheses in the penultimate sentence of Version 2 are "to the exclusion of Operafund". This means that on Version 2, it was accepted that if Schwab could proceed on its own, Operafund would be disadvantaged. The Unitary Award argument is as follows. There was a single arbitration brought by both the claimants against Spain. The Award itself which was dated 6 September 2019 was subject to a dissenting opinion by one of the arbitrators, Professor Sands QC, on liability and quantum, although he agreed with certain of the conclusions of the majority concerning jurisdiction. In paragraph 746 which stated the decision in a section "XIII Decisions", the majority stated "Respondent shall pay damages to Claimants amounting

to USD 29.3 million" and a separate amount in respect of costs which said "Respondent shall reimburse Claimants". The use of the plural "claimants" should be noted. The currency was amended in due course to Euros upon application to the tribunal, but there was nowhere, in any correction or amendment of the award by ICSID or by the Committee after Spain applied to annul the award, *any* differentiation or division performed in respect of dealing with each of the claimants separately so far as the money sum was concerned. Schwab sought to have this court do that, and one of its solutions would have had the effect of dividing (in some way) the sums as being partly awarded or payable to Schwab, and the remainder to Operafund.

40. Both of the two different ways of framing the issues as Version 1 and Version 2 above suffer from the same difficulty. They assume that determination of the appeal in Spain's favour – which appears to be predicated on the Intra-EU argument alone – will lead to some distinction in the position of Operafund on the one hand (because it is domiciled in the EU) and Schwab on the other (domiciled in Switzerland). The versions assume that all the issues on state immunity and jurisdiction would be resolved, one way or other, in this way. However, this assumption is fundamentally flawed in my view.

41. As each of A and B of the ISL Issues set out in [32] above make clear, there are two other grounds upon which Spain has been given permission to appeal. Neither of them would, if Spain succeeds on appeal, affect only a claiming party who is located in a member state of the EU, yet not one who is domiciled in Switzerland. Depending upon the outcome of the appeal, both Operafund and Schwab could potentially be affected (to their detriment, and each in the same way) if Spain succeeds. If Spain has state immunity under the State Immunity Act 1978 because (say) the ICSID tribunal had no jurisdiction, that would clearly affect both Operafund and Schwab. Some of the arguments advanced by Spain in the ***Infrastructure Services*** case, such as those emanating from the ratio of ***Slovak Republic v Achmea BV*** Case C-284/16; ECLI:EU:C:2018:158 (Judgment, Grand Chamber) (*"**Achmea**"*) and the case of ***Republic of Moldova v Komstroy LLC (successor in law to Energoalians)*** Case C-741/19; EU:C:2021:655 (Judgment, Grand Chamber); [2021] 4 WLR 132 ("***Komstroy***") are based on Spain's membership of the EU, rather than a claimant's domicile within the EU. As such, depending upon whether those arguments are accepted by the Court of Appeal and if so how, they could impact Schwab as well as Operafund. But not all Spain's arguments are based on the location or domicile of any claimant.

42. It all depends upon what the Court of Appeal decides, and each of A, B and C in the ISL Issues could be resolved in ways that are not currently anticipated potentially, but which are certainly not covered within either, or indeed any, of the ways in which each set of the issues is framed. One point of considerable – and potentially additional - importance will also be what the Court of Appeal decides on the Intra-EU Argument alone, and it is not possible to anticipate what that will be. Accordingly, proceeding on the Unitary Award Issue now would be wholly academic, and of no practical use or utility to any of the parties, Spain, Operafund or Schwab. It would be an entirely hypothetical exercise.

43. This adds to the problems I have already set out above at [24] to [29] concerning Operafund's position, and the fact that Schwab could potentially benefit by putting itself in a better pecuniary position than Operafund, to its co-claimant's detriment. It would be wrong in procedural terms in any event to determine a point that would impact

Operafund's interests without giving Operafund the opportunity to be heard. The exchanges above I have reproduced at [25] to [27] make it clear that there is at least reasonable doubt that this opportunity was taken. In my judgment, approaching this matter in the hypothetical way sought by the claimants (or by Schwab alone, depending upon one's view) and approaching the different questions or versions posed in a vacuum from the decision of the Court of Appeal in the ***Infrastructure Services*** case is fraught with difficulty. I decline therefore to do so. It would be contrary to the over-riding objective in any event, but it also takes an incorrect view of the jurisdiction of the court, which is currently being challenged by Spain.

44. What therefore needs to happen in this case is that Spain's application of 6 January 2023 to set aside the Registration Order be adjourned, and dealt with once the decision of the Court of Appeal is available in the ***Infrastructure Services*** case. This means that the issues contained in items (i) and (ii) in the Application Notice itself (at CB1906 of the hearing bundle) will be heard and decided with the benefit of the answers to the same points that the Court of Appeal judgment will contain. These are what I have termed, in this judgment, the Part I issues. In order that, after the appeal judgment when the position will become clear, the parties have time to take stock, I will order that an application be made to Commercial Court Listing by the claimants within 21 days of the appeal judgment in ***Infrastructure Services*** being handed down. If, as a result of the appeal judgment, parties such as Schwab are in a *different* position entirely in terms of registering ICSID awards than EU-domicile ones such as Operafund, then the so-called Unitary Award Issue would become relevant and can be addressed. However, it may be that this separate issue may never arise, and in that case it would fall away entirely, and both Operafund and Schwab would remain in an identical position, whatever that position might be. That therefore deals with the arguments advanced by Schwab concerning variation of the Registration Order to give Schwab only, rather than Schwab together with its co-claimant Operafund, the ability to proceed further on enforcing the Award.

45. Essentially, the first sentence of paragraph 2 of the Registration Order is redundant and has been overtaken by the passage of time, as this deals with service (which has happened) and time for Spain to issue an application to set aside (which it has done). The remainder of paragraph 2 must stay in its present form pending the appeal in the ***Infrastructure Services*** case, with one variation to reflect the fact that a further hearing may be required. I propose to vary it by adding "or further order" at the end of the existing paragraph 2.

46. The time estimate for listing that further hearing should be no more than one day at the very most, although it could well take far less time than that. I made certain comments in the ***Infrastructure Services*** case at [163] about lengthy applications of this nature on this type of issue. I observed:

"The entire purpose of the ICSID Convention and the 1966 Act would be undermined if lengthy and complex arguments of the type advanced by Spain in this case were routinely advanced."

47. In that case, the hearing had been set down for, and took, four full days. In the instant case, Spain sought a hearing initially of five days in length. Such a length of hearing will rarely if ever, on my understanding of the law concerning registration of ICSID awards, be required or justified. However, the degree to which lengthy hearings arguing

multiple points of law are suitable and/or will be entertained will become more clear once the Court of Appeal have decided Spain's appeal in ***Infrastructure Services***. Finally on this point, in its skeleton argument Spain purported to "reserve" the right to raise what it calls "merits objections" at a future stage in this case. This rather misses two points. Firstly, a party in the position of Spain has an opportunity to apply to the court to set aside a registration order that is made *ex parte*, but it does not have multiple opportunities to raise multiple grounds for doing so on multiple occasions. No such "merits objections" are identified in the application notice, which has two jurisdiction grounds and three grounds relating to full and frank disclosure. Spain has no ability to "reserve the right" to bring further arguments before the court later, on what it calls "the merits" or otherwise. Secondly, given the nature of international arbitration generally, ICSID awards under the Convention in particular and also the terms of the 1966 Act, I do not consider that there would be any proper basis for such a so-called "merits objections" challenge to registration in any event. That is a point that may arise at the next hearing, if there is one, and if Spain continues to attempt to pursue such an approach.

E. Part 2: Issue of Non-Disclosure

48. I now turn to the second way in which Spain seeks to challenge the Registration Order. This is far more straightforward. This is because Spain did not seek to appeal any of my findings on this subject (which must include the law) in the ***Infrastructure Services*** case, and because Spain also made submissions on it with an express reservation that it was not submitting to the jurisdiction by doing so. It therefore appears that Spain would like to know whether it has any proper basis for this aspect of its case. Spain consented to my resolving this point, so far as Schwab was concerned, on this basis. Further, although the facts of the non-disclosure are not of course the same in this case and the ***Infrastructure Services*** case, the type and extent of non-disclosure argued by Spain is very similar in any event. The law and procedural points raised are certainly the same.

49. There is, however, again, no agreement between the parties on the precise issues. The claimants (and for these purposes it must be assumed that the Day 2 position, namely the second of the positions adopted by Mr Ilie that he was acting for both Operafund and Schwab, is the operative one) wish non-disclosure to be determined against both of them, Operafund and Schwab. Spain maintains that the issue can and should be determined but only in respect of whether Schwab (rather than both claimants) breached its duty of full and frank disclosure. Whether this is a principled distinction, or is being adopted by Spain tactically to attempt to give it a second bite of the cherry in arguing the same matters against Operafund, is not clear. But on the basis that Spain is challenging the jurisdiction of the court generally, that jurisdiction challenge cannot yet be resolved, and jurisdiction must always be dealt with first, it seems to me that I must approach the matter on the basis contended for by Spain. So far as the fact of non-disclosure is concerned, given there was one witness statement lodged for both claimants for the registration, and one further statement (again lodged for both claimants) concerning an extension of time for service and update to the court, and exactly the same non-disclosure is alleged by Spain against both claimants, either both Operafund and Schwab were in breach of the duty of full and frank disclosure, or neither of them was. Therefore Spain's stance on this may make no practical difference overall.

50. Both parties have asked that the issue of non-disclosure be determined on an alternative basis; namely whether Spain succeeds, or fails, on its challenge to jurisdiction which is

to be heard on appeal by the Court of Appeal in June 2024. No issue of non-disclosure would, however, arise if Spain were to succeed on appeal in the ***Infrastructure Services*** case. This is because if it does succeed on appeal, the outcome would mean that the High Court has no jurisdiction over an application to register the Award under the 1966 Act. Whether an applicant has, or has not, complied with the general and important duty fully and frankly to disclose all relevant matters would not therefore arise in those circumstances, and the court would not have jurisdiction to determine such a point.

F. Discussion on Part 2

51. The application for registration was made *ex parte*, as it will almost always be. It should be noted, as Spain points out, that the two claimants made a single application for registration supported by a single, joint, witness statement. Therefore any material non-disclosure in respect of that application would affect both of the claimants equally.

52. The non-disclosure is alleged to have been as follows. Spain describes this as a "significant amount of information" which was not conveyed to the court at the time the Order was made, "and on which Schwab has failed to update the court thereafter". In its written skeleton, Spain maintains the following:

> "By doing so, Schwab has led the Court into error, and allowed that error to be maintained. Had Schwab complied with the obligations it assumed from the outset, the Order would not have been granted, or it would have been discharged prior to the hearing of Spain's application to set aside the Order. For this reason, Schwab's various breaches of its duty of full and frank disclosure justify the Court sanctioning Schwab by setting the Order aside in the usual way in the event that it determines that it has adjudicative jurisdiction over Spain."

53. There are three areas in which Spain alleges the duty was breached.

54. First, it is said that Schwab failed to disclose several significant matters concerning the court's jurisdiction when applying for the Order. In the 1st witness statement of Mr Jonathan Felce dated 9 August 2021, which was served for both Schwab and Operafund, there was a section purporting to discharge the duty of full and frank disclosure. However, Spain maintains that this statement omitted any mention of the legal developments which followed the decision of the CJEU in ***Achmea.*** These included the Advocate General's Opinion in ***Republic of Moldova v Komstroy LLC***. Both of these cases are referred to heavily in the ***Infrastructure Services*** judgment, and are central to the points advanced by Spain as justifying its opposition to jurisdiction and lack of an arbitration agreement. I do not propose to rehearse all those arguments here, but they are dealt with in my ***Infrastructure Services*** judgment between [57] to [63] (for ***Achmea***) and [63] to [66] (for ***Komstroy***). That latter judgment in ***Komstroy*** was not available when the application to register was made, but the Advocate General's Opinion would have been. The ***Komstroy*** judgment was not handed down until 2 September 2021 and could not have been included in Mr Felce's witness statement which was made almost one month earlier.

55. Secondly, Spain maintains that the witness statement of Mr Trevor Mascarenhas which was dated 1 February 2022 and served later "omitted various significant developments from its section on full and frank disclosure, including decisions of the courts of EU

member states declining the enforcement of intra-EU awards". Spain maintains that these legal developments should have been brought to the court's attention here.

56. Thirdly, Spain complains that the applicants for registration, the claimants, failed to draw the court's attention to a particular passage within a particular case. That case is ***Gold Reserve Inc v Bolivarian Republic of Venezuela*** [2016] EWHC 153 (Comm), [2016] 1 WLR 2829. At [67] to [91] in that judgment, Teare J considered similar issues of non-disclosure regarding enforcement of an arbitral award following resolution of a dispute between an investor and Venezuela concerning mining rights and concessions there, which were held by a Canadian company. There was a dispute resolution procedure in place under a Bi-lateral Investment Treaty (or "BIT") between Venezuela and Canada, and because Venezuela was not a signatory to the ICSID Convention the arbitration was conducted under the Additional Facility mechanism. Venezuela had been a party to the ICSID Convention but had denunciated it in accordance with Article 71 in July 2012.

57. In the ***Gold Reserve*** case, the applicant had drawn the court's attention to Venezuela's immunity, but was held to have breached the obligation of full and frank disclosure by failing to draw the court's attention to the arguments that Venezuela would be likely to rely upon in order to maintain that immunity. Teare J said at [71] and [72] the following, in a passage upon which Spain relies:

> "When a judge is faced with an application for permission to enforce an award against a state as if it were a judgment the judge will have to decide whether it is likely that the state will claim state immunity. If that is likely then he would probably not give permission to enforce the award but would instead specify […] that the claim form be served on the state and consider whether it was a proper case for granting permission to serve out of the jurisdiction. He would envisage that there would be an *inter partes* hearing to consider the question of state immunity. For that reason any applicant for permission must draw the court's attention to those matters which would suggest that the state was likely to claim state immunity. Indeed, since the court is required by section 1(2) of the State Immunity Act to give effect to state immunity even though the state does not appear, it is important that the court be informed of the available arguments with regard to state immunity. […]
> [W]here, as here, it was known that Venezuela was continuing to rely upon those arguments and therefore was likely to rely upon state immunity it was incumbent upon the applicant to summarise those arguments for the benefit of the judge. That was the more necessary where the application was on documents alone and the judge might well be considering the application after a busy day in court dealing with other matters."

58. The nature of the non-disclosure in that particular case is clear from [68] of the judgment of Teare J when he stated:

> "[68] With regard to state immunity Mr. Dunning submitted that Mr. Miller, who made the witness statement in support of the application without notice, did not refer to the fact that the arbitration agreement had been disputed in the arbitration or to the fact that

the arbitration agreement was still being disputed by Venezuela in proceedings in Paris and Luxembourg. In the result it was said that the court was not alerted to the fact that there was a substantial and continuing dispute concerning the agreement to arbitrate."

59. Spain relies upon this passage heavily and considers it to be instructive. It submits that the passage provides guidance for the court (in effect, any court) when dealing with state immunity and states that "where it appears likely that a state will rely on its immunity before the Court, the Court should make no *ex parte* order, but instead "envisage that there would be an *inter partes* hearing to consider the question of state immunity". In other words, Spain maintains that by failing to draw the specific terms of [71] of ***Gold Reserve*** to the court on the registration application, the court adopted the wrong procedure entirely. It is also said that by reason of the non-disclosure, the court was presented with a partial and incomplete picture of Spain's objections to the registration of the Award. It contends that had the necessary disclosure been given, the Registration Order may not have been made at all.

60. Spain also draws a number of other authorities on non-disclosure to my attention, such as ***Siporex Trade SA v Comdel Commodities Ltd*** [1986] 2 Lloyds Rep 428, ***L & Ors*** *v* ***Y Regional Government of X*** [2015] EWHC 68 (Comm), [2015] 1 WLR 3948. They are, more or less, different ways of emphasising the nature and scope of the duty of full and frank disclosure. They are well known and it is not necessary to recite them.

61. I accept that there was a co-existent duty of full and frank disclosure on the part of each of the claimants. They purported to comply with it, as can be seen from the fact that the first witness statement of Mr Felce expressly includes a section accepting that the duty exists (at his paragraph 53) and then over a number of pages in which he sought to comply with it. The existence of the duty is not in doubt, and to be fair to the claimants, their position accepts that such a duty was present, and it was complied with.

62. An identical complaint, in terms of procedure, namely the use of an *ex parte* application, and the importance of the dicta of Teare J in ***Gold Reserve***, was made by Spain in the ***Infrastructure Services*** case. In that case I observed at [144] and following:

"[144] There is nothing of substance in the complaint that the Order was made *ex parte* without the judge convening an *inter partes* hearing to consider and determine Spain's challenges to jurisdiction and/or claim of state immunity. This is because CPR Part 62.21 contains a specific regime for registration of ICSID awards. This is headed "Registration of awards under the Arbitration (International Investment Disputes) Act 1966". Teare J was considering the procedure under CPR 62.18 as made clear at [54] in his judgment where he sets this out. That is a different rule.

[145] The Practice Direction to CPR Part 62 does not deal specifically with whether an order recognising an award under the ICSID Convention should, or should not, be determined without a hearing in the first instance, but it does state in the commentary in the White Book on PD62(1) that:
"It is not necessary for a party seeking to enforce an award against a state under this provision to issue a claim form; it suffices to issue a without notice application, and the state is then able to apply to set aside any order made against it."

[146] That entry in the commentary supports the approach adopted by the claimants in this case. As observed by Jacobs J in ***Unión Fenosa v Egypt*** [2020] EWHC 1723

(Comm)..…. there have been very few reported cases on recognition of ICSID awards. At [59] he stated:

"Indeed, even though the procedure for registering awards under the 1966 Act has now been in place for over 50 years, there is no reported example of an application for registration coming before the court initially on an ordinary *inter partes* application under Part 8 or its equivalent under the rules of the Supreme Court. If there is to be a contested application, then it would be expected to arise on an application to set aside the without notice order."

[147] The Commercial Court Guide states in its 11th edition that such an order "may be made without a hearing" in section O.11. Further, this supports not only the approach in the commentary, but also that suggested by Jacobs J in the ***Fenosa*** case."

63. In the ***Fenosa*** case, the investor had obtained an award in an arbitration conducted pursuant to the ICSID Convention against the state of Egypt. The investor applied without notice under CPR Part 62.21 for registration of it, and CPR Part 62.21(3) provided that such an application for an ICSID Convention award had to be made "in accordance with the Part 8 procedure". Males J (as he then was) made an order granting permission to register the award, but a dispute arose as to whether, in addition to serving the order of Males J, the investor ought also to have served the Part 8 claim form on Egypt. On a without notice application by the investor, Teare J granted a declaration that service of the claim form was not required; Egypt applied to set aside that order, and contended that Part 8 applied to the application to register the ICSID Convention award. Egypt argued that the claim form ought to have been, and was required to be, served on the foreign state, and that the wrong procedure had been followed.

64. Jacobs J held that the claim form did not require to be served, and refused the application. He did so for three reasons. Firstly, it was not required on a proper construction of CPR Part 62.21. Secondly, requiring service of a Part 8 claim form would be inconsistent with the regime for registration incorporated in CPR Part 62.21 and CPR Part 74.6, which required service only of the order made on registration. Thirdly, he observed that it would be surprising if this were required, as it was not required under New York Convention awards unless the court so ordered, and the defences against enforcement under the New York Convention were far wider in scope than for ICSID Convention awards. He also found that CPR Part 8, for these purposes, had to be read consistently with CPR Part 62.21, and this latter rule modified or disapplied elements of Part 8 as they applied to applications to have an ICSID award registered, such that such an application could be made without notice. In summary therefore, his decision is consistent with the use of the *ex parte* procedure in the instant case, and inconsistent with any suggestion that the rules ought to be read differently.

65. Indeed, given ICSID awards will usually be against foreign states when it comes to registration under the 1966 Act, Spain's arguments relating to ***Gold Reserve*** amount to maintaining that there should be a wholesale disapplication of the existing rules if a claimant/applicant were to consider that there was a risk of a defendant state asserting immunity or challenging jurisdiction. I do not consider the submission made by Spain that I have reproduced at [57] above, that if immunity is thought of as being potentially something that a state will rely upon, an *inter partes* hearing should invariably be held, to be a good one. Nor do I consider that in this case this was not done because of some non-disclosure.

66. Such an approach would not be consistent with existing procedure as set out in the CPR, and indeed would be inconsistent with it, and it would be inconsistent with the Practice Direction. It would also, in my judgment, be contrary to the ethos of recognition of international arbitration awards and the purpose of the 1966 Act. I observed the following on the same point in ***Infrastructure Services***:

"[158]…..the making of the Order in the way adopted here (and in other cases) gives any respondent a chance to consider, take advice specific to this jurisdiction, and then reflect upon whether it will challenge the order, and if so, on what grounds. If *inter partes* hearings were to be required as a matter of routine (or irregular routine, given how seldom ICSID awards are brought before the courts), the utility of having an arbitral award recognised by the courts will be undermined, and the efficient dispatch of court business would be damaged. In my judgment (and putting to one side the existing procedural rules), declining to have made the Order on the usual *ex parte* basis and instead listing the matter for an *inter partes* hearing – which as experience of this case shows, would have required four court days, according to the parties, inevitably some way in the future - would not have been in accordance with the overriding objective, still less in accordance with both the terms and ethos of the 1966 Act and the ICSID Convention itself."

67. That remains my view on the ***Gold Reserve*** point. It must be remembered that the non-disclosure in that case was marked. Venezuela had consistently in that dispute challenged jurisdiction, including in the arbitration. This was simply not mentioned at all in the supporting evidence for the order; it was entirely ignored, and kept from the court. It was simply not disclosed. That is not the case here at all (nor was it the case in the ***Infrastructure Services*** case either). Finally, but in any event, the judgment in ***Gold Reserve*** in fact *was* expressly referred to in Mr Felce's witness statement, as was – very clearly – the point that Spain "may submit that this application should be dismissed as it is immune from the jurisdiction of this court, pursuant to section 1 of the 1978 Act". The arguments advanced by Spain in this case based on ***Gold Reserve*** are not good ones. They seek to elevate some of the observations of Teare J in that case to a status which is not justified, added to which that case did not in any event concern registration of an ICSID award such as the one in this case. Further, that case is now seven years old. It must be thought that if the Rules Committee agreed with it, the rules themselves and the Practice Direction would have been changed by now. The fact that the rules have not been changed should tell Spain all it needs to know on this point; namely that it is not a good argument.

68. The submission by Spain that there was no mention of the legal developments which followed the decision of the CJEU in ***Achmea,*** including the Advocate General's Opinion in ***Republic of Moldova v Komstroy LLC*** and by extension given the date of Mr Mascarenhas' witness statement dated 1 February 2022, this must include the judgment in ***Komstroy***, is not a good point either. All those numerous decisions did was reinforce the ratio of ***Achmea*** and apply its reasoning entirely consistently from that case across to others within the EU, including in ***Komstroy*** a case that specifically included the Energy Charter Treaty or ECT (remembering that ***Achmea*** concerned a BIT). But ***Komstroy*** did not change the argument, or raise additional points. All it did was apply the same ratio to different factual circumstances. The central thrust of all of the arguments mounted by Spain on jurisdiction start (and perhaps finish) with the supposed incompatibility of *any* arbitration provisions binding a Member State of the EU, due to the decisions of the CJEU on competency and supremacy. Whether that is

a good argument or not will be resolved at the appeal to come later in 2024, but it is no different because one, five or ten decisions of the CJEU say the same thing.

69. Yet further, Mr Felce drew the court's attention specifically to the application by Spain to annul the award which had been made to the Ad Hoc Committee of ICSID, and he set out at paragraph 69 of his witness statement the arguments that had been advanced, and that the EC (as he put it, meaning the European Commission) had been given permission to intervene in that annulment application as a non-disputing party. Mr Felce explained that the arguments being deployed by Spain included specific reference to the decision in ***Achmea*** at paragraph 69.1.1.2 of his statement, and he also said that one of the EU law arguments being advanced was "in the event of a conflict between the ECT and EU law, the primacy of EU law over the Respondent's obligations under the ECT." That neatly summarises the argument that prevailed in the EU courts in ***Komstroy*** and all the other cases. As a single example only, the Attorney General's opinion in ***Komstroy*** is no different either. All of these materials go to the same point, in essence.

70. The summary of this part of the challenge to registration by Spain is as follows. There are numerous references by the claimants in the witness statements lodged with the court to support the application to register the Award, including that of Mr Mascarenhas, to the arguments that the claimants anticipated Spain would raise (and which it has raised). Reference was made to material in the arbitration, including the Petition of its Memorial on Annulment by Spain, its Reply Memorial and its Opening Statement for the annulment hearing which took place before the Ad Hoc Committee. As a matter of fact in this case, on the evidence before me there was no breach of the duty of full and frank disclosure in the material lodged before the court which led Cockerill J to make the Registration Order.

71. Mr Mascarenhas' statement was served to support an application for an extension of time in which to serve the claim form out of the jurisdiction, and to update the court in respect of the obligation of full and frank disclosure. At paragraphs 44 to 61 of that statement he set out various legal developments, including the decision of the Committee of ICSID on the award which became the subject of the ***Infrastructure Services*** case (then called Antin Infrastructure Services). Although the witness statement referred to the ***Komstroy*** case by a different name – by the first part of the case name, Moldova, rather than the second part, Komstroy – it was the same case and he explained what had been decided over a number of paragraphs in his evidence to the court.

72. There was, in my judgment, no breach of the duty of full and frank disclosure in the material lodged with the court to support the application, and the succeeding material. That conclusion can and does plainly apply to the same non-disclosure alleged by Spain in the same witness statement supporting its application to set aside registration, when all of these matters were raised against both Schwab (as they are advanced now) but also Operafund too.

73. If that were the sole basis upon which Spain sought to set aside the Registration Order, that would be the end of the matter and the Order would remain. However, given the issues upon what I have called Part I, any further conclusion on Spain's application to set aside the Order must wait.

74. There are no grounds, in my judgment, for Spain to succeed in its application to set aside the Registration Order on the basis that there was any breach of the duty upon the claimants of full and frank disclosure either in Mr Felce's witness statement and/or that of Mr Mascarenhas. The parties wanted the answer to the full and frank disclosure grounds on the assumption that Spain succeeded in its appeal on jurisdictional grounds in the ***Infrastructure Services*** case; and also on the assumption that it failed in its appeal. I shall deal with them in reverse order to be clear. Were Spain to *fail* in its appeal on jurisdictional grounds in the ***Infrastructure Services*** case – and by extension therefore fail on those same arguments in this case – it would not succeed in setting aside the Registration Order on the grounds of breach of the duty of full and frank disclosure, as there was no breach of this duty in the totality of the material lodged with the court both for the making of the order initially, and then the extension of time granted for service. All relevant matters were fully and frankly disclosed to the court. Were Spain to *succeed* in its appeal on jurisdictional grounds in the ***Infrastructure Services*** case – and therefore similarly succeed on those same arguments in this case such that Spain would establish that the court had no jurisdiction to make the Registration Order - then Spain would be entitled to have the Registration Order set aside on the jurisdictional ground. Non-disclosure would not arise and the court would not ordinarily need or choose to determine alleged breaches, and it would not have jurisdiction to do so.

G. Conclusion

75. This is an unhappy case. The establishment of ICSID itself in 1966 as an international institution enshrined an agreement between states which took into account the need for international cooperation for economic development, and the role that private investment had in that activity. The disputes that can potentially arise between individuals or companies who have privately invested in other states, had the benefit of international settlement by way of arbitration under the ICSID Convention available to them. The whole purpose of the Convention, and of arbitration under it, was to avoid the risk of lengthy enforcement proceedings against states by parties that had succeeded in establishing awards in their favour. Whether, and if, these purposes can still be achieved under the 1966 Act in England and Wales concerning awards against Member States of the EU is a matter that will be decided by the Court of Appeal in the summer of 2024 when it decides Spain's appeal in the ***Infrastructure Services*** case.

76. Until then, the Registration Order made on 14 September 2021, itself a long time ago, in relation to an Award from 2019, remains as it was (with the small variation of "until further order" as explained above at [45]). This is because Spain's application to set it aside cannot properly be resolved until that appeal on the same issues in the other case has been heard. My explanation in [44] above concerning the mechanics of what is to occur after the ***Infrastructures Services*** appeal has been decided will have to be recorded in an order, as will any order made on any consequential matters.