Neutral Citation Number: [2024] EWHC 58 (Comm)

Case No: CL-2021-000541

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, WC4A 1NL

Date: 19 January 2024

Before :

MRS JUSTICE DIAS DBE

- -

Between :

(1) Border Timbers Limited
(2) Hangani Development Co. (Private) Limited

Claimants

- and -

Republic of Zimbabwe

Defendant

- -
- -

Christopher Harris KC and **Rumen Cholakov** (instructed by **Baker & McKenzie LLP**) for the Claimants
Salim Moollan KC, Benedict Tompkins and **Andris Rudzitis** (instructed by **Gresham Legal**) for the Defendant

Hearing dates: 31 October, 1 November 2023

- -

Mrs Justice Dias DBE:

INTRODUCTION

1. The matter before me arises out of an arbitration award dated 28 July 2015 made under the auspices of the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"). The arbitration in question was brought by the Claimants against the Defendant, the Republic of Zimbabwe ("Zimbabwe") and related to the alleged expropriation of the Claimants' land in Zimbabwe. By the award, Zimbabwe was ordered to pay to the Claimants some US$124 million plus interest, together with a further US$1 million in moral damages and costs.

2. Zimbabwe applied to have the award annulled by means of a process provided for in the ICSID Convention itself. That application was dismissed by the ICSID annulment committee on 21 November 2018 with further costs ordered to be paid by Zimbabwe. The award was not satisfied and on 15 September 2021, the Claimants applied to the English court without notice under CPR Part 62.21 for registration and entry of judgment on the award in England pursuant to section 2 of the Arbitration (International Investment Disputes) Act 1966 (the "1966 Act"). That application was granted by Mrs Justice Cockerill on 8 October 2021, who ordered that the award be recognised and entered as a judgment by the High Court in the same manner and with the same force and effect as if it were a final judgment of this court.

3. Cockerill J's order was served on Zimbabwe on 27 May 2022. On 25 July 2022, Zimbabwe applied to set it aside on the grounds that Zimbabwe was immune from the jurisdiction of the UK courts by virtue of section 1(1) of the State

Immunity Act 1978. In response, the Claimants argued that Zimbabwe fell within one or both of the exceptions to immunity set out in sections 2 and 9 of the 1978 Act on the basis that it had submitted to the jurisdiction by virtue of its agreement to the ICSID Convention and/or had agreed to submit the underlying dispute to ICSID arbitration and so was not immune in respect of proceedings in the United Kingdom relating to that arbitration.

4. In these circumstances, it was directed by Jacobs J on 27 January 2023 that the following preliminary issues (in essence) be determined in advance:

   (a) Whether Zimbabwe was entitled to claim state immunity in relation to these proceedings;

   (b) Whether Zimbabwe had waived such immunity under section 2 of the State Immunity Act by operation of the ICSID Convention;

   (c) Whether the English court was bound for the purposes of section 9 of the State Immunity Act by the determination of the ICSID tribunal and the annulment committee as to the jurisdiction of the tribunal;

   (d) Whether Cockerill J's order should in any event be set aside for breach of the Claimants' duty of full and frank disclosure in failing to draw the attention of the judge in the without notice application to potential arguments on state immunity and/or in failing to establish any legal basis for an exception to immunity.

5. This is the hearing of those issues.

6. I mention one point at the outset in order to dispose of it. On behalf of the Claimants, Mr Christopher Harris KC made much of the fact that Zimbabwe had participated fully in the ICSID arbitration but had failed in its defence before a vastly experienced tribunal. Its attempt to have the award annulled had likewise failed on all points, yet it was now resisting enforcement of the award on substantially the same grounds as had been advanced and rejected previously (albeit with the addition of one further ground). He observed that it was now 10 years since the original award was issued and the Claimants were still no closer to receiving the damages awarded to them.

7. I have no doubt that this protracted chronology is a source of immense frustration to the Claimants and that in their eyes the present application is no more than a further attempt by Zimbabwe to frustrate and obstruct the enforcement of the award so as to avoid having to meet its obligations. Whether true or not, however, it is irrelevant to the question I have to decide, which is whether Zimbabwe is entitled to have Cockerill J's order set aside on the grounds asserted or not.

THE LEGISLATIVE FRAMEWORK

State Immunity Act 1978

8. The starting point is the State Immunity Act 1978. Prior to 1978, England was almost alone in continuing to adopt a pure, absolute doctrine of state immunity in all cases: *I Congreso del Partido,* [1983] AC 244 at 261. Any waiver had to be declared in the face of the court, for example by pleading a defence to a claim: *Mighell v Sultan of Johore,* [1894] 1 QB 149. Moreover, an agreement

to arbitrate did not amount to a submission to the jurisdiction: *Duff Development Co. Ltd v Government of Kelantan,* [1924] AC 797.

9. The common law rules were, however, replaced and restated in the 1978 Act which provides in material part as follows:

> *"**1. General immunity from jurisdiction***
>
> *(1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.*
>
> *(2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question.*
>
> ***2. Submission to jurisdiction***
>
> *(1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom.*
>
> *(2) A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement; but a provision in any agreement that it is to be governed by the law of the United Kingdom is not to be regarded as a submission.*
>
> *(3) A State is deemed to have submitted –*
>
> *(a) if it has instituted the proceedings; or*
>
> *(b) subject to subsections (4) and (5) below, if it has intervened or taken any step in the proceedings.*
>
> *(4) Subsection (3)(b) above does not apply to intervention or any step taken for the purpose only of:*
>
> *(a) claiming immunity; or*
>
> *(b) asserting an interest in property in circumstances such that the State would have been entitled to immunity if the proceedings had been brought against it.*
>
> *(5) Subsection (3)(b) above does not apply to any step taken by the State in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained and immunity is claimed as soon as reasonably practicable.*
>
> *(6) A submission in respect of any proceedings extends to any appeal but not to any counter-claim unless it arises out of the same legal relationship or facts as the claim.*

…

9. Arbitrations

(1) Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration.

(2) This section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between States.

…

13. Other procedural privileges

…

(2) Subject to subsections (3) and (4) below –

(a) relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property; and

(b) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem*, for its arrest, detention or sale.*

…

(3) Subsections (2) and (2A) above do not prevent the giving of any relief or the issue of any process with the written consent of the State concerned; and any such consent (which may be contained in a prior agreement) may be expressed so as to apply to a limited extent or generally; but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection.

…

17. Interpretation of Part I

…

(2) In sections 2(2) and 13(3) above references to an agreement include references to a treaty, convention or other international agreement.

…"

10. The following were common ground before me:

(a) The default position under the 1978 Act is that a foreign state is entitled to blanket immunity from the jurisdiction of the UK courts except as provided in Part I of the Act.

(b) The Act is a complete code, and a state is therefore immune unless one of the exceptions applies: *Benkharbouche v Embassy of the Republic of Sudan*, [2017] UKSC 62; [2019] AC 777 at [39].

(c) The applicant bears the burden of proving the application of an exception on the balance of probabilities: *Al Masarir v Saudi Arabia*, [2022] EWHC 2199 (QB); [2022] PIQR P3 at [8].

(d) The court is bound to give effect to any sovereign immunity of its own motion; the point cannot escape scrutiny *sub silentio*.

The ICSID Convention

11. The Preamble to the ICSID Convention provides as follows:

> *"**Preamble***
>
> ***The Contracting States***
>
> ***Considering** the need for international cooperation for economic development, and the role of private international investment therein;*
>
> ***Bearing in mind** the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States*
>
> ***Recognizing** that while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases;*
>
> ***Attaching particular importance** to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire;*

Desiring *to establish such facilities under the auspices of the International Bank for Reconstruction and Development;*

Recognizing *that mutual consent by the parties to submit such disputes to conciliation or to arbitration through such facilities constitutes a binding agreement which requires in particular that due consideration be given to any recommendation of conciliators, and that any arbitral award be complied with; and*

Declaring *that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration,*

Have agreed *as follows…"*

12. Chapter I of the Convention establishes the structures and organs of ICSID, while Chapter II defines its jurisdiction. It is clear from these provisions that the Convention does not itself constitute an agreement to arbitrate but merely provides a framework for the resolution of such disputes as the parties may agree in writing to submit to ICSID. A separate agreement to arbitrate is therefore required, commonly to be found (as in this case) in a Bilateral Investment Treaty between two states.

13. Article 27 of Chapter II provides that no Contracting State shall give diplomatic protection or bring an international claim in respect of a dispute which has been submitted to ICSID arbitration unless the other Contracting State has failed to comply with the award.

14. Chapter III deals with conciliation while Chapter IV covers the processes and procedures for arbitration. The following provisions lie at the heart of this application and I set them out in full:

*"**Article 41***

(1) The Tribunal shall be the judge of its own competence.

…

Section 5

Interpretation, Revision and Annulment of the Award

…

Article 52

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

…

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

…

(3) On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators and ad hoc *Committee of three persons. None of the members of the Committee shall have been a member of the Tribunal which rendered the award, shall be of the same nationality as any such member, shall be a national of the State party to the dispute or of the State whose national is a party to the dispute, shall have been designated to the Panel of Arbitrators by either of those States, or shall have acted as a conciliator in the same dispute. The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1).*

…

(5) The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision…

…

Section 6

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…

(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 the 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."

The Arbitration (International Investment Disputes) Act 1966

15. This is the statute by which the ICSID Convention was implemented in English law. It was therefore common ground before me that it must be interpreted in the context of the ICSID Convention and that the presumed intention of parliament was to comply with the United Kingdom's treaty obligations thereunder. It is nonetheless important to note that although the Convention is scheduled to the Act, that does *not* mean that it is itself a part of English law. On the contrary, it is trite law that international treaties do not have direct effect in English law save to the extent that they are specifically enacted or incorporated.[1] The position is simply that the statute will be construed in a way which is consonant with the Convention and, so far as possible, with the United

[1] Specific provisions of the ICSID Convention were in fact directly incorporated into English law by the 1966 Act, but not the Convention as a whole.

Kingdom's other international obligations, including those relating to state immunity.

16. The relevant provisions of the 1966 Act are as follows:

> *"**1. Registration of Convention awards***
>
> *(1) This section has effect as respects awards rendered pursuant to the [ICSID Convention]…*
>
> *(2) A person seeking recognition or enforcement of such an award shall be entitled to have the award registered in the High Court subject to proof of the prescribed matters and to the other provisions of this Act.*
>
> *…*
>
> *(4) In addition to the pecuniary obligations imposed by the award, the award shall be registered for the reasonable costs of and incidental to registration.*
>
> *…*
>
> *(6) The power to make rules of court under section 84 of the Senior Courts Act 1981 shall include power –*
>
> *(a) to prescribe the procedure for applying for registration under this section, and to require an applicant to give prior notice of his intention to other parties,*
>
> *(b) to prescribe the matters to be proved on the application and the manner of proof, and in particular to require the applicant to furnish a copy of the award certified pursuant to the Convention,*
>
> *(c) to provide for the service of notice of registration of the award by the applicant on other parties,*
>
> *and in this and the next following section "prescribed" means prescribed by rules of court.*
>
> *(7) For the purposes of this and the next following section –*
>
> *(a) "award" shall include any decision interpreting, revising or annulling an award, being a decision pursuant to the Convention, and any decision as to costs which under the Convention is to form part of the award.*
>
> *…*
>
> ***2. Effect of registration***

> *(1) Subject to the provisions of this Act, an award registered under section 1 above shall, as respects the pecuniary obligations which it imposes, be of the same force and effect for the purposes of execution as if it had been a judgment of the High Court given when the award was rendered pursuant to the Convention and entered on the date of registration under this Act, and, so far as relates to such pecuniary obligations –*
>
> *(a) proceedings may be taken on the award,*
>
> *(b) the sum for which the award is registered shall carry interest,*
>
> *(c) the High Court shall have the same control over the execution of the award,*
>
> *as if the award had been such a judgment of the High Court."*

THE ISSUES

17. As already indicated, the Claimants rely on either or both of the exceptions to immunity set out in sections 2 and 9 of the State Immunity Act. So far as section 2 is concerned, they submit that the provisions of the ICSID Convention, in particular Article 54, amount to a prior written agreement submitting to the jurisdiction of the English courts for the purposes of enforcement of any award. Alternatively, the Claimants argue that Zimbabwe agreed to submit the dispute to arbitration within the meaning of section 9 and that although Zimbabwe argued before the tribunal and the annulment committee that the particular dispute did not fall within the scope of the relevant arbitration agreement, the tribunal's decision (upheld by the annulment committee) that it did have jurisdiction is final and binding on the English court.

18. These are deep waters. It is only in the last few years that the relationship between ICSID and state immunity has begun to be explored and I was referred to a number of recent judgments touching on the point, both English and from other common law jurisdictions. The latest contribution is the comprehensive

and impressive judgment of Mr Justice Fraser (as he then was) in *Infrastructure Services Luxembourg Sarl v Spain*, [2023] EWHC 1226 (Comm).

19. All of these cases were subjected to minute scrutiny before me and their reasoning either applauded or disparaged as best suited each party. It is fair to say that the legislative context in which the various foreign judgments were delivered is not the same as that which pertains in the United Kingdom. Nor were the issues which arose in each case necessarily identical to those raised by this application.

20. In particular, none of the English cases to date appears to have considered the ramifications of the Claimants' arguments for awards which fall to be enforced under the 1958 New York Convention. So far as I am aware, it has not hitherto been argued that a state is precluded from claiming sovereign immunity in relation to the recognition and enforcement of an award under the New York Convention. Yet if the Claimants are right that state immunity is lost by virtue of the obligation in Article 54 to recognise an ICSID award as binding and enforce it as if it were a final judgment of a national court, the same consequence must logically flow from the materially identical obligation in Article III of the New York Convention to recognise an award as binding and enforce it in accordance with the rules of procedure of the relevant country. Indeed, this is precisely the consequence which has been held to follow in two recent decisions in Australia and the USA respectively.

21. This would represent a seismic development so far as non-ICSID awards are concerned, and I was not persuaded by Mr Harris' argument that New York Convention awards could be distinguished on the grounds that recognition and

enforcement were subjected to the procedural laws of the enforcing state and that state immunity was to be regarded as a procedural matter. On the contrary, the blanket immunity provided for in section 1 of the State Immunity Act confirms that state immunity is very much more than a matter of mere procedure, being a substantive bar to proceedings where it applies. It is procedural only in the sense that the court must dismiss a claim in respect of which a state can claim immunity without adjudicating on the merits: see *Benkharbouche v Embassy of the Republic of Sudan (supra)* at [18]. I cannot therefore accept that the mere reference to procedural laws has the effect of preserving state immunity for the purposes of the New York Convention when it would otherwise have been lost. Nor can I accept that it makes any difference that the New York Convention permits wider grounds of challenge to an award than the ICSID Convention. The extent to which an award can be reviewed, if at all, has nothing whatsoever to do with state immunity.

22. Notwithstanding that this point was not apparently raised before or considered by Fraser J, I was nonetheless urged by the Claimants to follow his decision unless I was convinced that it was wrong. Permission to appeal to the Court of Appeal has in fact been given in that case and it is therefore clear that others also find this an area deserving of further consideration. In those circumstances, knowing that the Court of Appeal will soon be examining the matter, I have allowed myself slightly more latitude in reaching my own conclusions. As it is, I have listened to all the arguments with the greatest care and formed my own views where I am not bound by authority. On some issues, I agree with the reasoning in other judgments; on others, I have reached different conclusions. In particular, while I have reached the same ultimate conclusion as Fraser J, I

have done so on different grounds reflecting the considerably fuller argument that took place before me on the relevant issues.

DISCUSSION AND ANALYSIS

23. For the purposes of exposition, I address the issues under the following heads:

(a) The correct interpretation of Articles 53-55 of the ICSID Convention;

(b) Section 2 of the 1978 Act;

(c) Section 9 of the 1978 Act;

(d) Whether state immunity is engaged at all in relation to an application for registration of an award under the 1966 Act;

(e) Full and frank disclosure.

(1) Interpretation of Articles 53-55

Principles of treaty interpretation

The Vienna Convention

24. It was not in dispute that the ICSID Convention, as an international treaty, falls to be interpreted in accordance with Articles 31-33 of the Vienna Convention on the Law of Treaties 1969 which provide as follows:

> *"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.*
>
> …

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

(a) …

(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.

…

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;

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

Article 33: Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

…

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."

Correct approach: textual versus teleological

25. There was considerable argument before me as to the relative weight to be accorded to the text of the Convention on the one hand and its object and purpose on the other. Mr Moollan KC, who appeared for Zimbabwe, submitted that the Vienna Convention mandated a textual approach to interpretation and

that I should not be seduced by the Claimants' submissions into adopting a teleological or purposive approach.

26. Ultimately, however, it seemed to me that this was an arid debate, given that Article 31 expressly requires the terms of any treaty to be interpreted in their context and in the light of its object and purpose. Text and object/purpose thus go hand in hand and in my judgment it is unnecessary and unproductive to try to disentangle them. What is required is a holistic approach and I do not read the International Court of Justice as saying anything different in paragraph 41 of its judgment in *Libya v Chad (3 February 1994).* The comment by the court in that case that *"Interpretation must be based above all upon the text of the treaty"* must be understood in the context of an argument by Libya that the court could go beyond the matters set out in Article 31 so as alter the natural meaning of the text by reference to the intentions of the parties to the treaty. It is hardly surprising that in rejecting this argument, the court emphasised the primacy of the text, but it clear from the remainder of the judgment (in particular, paragraph 52) that the text was nevertheless to be read in the light of the object and purpose of the treaty.

27. I agree, of course, that it is impermissible, if not impossible, to interpret a treaty by reference to the deemed intention of the parties, not least because they may never have had any common intention. In the context of an international treaty, the parties are therefore deemed to have intended what they have actually said: *Czech Republic v European Media Ventures SA,* [2007] EWHC 2851 (Comm) at [17]; *Brown v Stott,* [2003] 1 AC 681 at 703E. The object and purpose of a treaty are accordingly to be found primarily in the preamble to the treaty or any

other common expression of intent and the court should be cautious before going further: *Czech Republic v European Media Ventures SA ((supra)* at [19].

28. This latter case also confirms the following principles which I bear in mind:

(a) The task of the court is to interpret the treaty, not the supplementary means of interpretation (paragraph [31]);

(b) It is important to give the treaty an independent interpretation divorced from any distinctive features of a particular legal system (paragraph [34]);

(c) The ordinary meaning of the terms used is to be assessed as at the date of conclusion of the treaty (the principle of contemporaneity) (paragraph [36]);

(d) The court should try to ascribe meaning to each of the words being interpreted (paragraph [37]).

29. A further matter debated before me was the extent to which I could or should be guided by decisions of courts or tribunals in other jurisdictions. Mr Harris referred me to several which he submitted showed a consistent trend, although he did not go so far as to assert that they established a subsequent practice within the meaning of Article 31(3)(b) of the Vienna Convention. However, none of these decisions is binding on me and while they may be more or less illuminating, much will depend on the issues raised and the potentially different legal landscapes in which they were decided. Thus, the Claimants submitted that any differences in the applicable statutory provisions were irrelevant, while

Zimbabwe argued that they were significant. I consider this further when I discuss these cases below.

The travaux préparatoires

30. Article 32 of the Vienna Convention permits resort to the *travaux préparatoires* to confirm a meaning, or to determine that meaning but, in the latter case, only where the wording is ambiguous or would lead to manifest absurdity.

31. I was treated to a detailed excursus through the *travaux préparatoires* by both parties who frequently relied on the same passages for diametrically opposed conclusions. The architect of the ICSID Convention was the General Counsel of the World Bank, Mr Aron Broches. Following his preparation of a Preliminary Draft, a series of consultative meetings was held in Addis Ababa (December 1963), Santiago de Chile (February 1964), Geneva (February 1964) and Bangkok (April-May 1964) attended by representatives (predominantly lawyers) from many countries. A Revised Draft was then the subject of intensive deliberation by a special legal committee in Washington in November/December 1964, following which the Convention was concluded in March 1965.

32. I do not propose to rehearse the respective arguments of the parties on the *travaux*; suffice it to say that in my view they demonstrate the following:

(a) The Convention imposed a direct obligation at international level on every Contracting State to be bound by an ICSID award;

(b) The firm assumption was that a Contracting State would honour a binding award against it. It was therefore sufficient for Article 53 to

stipulate that an award was binding on the parties and unnecessary to provide for any further sanction against a defaulting state beyond the revival of diplomatic protection in Article 27 backed by the risk of indirect sanctions from the international community if the state in fact failed to honour its obligations;

(c) By contrast, individual investors, not themselves being parties to the treaty, were not subject to any obligations thereunder, whether direct or indirect. It was therefore necessary to provide some means whereby a successful state could enforce an award against the assets of a defaulting investor, and this was the primary objective of the provisions which ultimately became Articles 53 and 54;

(d) The purpose of requiring Contracting States to recognise an award as final and binding was to give effect to its status as *res judicata*;

(e) From the outset, there was never any intention to harmonise or change the law of state immunity as applied by each Contracting State since this varied from state to state. Instead, the Convention adopted the approach of equating an award with a final judgment of the national court leaving questions of execution to be governed by the domestic laws of the enforcing state under Article 53(3). Thus, if an equivalent judgment could be enforced against a state, so could an award; if it could not be so enforced, neither could an award;

(f) This was not thought to present any problem, because the expectation and assumption was that Contracting States would honour a binding award. The question of enforcement against a state was therefore viewed

as an academic question such that there was no risk of a third party state finding itself in the embarrassing position of being asked to enforce an award against another state. Nonetheless, Article 55 was inserted at a late stage by way of clarification and reassurance to make clear that the Convention did not allow for forcible execution against a state;

(g) The procedural processes and requirements for seeking recognition and enforcement were left to the domestic law of the enforcing state;

(h) As emphasised on multiple occasions by Mr Broches during the course of the negotiations, and reiterated in his Memorandum dated 19 January 1965 accompanying the Convention, the word "enforce" in Article 54(1) should be understood as meaning "enforceable" in the sense that an award be given the same status as a final judgment.

Articles 53-55

33. Against this background, I turn to the critical provisions of the ICSID Convention, namely Articles 53-55, starting with the words of the text themselves. One of the major difficulties in this respect is that the terms "recognition", "enforcement" and "execution" are not defined, and the precise scope of each term is not always clear. In particular, there is a question as to whether "enforcement" and "execution" are used synonymously or discretely, or whether they overlap.

34. Article 53(1) encapsulates the agreement of each Contracting State to the fundamental obligation that the parties to a dispute shall abide by and comply with the terms of an award except to the extent that enforcement is stayed. The

reference to "enforcement" here can only be to the "enforcement" contemplated by Article 54 since that is where the obligation to enforce is set out.

35. The first sentence of Article 54(1) is a composite provision comprising two distinct obligations. The first is an obligation on each Contracting State to recognise as binding an award rendered pursuant to the Convention. As a matter of language, this applies to the entirety of the award and involves acceptance of both the binding character of the award and its preclusive effects as regards, for example, *res judicata* and issue estoppel. The second is an obligation on Contracting States - limited to pecuniary obligations only - to enforce such pecuniary obligations in the award as if they were contained in a final judgment of a national court.

36. The obligation to recognise and enforce contained in Article 54(1) is not self-executing; some formal step is required. However, the process by which recognition and enforcement is to be achieved is not prescribed in the Convention itself but is left to each Contracting State to determine as a matter of its own internal procedures, subject only to the formal requirements set out in Article 54(2). Thus, in some countries, the obligation to recognise and enforce an award under Article 54(1) is given effect by entering judgment in the amount of any pecuniary obligations, while in others it may simply be by ordering that the award be recognised or take effect as if it were a judgment of the court.[2]

[2] In the English courts, registration of ICSID awards under the 1966 Act is governed by a bespoke procedure set out in CPR Part 62.21.

37. Article 54(3) is directed at the execution of an award and provides that execution is to be governed by the laws concerning the execution of judgments in force in the country in which execution is sought.

38. Article 55 contains the clarificatory saving for immunity from execution referred to in paragraph 32(f) above, although it should be noted that this article is not expressed to be exhaustive of the circumstances in which state immunity can be claimed. Moreover, the *travaux préparatoires* make clear that this was a "belt and braces" insertion which was not thought to be strictly necessary as the drafters of the Convention believed that Article 54(3) in any event sufficiently preserved the effect of each Contracting State's domestic law on state immunity so far as concerned execution against assets.

39. As a matter of language, therefore the wording of Articles 54(1) and 54(2) draws a clear distinction between "recognition" and "enforcement". Each is the subject of a separate obligation in Article 54(1) and the reference to an application for *"recognition or enforcement"* in Article 54(2) clearly contemplates that an application can be made for one without the other.[3] Mere recognition on its own, however, says nothing about the ability of the successful party to proceed further along the enforcement path.

40. A distinction is likewise drawn between "recognition" on the one hand (Articles 54(1) and (2)) and "execution" (Article 54(3)).

41. However, the relationship between "enforcement" and "execution" is altogether more elusive. On the one hand, it is noteworthy that the French and Spanish

[3] Although it is fair to point out that enforcement must necessarily presuppose recognition.

texts of the Convention, both of which are also designated as authentic, use the same word, (*exécution* and *ejecución* respectively) for both concepts where the English text distinguishes between them.

42. On the other hand, the terms can hardly be regarded as synonymous, since that would give rise to an immediate and obvious tension: either Article 54(1) would have to be read as preserving state immunity also in relation to enforcement in the sense that the word is used in Article 54(1), contrary to the obligation to enforce awards contained in that article, or Article 54(1) would have to be read as referring also to execution which would then conflict directly with Articles 54(3) and 55. This possibility can accordingly be rejected as nonsensical and manifestly absurd.

43. I do not derive any assistance in this respect from the preamble to the Convention. This is therefore a situation where the meaning of the terms is ambiguous or obscure such that it is appropriate to have regard to the *travaux préparatoires*. In my judgment, the clue to the correct interpretation is to be found in the repeated comments of Mr Broches that the intention underlying Article 54(1) was that the word "enforce" should be understood as meaning "enforceable" in the sense that the award should be equated to a final judgment.

44. On this basis, the basic scheme contemplated by the Convention is as follows:

    (a) Every Contracting State undertakes (i) to recognise an ICSID award as binding for the purposes of *res judicata* **and** (ii) to enforce any pecuniary obligations it imposes by giving the award the same status as a final judgment of its own courts. An enforcing court cannot re-examine the award on its merits or refuse enforcement (in this sense) on grounds of

public policy. This is in stark contrast to the position under the New York Convention where recognition and enforcement of an award can be refused on certain specific grounds, including public policy.

(b) However, "enforcement" in this context means no more than according to an ICSID award the same status as a final judgment of the national court. By contrast, questions of execution are left to individual national courts so that if the enforcing court's law of state immunity prevents any further steps being taken to execute the award, that will be the end of the matter.

45. As to the conundrum of the French and Spanish texts and the fact that they do not distinguish linguistically between the concepts of "enforcement" in the sense of enforceability and "execution", I find the reasoning of the High Court of Australia in *Spain v Infrastructure Services Luxembourg Sarl*, [2023] HCA 11 to be compelling on this point. The High Court concluded that in truth there was no inconsistency which needed to be reconciled on the basis that:

(a) The French, Spanish and English texts are equally authentic. Article 33(3) of the Vienna Convention therefore presumes the terms of the treaty to have the same meaning in each text.

(b) However, the French and Spanish texts have to be understood in the context of the civilian concept of *exequatur* which combines recognition with a declaration of enforceability. The terms *exécution* and *ejecución* thus encompass both recognition and enforcement in the sense of enforceability (Article 54(1)) on the one hand, and enforcement by way of execution on the other (Article 54(3)).

(c) This is the sense which best reconciles the texts having regard to the object and purpose of the Convention as required by Article 33(4) of the Vienna Convention.

46. Accordingly, even if "execution" can be regarded in a general sense as an aspect of "enforcement", in my judgment the French and Spanish texts provide powerful support for interpreting the word "enforcement" as used specifically in Articles 54(1) and 54(2) as meaning a declaration of enforceability by according an award the same status as a final judgment.

47. As the High Court of Australia pointed out, such an interpretation would also accord with the definitions of "recognition", "enforcement" and "execution" contained in the proposed US Restatement of the Law of International Commercial and Investor-State Arbitration. I accept of course that these definitions have no authoritative status and that the ICSID Convention must be interpreted on its own terms. It is nonetheless instructive to note that according to the proposed Restatement:

(a) "recognition" is defined as the court's determination that an award is *"entitled to be treated as binding"*, which involves *"acceptance of the award's binding character and its preclusive effects"*;

(b) "enforcement" is defined as *"the legal process by which an international award is reduced to a judgment of the court that enjoys the same status as any judgment of that court"*;

(c) "execution" is defined as *"the means by which a judgment enforcing an international arbitral award is given effect"* commonly by taking

measures against the property of the judgment debtor pursuant to a writ of execution.

48. To my mind, such an interpretation makes perfect sense of the Convention in all of its authentic texts. It is also consistent, or at least not inconsistent, with the decision of the Supreme Court in *Micula v Romania*, [2020] UKSC 5; [2020] 1 WLR 1033.

49. In *Micula*, the question was whether an English court had power under the 1966 Act and the ICSID Convention to stay execution of an ICSID award. The Court of Appeal held that a stay could and should be granted although there was a divergence in the reasoning of the court as to the basis on which such a stay could be ordered. Leggatt LJ (as he then was) took the view that the purpose of equating an award with a final judgment of the enforcing court was to give legal force to an award preparatory to executing it and to provide machinery for that purpose – in other words adopting an interpretation of Article 54(1) along the lines suggested above. He and Arden LJ (as she then was) were of the view that it would be inconsistent with the scheme of the ICSID Convention for a national court to refuse enforcement simply because, if it had been a domestic judgment, giving effect to it would have been contrary to a provision of national law. The only circumstances in which the validity or enforceability of an award could be challenged were those set out in the Convention itself. Thus, a national court could not refuse enforcement on substantive grounds, or stay enforcement on grounds which would justify a stay of a final domestic judgment, or grant a permanent or indefinite stay. That said, Leggatt and Arden LJJ also agreed that the court could nonetheless grant a temporary stay of execution provided always

that to do so was just in all the circumstances, *and* consistent with the purposes of the Convention. By contrast, Hamblen LJ (as he then was) held that the effect of the ICSID Convention was to assimilate an award to a final domestic judgment for all purposes such that a stay could be granted where it would be granted in the case of a domestic judgment.

50. In the event, it was unnecessary for the Supreme Court to decide between the two approaches. Lords Lloyd-Jones and Sales, who gave the leading speech with which the other members of the court agreed, recognised that the proper interpretation of Article 54(1) so far as regards the availability of a stay could only ultimately be resolved by the International Court of Justice. Nonetheless, since Romania's argument failed either way, it was not necessary for the English court to grapple further itself with the correct interpretation of Article 54(1) and the distinction, if any, between "enforcement" and "execution".

51. While the actual decision in *Micula* is therefore not directly relevant to the present case, the reasoning of the Supreme Court was heavily relied upon by the Claimants in support of their argument that Zimbabwe had no immunity. As part of that reasoning, the Supreme Court held that:

(a) The 1966 Act implements the ICSID Convention in UK domestic law, and section 1(2) of the Act entitles a person seeking recognition or enforcement of an ICSID award to have it registered (paragraph [63]);

(b) The 1966 Act must be interpreted in the context of the ICSID Convention, and it should be presumed that Parliament intended it to conform to the United Kingdom's treaty obligations (paragraph [68]);

(c) A notable feature of the ICSID scheme is that once the authenticity of an award is established, a domestic court called upon to recognise it may not re-examine the award on its merits or refuse to enforce it on grounds of public policy (paragraph [68]);

(d) Contracting States may not refuse recognition or enforcement of an award on grounds covered by the challenge provisions in the Convention itself or on the basis of any general doctrine of *ordre public* (paragraph [69]);

(e) Article 54(3) is concerned with execution and provides that the available processes of execution will be those of the enforcing court. However, this provision does not limit the obligation of Contracting States to enforce awards (paragraph [76]);

(f) It is arguable that there is scope for some additional defences against enforcement in exceptional or extraordinary circumstances, if national law recognises them in respect of final judgments of national courts and if they do not directly overlap with the grounds of challenge specifically reserved to ICSID under Articles 50-52 of the Convention (paragraph [78]);

(g) Hamblen LJ's view that Article 54(1) operates on the basis of a principle of "equivalence" had some support in the *travaux préparatoires.* However, the contrary view of Arden and Leggatt LJJ was also arguable that the only circumstances in which the validity or enforceability of an ICSID award can be challenged are those set out in the Convention itself (paragraphs [80][81]);

(h) If Leggatt LJ's approach to Article 54(1) was right, then Article 54(1) simply provided a basis for execution such that an English court could not refuse to enforce an award just because there were grounds that would justify staying enforcement of a domestic judgment (paragraph [81]).

52. Notwithstanding that the Supreme Court has not decided which approach to the interpretation of Article 54(1) is correct, it has nonetheless accepted that Leggatt LJ's view is arguable. Importantly, it has also held that the fact that Article 54(3) leaves matters of execution to the national courts does not limit the obligation of Contracting States to recognise and enforce awards. This, in my judgment, provides powerful support for the analysis suggested in paragraphs 44-48 above. For good measure, although I accept that the tail cannot be allowed to wag the dog, the distinction between "enforcement" (in the sense of "enforceability") and "execution" is also mirrored in sections 1 and 2 of the 1966 Act.

Waiver of immunity?

53. If this interpretation is correct, the next question is whether Articles 53 and/or 54 amount to a waiver of sovereign immunity by Contracting States and, if so, to what extent.

54. In this connection, I was referred by the Claimants to the decisions of the Federal Court of Australia and the High Court of Australia in *Spain v Infrastructure Services Luxembourg Sarl*, [2021] FCAFC 3 and [2023] HCA 11, the decision of the High Court of New Zealand in *Sodexo Pass International SAS v Hungary*, [2021] NZHC 371 and various United States decisions. All of

these decisions were made in different statutory contexts. Specifically: the ICSID Convention has been expressly incorporated into both Australian and New Zealand law; the Australian equivalent to the State Immunity Act does not have an arbitration exception equivalent to section 9 of the 1978 Act; New Zealand has no State Immunity Act at all; and the US statutory framework is very different and contains a very broad arbitration exception. While I have found some of the reasoning illuminating and instructive, I do not propose to rehearse them in detail since none of them is directly binding on me.

55. As a matter of English law, the general principle is that any waiver of sovereign immunity by treaty must be express although it need not be in writing: *R v Bow Street Magistrates, ex parte Pinochet (no. 3),* [2000] 1 AC 147 at 215 *per* Lord Goff.[4] Where the alleged waiver is in writing - for example, in a prior treaty provision - it must be express and cannot be implied. Where it is not in writing - for example, actual conduct in submitting to the jurisdiction - it must be expressed in a clear and unequivocal manner. The latter is sometimes referred to as implied waiver but, as Lord Goff pointed out (at 217), this is the only example given of an implied waiver and it is in any event probably better regarded as a form of express waiver.

56. On behalf of the Claimants, Mr Harris relied heavily on the decision of the High Court of Australia in *Spain v Infrastructure Services Luxembourg Sarl (supra)* that Spain's agreement to Articles 53-55 of the ICSID Convention amounted to a waiver of state immunity from the jurisdiction of the Australian court to recognise and enforce (but not to execute) the award. The case thus fell within

[4] Although Lord Goff dissented in the result, his exposition of the law on waiver of immunity was not in issue and is considered as authoritative.

the exception to state immunity contained in section 10(2) of the Australian Foreign States Immunities Act (which is equivalent to section 2 of the 1978 Act). Mr Moollan urged me to exercise caution in relation to this decision on the basis that the High Court was under particular pressure to find a submission to the jurisdiction within section 10(2) because there was no Australian arbitration exception equivalent to section 9 of the 1978 Act. That may or may not be so but it is in my view irrelevant. The reasoning of the court either withstands scrutiny on its own merits or it does not.

57. As to waiver, the High Court of Australia accepted the principle, which it regarded as having been correctly articulated in *Pinochet*, that waiver of state immunity must be express or unequivocally implied from conduct. It recognised that the distinction between express and implied terms was somewhat elusive because of the inherent imprecision of language, meaning that some form of implication was almost inevitably involved even in the construction of express words. The court therefore concluded that the requirement for an express waiver meant only that the expression of waiver must be derived from the express words used and not, for example, implied from conduct. However, waiver could be implied from the express words of a treaty read in their context and in the light of their purpose, although a high level of clarity and necessity was required before inferring that a state had waived its immunity in a treaty.

58. Adopting that approach, the High Court held that (i) the stipulation in Article 53(1) that awards were binding on Contracting States and (ii) the preservation in Article 55 of immunity in relation only to execution meant that it would

distort the terms of Article 54(1) to require separate conduct amounting to a waiver of immunity before an applicant could obtain recognition and enforcement of an award. The express terms of Article 54(1) accordingly amounted to a waiver of immunity in relation to recognition and enforcement and the requirements of section 10(2) were thus satisfied.

59. Mr Moollan submitted that this decision was not binding on me and that I should decline to adopt its reasoning. In his submission, whatever the High Court of Australia may have said, the Claimants could only establish a waiver by a process of implication. He further argued that whereas Article 53 is dealing with the situation of a Contracting State which is party to an award, Article 54 was only directed at non-party Contracting States. I do not accept this distinction. The term "Contracting State" in Article 54 is not qualified in any way and thus applies to all Contracting States, whether parties to an award or not. Furthermore, while the *travaux préparatoires* make clear that the primary objective of Article 54 was to give a Contracting State an effective means of enforcement against an investor (who did not assume any direct obligations under the Convention), the provision is drafted in terms which apply as much to enforcement against a state as they do to enforcement against an investor.

60. I accept that the immediate import of the words in Article 54(1) is to enjoin each Contracting State to recognise and enforce an award in its own territory. However, *Micula* confirms authoritatively at [105] that the duties imposed by Articles 53 and 54 are unqualified and owed to all other Contracting States and not just to the other parties to an award. The Supreme Court regarded this as confirmed by Article 27(1) which recognises that if a Contracting State fails to

abide by an award, it may be subject to an international claim by the Contracting State of the aggrieved investor. Necessarily, therefore, every Contracting State recognises that the duties imposed by Article 54(1) are undertaken by every other Contracting State and that every other Contracting State is accordingly obliged to recognise and enforce an award as if it were a final judgment, including awards against the first state.

61. Does this amount to an express waiver of immunity? I have not found this an easy question to decide. A case on which Mr Moollan placed great reliance was a decision of the BVI court in *Tethyan Copper Company Pty Limited v Pakistan*, (Claim No. BVIHC (Com) 2020/0196, 27 April 2021). This was a case in which the applicable statutory framework was identical to that which pertains in the United Kingdom. At paragraph [51] of his judgment, Mr Justice Wallbank held that Article 54(1) imposed an obligation on Pakistan as a Contracting State to allow recognition and enforcement of an award before its own courts but did not impose any obligation on it before the BVI courts. Accordingly, Article 54(1) could not amount to a waiver of immunity.

62. Mr Moollan submitted that this reasoning, albeit concise, was nonetheless compelling and directly applicable to the present situation. However, with great respect to the learned judge, I am unable to agree. Given the scheme of the Convention as set out above and in the light of the *travaux préparatoires*, it is difficult to conclude otherwise than that Article 54(1) was intended to amount to a waiver of state immunity in respect of recognition and enforcement but not in relation to processes of execution against assets, which were expressly carved out in Articles 54(3) and 55.

63. While (like the High Court of Australia) I accept that the line between construction and implication is sometimes a fine one, I do not regard this conclusion as in fact involving any process of implication. In my judgment and in agreement on this point with the High Court of Australia, it is simply a question of elucidating the meaning of the express words used and drawing the inevitable consequences.

64. However, that by no means concludes the argument in favour of the Claimants, since it is still necessary to determine whether a waiver of immunity in general terms such as this is a sufficient submission to the jurisdiction of the English courts for the purposes of section 2 of the State Immunity Act. I therefore now turn to the arguments relating to section 2.

(2) Section 2 of the 1978 Act

65. Mr Harris submitted that by agreeing and accepting that all other Contracting States were obliged to recognise and enforce an award, Zimbabwe was not only waiving immunity generally but was necessarily also agreeing to submit to the jurisdiction of all other Contracting States for that purpose. He found powerful support for this argument in the judgment of Fraser J in *Infrastructure Services Luxembourg Sarl v Spain (supra)* who at paragraphs [95] and [114] held that Article 54 was a prior written agreement for the purposes of the 1978 Act and that Spain had therefore submitted to the jurisdiction of the English court by reason of its accession to the Convention.

66. With no little diffidence and the greatest respect to the learned judge, I have some difficulty with this reasoning. Under the 1978 Act, a state is entitled to blanket immunity from jurisdiction except in so far as one of the stipulated

exceptions can be established. It follows that even a general waiver of immunity will not necessarily deprive a state of its immunity for the purposes of the Act unless it can be brought within one of those exceptions.

67. Section 2 of the 1978 Act has been set out above. It was common ground that the Act should be interpreted as far as possible in a way consistent with the 1966 Act and the United Kingdom's international obligations under, for example, the ICSID and New York Conventions. Conversely, however, the Act is of general application and contains no specific mention of ICSID or any qualification differentiating ICSID from other matters. Applications concerning ICSID awards must therefore be approached in the same way and be subject to application of the same principles as proceedings involving any other type of award.

68. In my judgment, section 2 is drafted with reference to specific proceedings before a specific court and accordingly requires any submission to be in respect of the jurisdiction which is actually being exercised in those proceedings. A waiver of immunity unrelated to any identifiable proceedings is therefore not synonymous with a submission to the jurisdiction under section 2, even though the two may overlap, for example when a state waives its immunity by submitting to the jurisdiction in respect of a particular action.

69. Authority for the distinction between a general waiver of immunity and a submission to the jurisdiction can be found in the decision of the Court of Appeal in *Svenska Petroleum Exploration AB v Lithuania (supra)* which is the only one of the authorities cited to me to consider the point. Upholding the decision of Mrs Justice Gloster at first instance, the court held at [128] that:

> *"The judge was unable to accept that a general waiver of immunity of the kind found in article 35.1 amounted to a submission to the jurisdiction of the English courts within the meaning of section 2(1). We agree, not only because we think it is too imprecise, but because we think it must be read in the context of the government's agreement to submit to ICC arbitration (which was in fact the context in which the waiver of immunity is found in the earlier drafts of the agreement)."*

70. It is true that one of the reasons given by the Court of Appeal for finding that there had been no submission to the jurisdiction of the English courts in that case was the fact that the parties had agreed to submit their disputes to ICC arbitration. Clearly, that reasoning cannot apply here where the relevant submission to the jurisdiction does not concern the underlying dispute but rather the recognition and enforcement of an award which has emerged at the end of the arbitral process.

71. Nonetheless, it remains the case that there is a conceptual distinction between a general waiver and a submission to the jurisdiction which it is necessary to consider with some care. In the present case, Article 54 did not contain any express submission by a Contracting State to the jurisdiction of, for example, *"the courts of any other Contracting State called upon to enforce an award against it"*. Had it done so, the position might have been very different. As it is, however, the waiver of immunity which I have held to be established is entirely general and unrelated to any specific or identifiable proceedings. To the extent that it might be argued that such a submission is implicit, then it falls foul of the requirement in *Pinochet* for any waiver and, *a fortiori*, any submission to the jurisdiction contained in a treaty provision to be express.

72. Ultimately, I have concluded that Article 54 is not a sufficiently clear and unequivocal submission to the jurisdiction of the English courts for the purposes

of recognising and enforcing the award against Zimbabwe in these proceedings. I recognise that this conclusion is contrary to that of Fraser J, but it is not apparent that the potential distinction between waiver and submission was argued before him. I also recognise that it could be said to run counter to the object and purpose of the ICSID Convention which was to preserve state immunity only in respect of execution while providing for mandatory recognition and enforcement across the board. However, this is simply the inevitable result of applying what seem to me to be the clear words of section 2 of the 1978 Act. The Convention itself is not part of English law and I must give primacy to the words of the statute, particularly bearing in mind that it applies generally and so extends far beyond the limited and somewhat niche category of ICSID awards.

73. I therefore hold that the Claimants have failed to establish that Zimbabwe submitted to the jurisdiction of the English courts within the meaning of section 2 for the purposes of obtaining recognition and enforcement of the award.

74. For completeness, I should deal with two further points advanced on behalf of Zimbabwe under this head.

75. First, I was unpersuaded by Mr Moollan's argument that the principle of contemporaneity precludes the argument that Article 54(1) could amount to a waiver or submission to the jurisdiction. He submitted that in 1965, when the ICSID Convention was signed, English law did not permit waiver of state immunity by prior agreement. Accordingly, if Article 54(1) did constitute a waiver or submission the UK delegate would have been agreeing to something which could never have been effective. However:

(a) As noted in paragraph 8 above, English law seems to have been something of an outlier in this respect: *I Congreso del Partido (supra)* at 261. But in any event, the Convention has to be interpreted in an autonomous way without regard to the national laws of any particular state, and what the UK delegate may have thought subjectively is irrelevant. Other Contracting States may have thought differently.

(b) In any event, if the Convention on its proper interpretation amounts to a waiver of immunity or submission to the jurisdiction, it must retain that quality even if effect could not have been given to it prior to 1978. This is nothing to do with giving the treaty a different construction from that which it would have received contemporaneously; it is simply that once the State Immunity Act was passed, the waiver/submission which had always been inchoate could finally be given effect.

76. Secondly, I would likewise have rejected Mr Moollan's further submission that even if there was otherwise a submission to the jurisdiction, the award in question was not rendered *"pursuant to this Convention"* for the purposes of Article 54(1) in circumstances where, irrespective of what the tribunal and the annulment committee had decided, the tribunal in fact had no jurisdiction. In truth, of course, this was a thinly-disguised argument that the court could reopen the award on jurisdictional grounds under section 2.

77. The question in this regard is whether the conclusion of ICSID on its own jurisdiction is final and binding on the English court such that the award can properly be regarded as having been rendered *"pursuant to this Convention"* even if the English court thinks that ICSID may have been wrong. I am quite

clear that the award is final and binding for this purpose and that it is not open to the English court to review the merits of the decision or the jurisdiction of the tribunal. In this specific context,[5] I regard it as highly relevant that ICSID is a self-contained regime and that the only permitted avenue of challenge to an award is via the process for annulment within the confines of the Convention.

78. Accordingly, the words *"pursuant to this Convention"* in my judgment mean no more or less than that the award has been rendered pursuant to the processes set out in the Convention. If the annulment process has been pursued but failed, the award has been rendered pursuant to the Convention because the Convention processes have been followed. That remains the case *even if* the application for annulment should have succeeded because the tribunal did not in fact have jurisdiction. This is not a question of treating the ICSID determination as binding for the purposes of state immunity; it is simply a question of whether the Convention processes have been correctly observed without regard to the content of the decision which emerged at the end of those processes.

79. I would not therefore have rejected the Claimants' arguments on either of these grounds.

(3) Section 9 of the 1978 Act

80. The exception in section 9 of the 1978 Act applies where a state has agreed in writing to submit a dispute to arbitration. It was not contentious before me that the ICSID Convention does not itself confer jurisdiction on a tribunal and that independent consent to arbitrate is required. This is clear from, amongst others,

[5] Albeit not in relation to section 9 of the 1978 Act, as to which see paragraph 89 below.

Articles 25(1), 25(4) and 36. It was further accepted before me that the relevant arbitration agreement in this case consisted of Article 10 of a bilateral investment treaty (the "BIT") concluded between Switzerland and Zimbabwe on 15 August 1996 which refers to *"disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party"*, coupled with the Claimants' acceptance (or purported acceptance) of the offer to arbitrate contained in that Article.

81. Without going into unnecessary detail, it was Zimbabwe's case that the dispute was not in fact covered by Article 10 because the tribunal did not have jurisdiction over the dispute for a variety of reasons. Certain of these arguments were put before the annulment committee and all failed as put. It was nonetheless Zimbabwe's case that it is entitled to raise them again under section 9, together with other arguments going to the tribunal's jurisdiction. Its alternative case was that a waiver of state immunity under section 9 is subject to any contrary provision in the arbitration agreement and that such contrary provision is to be found in Article 10(6) of the BIT which provides that the award *"shall be final and binding for the parties involved in the dispute and shall be enforceable in accordance with the laws of the Contracting Party in which the investment in question is located."*

82. The substantive merits of these arguments are for another day, if at all. My task is simply to determine whether it is open to Zimbabwe to raise these jurisdictional points in order to argue that the exception to immunity in section 9 cannot apply. Mr Harris argued forcefully that it was not, because the question had been foreclosed by the decision of the annulment committee. He sought to

impress on me the glowing credentials and vast experience of both the tribunal members and the annulment committee. I have no doubt that is so, but it is wholly irrelevant to my assessment of whether or not their determination as to the applicability of the arbitration agreement is binding on an English court for this purpose.

83. As it seems to me, section 9 raises two issues: first, whether section 9 requires or permits the English court to re-examine the jurisdiction of the tribunal (whether an ICSID tribunal or any other tribunal) and, secondly, whether ICSID awards fall to be treated differently from other awards in this respect.

84. As to the first of these issues, I have already emphasised the hermetically sealed nature of arbitration under the Convention under which there are no means of challenge other than by annulment and which gives rise to an award which is final and binding with no possibility of further review. Nonetheless, the wording of section 9 is quite clear that the statutory exception only applies if a state has agreed in writing to submit a dispute to arbitration. If it has not so agreed, then there is no loss of immunity. On the plain and ordinary meaning of the statute, therefore, before finding that section 9 is engaged, the English court must satisfy itself that the person accepting the offer of arbitration was entitled to do so and that the dispute in question fell within the scope of the arbitration agreement.

85. The interpretation of section 9 was considered by Mr Justice Butcher in *PAO Tatneft v Ukraine,* [2018] EWHC 1797 (Comm); [2018] 2 CLC 290. This case involved a non-ICSID award under UNCITRAL rules which Tatneft sought to enforce in England. Ukraine argued that it had not in fact agreed to submit any

of the relevant disputes to arbitration and that the section 9 exception did not apply. In response, Tatneft argued that these were points which went to the jurisdiction of the tribunal, and that while Ukraine had raised other jurisdictional objections before the tribunal, it had *not* relied on these specific arguments. Accordingly, it submitted that Ukraine should not be permitted to raise new jurisdictional points at this stage but should be confined to the same points as had already been argued.

86. Butcher J held at [35] that Ukraine was not precluded by what had occurred before the tribunal from raising the arguments which it now sought to rely on:

> *"By reason of s1(1) of the SIA [Ukraine] is immune from the jurisdiction of the court unless an exception provided for in the SIA applies, and indeed the court is obliged to give effect to that immunity even if the state does not appear. What that entails in the present case is that the court would have to give effect to the immunity unless it is satisfied that the state has agreed in writing to submit a dispute to arbitration and the proceedings relate to the arbitration. If there is an issue which is either apparent to the court of its own motion or is raised by the state and which goes to the question of whether there was such an agreement in writing in relation to the relevant dispute, then I consider that the court is obliged to consider it and can only exercise jurisdiction over the state if satisfied that the s.9 exception is nevertheless applicable. There is nothing in the SIA which suggests that there can be a foreclosure of the points which the state may raise as to the applicability of the immunity afforded by the SIA by reason of what may have occurred in front of an arbitral tribunal in a way similar to that provided for by the Arbitration Act. In particular there are no provisions similar to those in s.73 of the Arbitration Act, and I do not consider that such constraints can be read into the SIA."*

87. It is true that there was no express consideration of what the position would have been if the relevant points had been taken and conclusively determined against Ukraine, but the thrust of Butcher J's reasoning is that the English court must be independently satisfied that there was an agreement to submit the particular dispute and that this is so whether or not any particular points were argued in the arbitration. I find this reasoning compelling and while the decision

of Fraser J in *Infrastructure Services Luxembourg Sarl v Spain (supra)* is to contrary effect, *Tatneft* is not referred to in his judgment.

88. The question then arises, however, as to whether ICSID awards fall to be treated differently for the purposes of section 9. In principle, it is difficult to see why this should be so. Section 9 is of general application and must apply equally to ICSID and non-ICSID awards. In this context, it seems to me irrelevant that ICSID is a self-contained regime under which the ICSID tribunal is the final arbiter of jurisdiction. Unless there was in fact an agreement to submit a particular dispute to ICSID arbitration, the ICSID process should not by rights be engaged at all, and the hermetically sealed nature of the regime is neither here nor there.

89. The position under section 9 is therefore different from that which pertains under section 2 in relation to Article 54. The enquiry which the court has to conduct under section 2 is whether there was a submission to the jurisdiction. On my analysis, the existence of a valid award is a given in that context, and the only question is whether it was rendered pursuant to Convention procedures. Questions of jurisdiction simply do not arise.

90. In my judgment, therefore, the Claimants have likewise failed to establish the applicability of the section 9 exception to immunity. For the avoidance of doubt, I would not have accepted Mr Moollan's submission that article 10(6) of the BIT amounted to a *"contrary agreement"* for the purposes of section 9. Article 10(6) does not purport to be exhaustive of the right to enforce; it simply confirms the enforceability of an award in Zimbabwe in addition to any other enforcement rights that the Claimants may have.

91. Even so, however, this does not determine the application in Zimbabwe's favour, since I have concluded for other reasons set out below that it is not in any event entitled to assert state immunity in relation to the Cockerill J order.

(4) Whether state immunity is engaged at all on an application for registration under section 2 of the 1966 Act

92. Although the point was not argued in this way before me, reference was made in the various cases cited to the specific regime established under rules of court in relation to the registration of ICSID awards. This is to be found in CPR Part 62 and was comprehensively considered by Mr Justice Jacobs in *Unión Fenosa v Gas SA*, [2020] EWHC 1723 (Comm); [2020] 1 WLR 4732.

93. As there discussed, Part I of CPR Part 62 is concerned with claims under the Arbitration Act 1996. This covers the majority of arbitration-related claims, for example applications to appoint an arbitrator or to appeal against an award. Such claims are required to be commenced by an arbitration claim form issued in accordance with the Part 8 procedure and the claim form must be served on the defendant within one month of issue unless the court orders otherwise.

94. Part 2 of CPR Part 62 deals with applications under the regime pre-dating the 1996 Act. This also requires service of the arbitration claim form.

95. Part 3 of CPR Part 62 deals with the enforcement of awards. Non-ICSID awards (which may of course also include awards against states) are covered by Part 62.18 while ICSID awards are separately covered by Part 62.21. The default position in relation to a non-ICSID award under Part 62.18 is that the application to enforce may be made without notice and the arbitration claim form does not need to be served unless the court so orders. Part 62.18(4) provides for

permission to be given for service out of the jurisdiction where necessary. However, even though it may not be necessary to serve the claim form, service of the registration order giving leave to enforce the award is mandatory under Part 62.18(7) and permission to serve out is not required.

96. By contrast, the regime for ICSID awards under Part 62.21 is different. There is no express reference to any requirement for a claim form or to service out of the jurisdiction notwithstanding that such awards will inevitably involve a foreign state on one side or the other. Part 62.21(3) merely states that an application for registration of in ICSID award must be made in accordance with the Part 8 procedure.

97. Part 62.21(2) applies certain provisions of Part 74 (with necessary modifications) in so far as they apply to the registration of judgements under the Foreign Judgments (Reciprocal Enforcement) Act 1933 but always subject to the provisions of Part 62.21. For the most part these provisions relate to the evidence which needs to be served on an application for registration. Part 74.6, however, provides that the order granting permission to register the judgment (or award) must be served on the judgment debtor. It is also noteworthy that the provisions of Part 74.6(3)(c)-(e) giving the judgment debtor the right to apply to have the registration set aside are expressly *not* applied to ICSID awards.

98. Mr Justice Jacobs considered at [50] that it was no accident that the regime put in place for ICSID awards was different from that applicable to other awards:

"It reflects the different and simplified procedure which exists for registration of awards to which CPR r 62.21 applies. This procedure is explained by the important cross-references in CPR r 2.21(2) to particular provisions within

CPR Pt 74, as further discussed below. It also reflects (also as further discussed below) the very limited circumstances in which a state may be able to resist enforcement of an ICSID award. Apart from the possibility of exceptional and extraordinary cases,[6] *those circumstances are limited to those contemplated in CPR r 52.21(4) and (5): ie that enforcement has been stayed under the ICSID Convention, or where an application for a stay has been made."*

99. On that basis, he concluded that it would be inconsistent with the registration regime incorporated via CPR Part 62.21(2) to require service of a claim form, let alone a fully-fledged Part 8 procedure leading to determination of an application for registration at a contested hearing. Indeed, if service were required, permission to serve out would have to be sought under CPR Part 6 as Part 62.21 (unlike Part 62.18) did not address service out of the jurisdiction at all.

100. Jacobs J further drew attention to the requirement incorporated from Part 74.6 that the judgment creditor should draw up the order and serve it on the judgment debtor and that permission to serve out of the jurisdiction was not required. The fact that express provision was made for service of the order out of the jurisdiction indicated to him that this was the only service that was required.

101. In the light of this compelling analysis, it occurred to me while considering my judgment that if the application to register an ICSID award did not have to be served, then there was an argument that the application did not require Zimbabwe to be impleaded with the result that the doctrine of sovereign immunity was not engaged at that stage at all. Since this point had not featured in any of the written or oral arguments, I invited counsel to submit further brief submissions on the question *"whether, in the light of the fact that the bespoke procedure for registration of ICSID awards set out in CPR 62.21 does not*

[6] A reference to *Micula*.

require service of any originating process on the respondent (see Unión Fenosa), the doctrine of sovereign immunity is engaged at all in relation to such an application."

102. The Claimants' response can be summarised as follows:

(a) The decision of the Supreme Court in *General Dynamics United Kingdom v Libya,* [2021] UKSC 22; [2022] AC 318 determines (albeit in the context of an application to enforce a non-ICSID award under CPR Part 62.18) that where service of the claim form is not required it is the order granting permission to enforce the award which is the document which institutes proceedings against the state.

(b) Service of the order invokes the jurisdiction of the court and triggers Zimbabwe's ability to seek to assert immunity, subject always to any exceptions.

(c) In *AIC Limited v Nigeria,* [2003] EWHC 1357 (QB), Mr Justice Stanley Burnton was faced with an argument that registration of a judgment under the Administration of Justice Act 1920 did not involve any exercise by the court of its adjudicative immunity and that section 1 of the State Immunity Act was accordingly inapplicable. He held that the registration of a judgment under the 1920 Act did involve the exercise by the court of its jurisdiction and that *"even if the registration of a judgment were a purely administrative act, I should hold that it is subject to the immunity conferred by section 1 [of the State Immunity Act]."* In any event, registration under the 1920 Act was an adjudicative act as the court was not bound to order a judgment to be registered but had a

discretion to do so. His decision in relation to applications under the 1920 Act was approved by the Court of Appeal in *Svenska Petroleum Exploration AB v Lithuania (supra)* at [135].

103. On behalf of Zimbabwe, Mr Moollan submitted that:

(a) State immunity is a substantive statutory rule which is engaged whenever the jurisdiction of the courts of the United Kingdom is invoked against a sovereign state.

(b) Operation of the State Immunity Act does not depend on whether or not the relevant process involves service on a state or, if so, at which stage of the proceedings the state is served.

(c) *General Dynamics United Kingdom v Libya (supra)* establishes that service of an order for registration necessarily entails an exercise of jurisdiction and thereby engages the State Immunity Act.

(d) On its plain meaning, section 1 of the State Immunity Act is engaged by an application for the registration of ICSID awards as this entails an exercise of the court's jurisdiction by the making of, and then service of, a court order.

104. This is a novel question which does not appear to have been considered previously save for Stanley Burnton J's passing comment in the context of the 1920 Act. However, the registration of judgments under the 1920 Act is in a materially different category to the registration of ICSID awards, since the former requires the court to exercise a discretion, while the latter involves no discretion at all. On the contrary, under section 2 of the 1966 Act, the applicant

is *entitled* to have the award registered, subject only to proof of authenticity and other evidential requirements. I have therefore looked at the matter from the specific perspective of ICSID awards.

105. The classic statement of the doctrine of state immunity is that of Lord Atkin in *The Cristina*, [1938] AC 485 at 490:

> *"the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings, whether the proceedings involve process against his person or seek to recover from him specific property or damages."*

106. However, in the case of applications to register ICSID awards, I have reached the conclusion that the foreign state is not impleaded unless and until the order granting registration is served on it, and that the doctrine of state immunity has no application at the anterior stage of registration. This is for the following reasons:

(a) In contrast to the position under the 1920 Act, no exercise of the court's adjudicative jurisdiction is required when registering an ICSID award. As previously stated, section 1(2) of the 1966 Act confers an entitlement on the applicant to have the award registered which is unqualified save in respect of purely procedural requirements.

(b) Accordingly, on an application for registration, the court is being asked to perform an essentially ministerial act in compliance with the UK's international obligations under the ICSID Convention. This does not involve the initiation of any substantive steps against the state, since the application is only for recognition and enforcement (in the sense

discussed in paragraphs 44-48 above) of an award which is the result of a prior adjudicative process.

(c) It is undoubtedly the case that service of the order granting recognition must be made on the state, but it is only at that stage that the state is formally impleaded and the jurisdiction of the English court formally invoked against the state. It is therefore only at that stage that the doctrine of sovereign immunity becomes engaged.

(d) The distinction between the application for registration, of which it is only necessary to give notice, and the resulting order, which must be formally served, is expressly drawn in section 1(6) of the 1966 Act itself.

(e) Once served with an order, a state may apply (as is the right of any litigant where an order is made without notice) to have the order set aside. However, the only grounds on which it may do so are if the order made has strayed beyond mere recognition and enforcement or if there was a failure to make full and frank disclosure. It is *not* open to it to do so on the grounds that the order should not have been made on the merits because, for example, it was entitled to claim state immunity.

(f) In this respect, it is telling that the provisions of Part 74 which permit an application to set aside the registration are expressly *not* applied to ICSID awards whereas they are preserved in relation to the enforcement of non-ICSID awards under Part 62.18 and in relation to the registration of foreign judgments by Part 74.

(g) The state may, of course, assert immunity in relation to any further steps that the judgment creditor may seek to take to execute the award.

107. This analysis seems to me to be confirmed by the decision of the Supreme Court in *General Dynamics United Kingdom v Libya (supra)* at [43]-[44] that (emphasis added):

> *"[43] The exercise of jurisdiction by the courts of one state over another state is an act of sovereignty. The institution of such proceedings necessarily requires that the defendant state should be given notice of the proceedings.* ***The service of process on a state in itself involves an exercise of sovereignty and gives rise to particular sensibilities****…*
>
> *…*
>
> *[44] In the particular context of enforcement of arbitration awards against a state, an application may be made to the court without notice (with or without issuing an arbitration claim form), in accordance with CPR r 62.18(1), for permission to enforce. Although the court may order service of the arbitration claim form (CPR r 62.18(2)) this is not usually required. However, under CPR r 62.18(7) the resulting order giving permission to enforce must be served on the defendant state which may then apply under CPR r 62.18(9) to set aside the order. If the order giving permission were not served, the defendant state may well be unaware of the enforcement proceedings* ***and may not have the opportunity to assert immunity from enforcement before an attempt is made to attach or to seize the state's assets within the jurisdiction****…."*

108. As I read the first passage, the view of the Supreme Court is that it is the *service of process* on a state which involves an exercise of sovereignty. This can be contrasted with the mere notification of the application for registration which is all that is required under section 1(6) of the 1966 Act and CPR Part 62.21. As for the second passage, the concern of the court was that a state should have the opportunity to assert immunity before any attempt is made to execute against its assets. However, that opportunity is adequately secured by requiring service of the order for registration.

109. I therefore respectfully disagree with the view of Fraser J in *Infrastructure Services Luxembourg Sarl v Spain (supra)* at [20] and [56] that the mere recognition and enforcement of an ICSID award involves the exercise of the court's adjudicative jurisdiction. The court's jurisdiction to make the order derives directly from the 1966 Act and involves no exercise of discretion or adjudication at all but merely gives effect to the applicant's statutory entitlement.

110. It follows in my judgment that the question of sovereign immunity does not arise in relation to an application to register an ICSID award. It is therefore not open to Zimbabwe to apply to set it aside on that basis, although it may of course claim immunity in relation to any further steps towards execution. I should add that if Cockerill J's order had gone beyond mere recognition and enforcement, this might also have been a legitimate ground for an application to set aside *pro tanto*. However, I am satisfied that it does not and that (subject to the question of full and frank disclosure which is considered below), Zimbabwe has no basis for its application.

111. I accept that this is a novel approach for which there is no direct authority. However, to my mind, it has the following positive merits:

(a) It gives full force and effect to the United Kingdom's international obligations under the ICSID Convention to recognise and enforce ICSID awards;

(b) It recognises the self-contained nature of the ICSID regime with its internal appellate review process;

(c) It gives full weight to statements of the highest authority that, provided the enforcing court is satisfied of the authenticity of the award, it is not entitled to review either the substance of the award or the jurisdiction of the tribunal or to refuse recognition or enforcement (save possibly in the exceptional and extraordinary circumstances contemplated in *Micula*);

(d) It does no violence to the principles of state immunity because an order for recognition and enforcement goes no further than recognising the award as binding – something which the state in question has already undertaken to do under the Convention. In particular, it does not involve taking any substantive steps against the state and no adjudicative jurisdiction is asserted over the state or its assets as such;

(e) It also enables a principled distinction to be drawn between applications to enforce ICSID awards, which are not served and where the award cannot be reviewed, and applications to enforce awards under the New York Convention, which not only do potentially require service but, more importantly, expressly require the court to exercise its adjudicative jurisdiction in determining that none of the defences to recognition and enforcement applies. The potentially far-reaching consequences which would otherwise ensue for enforcement of awards under the New York Convention are thus avoided altogether and the well-established case law in this field, such as *Svenska Petroleum Exploration AB v Lithuania*, *Tatneft* and *General Dynamics*,[7] is left intact.

[7] It is for this reason that Mr Harris' argument that *Tatneft* is contrary to the decision of the Supreme Court in *Micula* at [69] (i.e., that a Contracting State cannot refuse recognition or enforcement of an award on grounds covered by the challenge provisions of the ICSID Convention) can never arise.

(5) Full and frank disclosure

112. There remains to consider Zimbabwe's argument that Cockerill J's order must in any event be set aside on the grounds that the Claimants failed to make full and frank disclosure.

113. It was not in dispute that Mr Poulton's first witness statement in support of the application for registration made no mention of state immunity at all. Indeed, it did not even address the question of full and frank disclosure, as it should have done given that this was a without notice application.

114. The explanation given by Mr Poulton in his second witness statement was that there was nothing to disclose because it was patently obvious that Zimbabwe was not immune by virtue of section 2 and/or section 9 of the State Immunity Act 1978. As will be apparent from what has gone before, I do not accept that either section of the Act has deprived Zimbabwe of any immunity, so the premise of the Claimants' argument is flawed. It is true that I have ultimately concluded in favour of the Claimants, but that was not on the basis relied on.

115. It is the overriding duty of the court to give effect to state immunity even if the state does not appear. It is therefore incumbent on anyone making an application which names a state as respondent to address the question in order to allow the court to satisfy itself that immunity is not engaged: see the comments of Stanley Burnton LJ in *ETI Euro Telecom International NV v Bolivia,* [2008] EWCA Civ 880; [1989] 1 WLR 665 at [110], [128] and Butcher J in *General Dynamics United Kingdom Ltd v Libya* [2022] EWHC 501 (Comm) at [25], [30]. It is not for the applicant to assess for itself whether a

point is arguable or not. That is the function of the court, and on this point I agree with Mr Justice Wallbank in *Tethyan* at [42].

116. The fact (if such indeed be the case, which was disputed) that Zimbabwe may have given no indication that it would rely on state immunity may be relevant to my exercise of discretion, but it does not absolve the Claimants from raising the point. The comments of Lawrence Collins J in *Konamaneni v Rolls Royce Industrial Power (India) Ltd*, [2002] 1 WLR 1269 at [180] (quoted by Butcher J in *General Dynamics (supra)* at [25]) suggesting the contrary are in my judgment directed at failure to make full and frank disclosure in general and did not specifically have in mind cases such as this where the court is obliged to take the point of its own motion.

117. I therefore regard the breach of duty in this case as culpable, albeit not deliberate. This means that I have a discretion to set aside the order without considering the substantive merits, the purpose of doing so being to deprive the wrongdoer of any advantage improperly thereby obtained. Nonetheless, I am not bound to set the order aside and must exercise that discretion taking into account all the relevant circumstances.

118. In the event, I have decided that it would not be appropriate to set aside Cockerill J's order on this ground alone. As I have found, the Claimants have an entitlement to register the award conferred by the ICSID Convention and given effect by the 1966 Act. On the view I have taken of the case, state immunity is irrelevant to applications for registration with the result that the failure to disclose was in fact immaterial. Moreover, since in applying for registration the Claimants were merely exercising a statutory entitlement rather than seeking

direct relief against or invading the rights of Zimbabwe, they have not received any benefit which they ought not to have had: *General Dynamics (supra)* at [45]. Nor can I discern any tangible prejudice to Zimbabwe. An application for registration and enforcement merely recognises the status of something which has substantively already happened, namely the award, and Zimbabwe can in any event rely on state immunity in order to resist any attempt by the Claimants to proceed beyond mere registration towards execution.

119. I accept that, albeit culpable, the breach was not deliberate or contumelious and in my judgment it would be excessively harsh to deprive the Claimants of their entitlement to register the award. It is sufficient in all the circumstances to penalise them in costs.

120. Zimbabwe's application to set aside accordingly fails and is dismissed. I will hear counsel on any consequential matters.