UKSC-2025-0177

IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)
[2025] EWCA Civ 588

B E T W E E N:

THE CZECH REPUBLIC

Claimant
(Appellant on this appeal)

-and-

(1) DIAG HUMAN SE
(2) MR JOSEF STAVA

Defendants
(Second Defendant is Respondent to this Appeal)

CLAIMANT'S WRITTEN CASE

A: Introduction

1. This appeal, made by the Czech Republic (CR), concerns the bilateral investment treaty (BIT or Treaty) in force between Switzerland and CR. As far as CR is aware, this is the first appeal to come before the Supreme Court (or the House of Lords) involving an issue of the interpretation of a BIT, of which there are now thousands in existence around the world[1]. Only two previous appeals have come before the Supreme Court concerning other investment treaty issues: both were concerned with enforcement of ICSID awards[2]. {**21.1/ 651-662**}

2. The appeal is concerned with the question set out in paragraph 66 of the Agreed Statement of Facts and Issues (SFI): *Is CR's objection to Mr Stava's claim in respect of breaches / conduct after June 2011, alternatively 31 December 2011, on the basis that in view of his divestment of the shares in Diag Human SE, he did not own or* {**1/38-39**}

[1] According to the UN Trade and Development – Investment Policy Hub webpage, as at 24 September 2026 there are 2861 BITs in total, and 2238 in force: https://investmentpolicy.unctad.org/international-investment-agreements.

[2] *Micula v Romania* [2020] UKSC 5, [2020] 1 WLR 1033; *Spain v Infrastructures Services Luxembourg Sarl, Republic of Zimbabwe v Border Timbers Ltd* [2026] UKSC 9, [2026] 2 WLR 581. {**30.15/ 2789-2793**}

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control an "investment" after this time, an objection to "substantive jurisdiction" as defined in sub-sections 1(a) and/or (1)(c) of section 30 of the Arbitration Act 1996? It is submitted that the answer is "Yes", because on the true interpretation of the offer of arbitration contained in the BIT there was no offer to arbitrate in respect of such claim.

3. In the field of investment treaty arbitration in general, jurisdictional objections are usually categorised according to the three main jurisdictional thresholds that a claimant must cross in order to reach the merits phase of an investment treaty arbitration, known by their Latin names: *ratione materiae, ratione personae* and *ratione temporis*[3].

4. The first focusses on whether a claimant has at the material time 'a protected investment' (is the subject matter of the claim or claims in question covered by the arbitration agreement?); the second on whether a claimant was a protected 'investor' (is the claimant a qualifying person?); and the third on the temporal scope of the tribunal's jurisdiction (is the relevant time or times - in respect of breaches which do not all occur on the same date - covered by the treaty?).

5. Understandably, given that the Arbitration Act 1996 (the Act) was drafted from the perspective of English law and also with commercial arbitration principally in mind, these three categories do not match with the three categories in the definition of "*substantive jurisdiction*" in s.30(1)(a) to (c) of the Act, at least one of which must be present to enable a decision to be challenged under s.67 of the Act. However, depending on the circumstances, all three sub-sections of s.30(1) can potentially apply to a jurisdictional challenge in an arbitration commenced under an investment treaty. **{33.1/3380}** **{26.1/ 1642-1644}**

6. This case raises the question how the Courts should draw the boundary in the context of a particular bilateral investment treaty arbitration between objections which are capable of being brought under s.67 of the Act – and hence re-determined by the Court – as they go to "*substantive jurisdiction*", as defined in s.30 of the Act, and those which do not. It is submitted that the answer lies in interpreting the offer to arbitrate made in the treaty by each of the Contracting States to investors of the other State to determine **{26.1/ 1642-1644}** **{33.1/3380}**

[3] Reference is also seen to i) "*ratione loci*" – a territorial objection (though this may often be subsumed as part of an objection to whether there is a qualifying investment) and ii) "*ratione voluntatis*", which one sees used to refer to other objections that there is no consent to arbitrate e.g. where there is a dispute about whether a party can rely on a "most favoured nation" clause to rely upon an offer to arbitrate in another treaty.

whether the objection in question raises an issue falling within the definition of substantive jurisdiction in s.30.

7. As set out in the Agreed SFI, the arbitration which forms the background to this appeal was brought by two claimants, Mr Stava and Diag Human SE. This appeal concerns CR's objection to the Tribunal's jurisdiction in respect of the part of the claim brought by Mr Stava. [4] The relevant objection arises from the fact that Mr Stava intentionally disposed of his investment by a suite of legal documents executed by him in late May 2011 with the benefit of legal advice. He did so by transferring his interest in the shares in Diag Human SE to LNR Trust Reg, a Liechtenstein trust corporation which was the trustee of the Koruna Trust, which transfer took effect at the latest by the end of 31 December 2011. The Liechtenstein trustee does not qualify for the protection under the Swiss/Czech BIT. Mr Stava made this transfer for what he described in his own evidence as succession planning purposes (as well as asset protection from third parties)[5]. In other words, he consciously wished to avoid certain legal consequences of owning the shares in an inheritance situation and hence disposed entirely of his legal interest in them. {1/14} {23.1/1109-1124}

8. It was common ground below, following expert evidence on Liechtenstein law, that thereafter, he had no ownership interest in the shares of any kind. Although Mr Stava fell within the class of discretionary beneficiaries to whom an appointment or distribution out of the trust assets might be made, he had (by design) no entitlement to such an appointment or distribution. The trust was a discretionary one, and in any event, there is no such thing as equitable or beneficial ownership under Liechtenstein trust law. Thus, the result of such disposal was at all relevant times afterwards (when otherwise a cause of action for subsequent breach of the Treaty might have arisen in his favour, including in 2014) that he no longer owned or held the relevant investment.

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[4] CR also relied upon the effect of the same transactions to challenge jurisdiction regarding the claim by Diag Human SE. CR succeeded on that point before the Court of Appeal, resulting in the set aside of the Award vis à vis Diag Human SE. That is the subject of the appeal by Diag Human SE in appeal number UKSC-2025-0176. {21.2/664}

[5] First Witness Statement of Mr Stava, [12]; Second Witness Statement of Mr Stava, [29]; Third Witness Statement of Mr Stava, [13]-[15]; cross-examination of Mr Stava on Day 2 of the arbitration, p.116, line 11- p.118, line 5; p.124, lines 19 – p.131, line 7; First Witness Statement of Mr Stava, [3]; cross-examination of Ms Nicole Stava during the Commercial Court hearing, Day 2, pp. 200 – 203, of Mr Stava on Day 3, p.11, line 25 – p.12, line 9; p.13, lines 3 – 20; p.20, lines 2 – p.28, line 17; p.35, line 15 – p.36, line 5; p.39, line 8 – p.40, line 20. {21.5/719} {21.7/723} {21.8/724-735} {25.1.1/1168-1172}

CR's objection is based on there being no offer to arbitrate a dispute in respect of claims for alleged treaty breach arising in that period. This objection can be viewed as partly *ratione materiae* and partly *ratione temporis*. {**25.1.2/ 1174-1175; 1176; 1179-1187; 1188-1189; 1190-1191**}

9. The Courts below both held that this objection was not one of "*substantive jurisdiction*" and hence the arbitral tribunal's decision was incapable of being the subject of a challenge under s.67. {**26.1/ 1642-1644**}

10. At first instance, Foxton J's reasoning on this issue in his March Judgment – a very long judgment which addressed many other issues – was at [145]-[146], as follows: {**11/422**}

> "*145. The effect of this objection is that even if Mr Stava is Swiss, and made the investments which the tribunal found were made at Award, [387]-[393], all of which were made long before June 2011, the tribunal would not have jurisdiction to determine whether or not Mr Stava retained those investments at the date of the Article 4(2) breach in relation to the 2014 Review for the purpose of determining a claim by Mr Stava for damages in relation to such a breach.*
>
> *146. On that basis, Mr Stava was an investor, and he made investments for the purposes of the Investment Treaty. Construing Article 9 of the Investment Treaty in accordance with the principles set out in [142] above, I see nothing in Article 9 which limits the offer to arbitrate to breaches which occur at the date when the investor still owns the investments they made (albeit it is easy to see how this would be relevant to the investor's standing to complain about the breaches and to the question of loss). It is important to recall that Article 9 refers to "disputes with respect to investments". If the question is asked whether the dispute between Mr Stava and the Czech Republic as to his continuing ownership of the investments from June 2011 onwards (such that he has standing to claim for breaches of the Investment Treaty impacting on those investments) is a dispute "with respect to investments", the answer, in my view, is clearly yes. The contrary argument requires the court to read into Article 9 a limitation which is not expressly stated, something the applicable principles of interpretation make a challenging task.*"

11. It is submitted that this reasoning, with which the Court of Appeal later agreed, was incorrect. As to [145], the point made is simply incorrect, in view of the doctrine of *Kompetenz-Kompetenz*: see further paragraphs 61-62 below. The Tribunal would have {**11/422**}

had the power to determine whether, as a matter of fact, Mr Stava still retained the shares at the relevant times (post-disposal) as part of determining the jurisdiction objection. As explained in more detail below, that determination, like other determinations as part of the Tribunal's exercise of its *Kompetenz-Kompetenz* jurisdiction to decide whether it had jurisdiction, would itself then be subject to review by the Court.

12. As to [146], it is submitted that the Courts below were both wrong to interpret the words *"dispute with respect to an investment"* in the offer of arbitration contained in Article 9(1) as covering a dispute over a claim relating to an alleged "*investment*" which the investor does not in fact own or hold at the relevant time when the events founding the claim giving rise to that dispute occur (even if he did previously own it). This is especially when the "ordinary meaning" of the words in the offer to arbitrate is combined with the various other factors mandated by Article 31 of the Vienna Convention on the Law of Treaties (VCLT). This is the central point on this Appeal and it is developed in detail below. {**11/422**} {**21.1/657**} {**29.32/ 2420-2421**}

13. Thus, CR's appeal against the decision of the Court of Appeal turns on the question of whether or not there was a question of "*substantive jurisdiction*" raised by its objection to the exercise of jurisdiction by the Tribunal regarding that part of the claims brought by Mr Stava which relate to matters which occurred *after* the shares in Diag Human SE ceased to belong to Mr Stava and when they were transferred to and held by the Liechtenstein trust. It is important to appreciate that, because the Courts below (Foxton J and the Court of Appeal) both held that the objection in question was not one of "*substantive jurisdiction*", and hence s.67 could not be invoked, there has been no decision by the Courts as to whether the objection is in fact a well-founded one. This Appeal therefore gives rise to a very short issue which requires determination: were the Courts below correct to hold that the relevant objection was not one of "*substantive jurisdiction*" and hence could not be raised at all under s.67? {**26.1/ 1642-1644**}

14. It is submitted that there is an equally short answer to this question. The State parties to the Treaty have agreed in Article 9(1) to offer and submit to arbitration "*disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party"*. When an investor does not own or hold an investment at the time when the alleged treaty cause of action arises, he does not have a *"dispute with respect* {**21.1/657**}

to an investment", as he no longer owns or holds the investment. As a matter of ordinary language, that is a dispute with respect to a former investment that someone used to have. It is Mr Stava who requires the Court to read into Article 9 an extension which is not expressly stated and for which there is no rational justification. The first instance Court here, upheld by the Court of Appeal, was wrong to decline to entertain the s.67 challenge and it should instead have gone on to decide the challenge on its merits under s.67. {**26.1/ 1642-1644**}

15. Were this Court to decide that the objection is one of "*substantive jurisdiction*", as it is submitted that it should, it would consequently need to remit the objection back to the first instance Court to be determined on its merits. (Relief is addressed in more detail in a separate section below.) That is precisely what happened in the *Korea v Elliott* case, also decided against the State in that case by Foxton J at first instance[6] when he concluded that the State's objection was not one of "*substantive jurisdiction*". That was reversed on appeal by a differently constituted panel of the Court of Appeal[7] and so remitted to the Commercial Court (in the event, to Foxton J) for a decision on the merits of the jurisdiction objection, which objection he then upheld in favour of Korea.[8] See further Section B below in relation to that decision.

16. It is submitted that the Court of Appeal's reasoning in rejecting the appeal on the basis that the objection was not properly to be characterised as an objection of "*substantive jurisdiction*" under ss.30(1) and 67 of the Act was incorrect. The Court should have held that this objection fell under s.30(1)(a) and/or (c) and could therefore be adjudicated under s.67. {**33.1/3380**} {**26.1/ 1642-1644**}

17. So far as concerns s.30(1)(a), the analysis is as follows. There is obviously no arbitration agreement between the host State and an investor at the initial point in time when the treaty is made, as the BIT is made only between the two Contracting States. The arbitration provision in an investment treaty (here, Article 9(1)) is considered to be a standing offer from a host State of willingness to arbitrate with those who meet the definition of an "*investor*" of the other contracting State in respect of claims under {**33.1/3380**} {**21.1/657**}

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[6] *Republic of Korea v Elliott Associates* [2024] EWHC 2037 (Comm), [2024] 2 Lloyd's Rep 363. {**34.7/ 3432-3450**}

[7] *Republic of Korea v Elliott Associates* [2025] EWCA Civ 905. {**27.13/ 1964-1985**}

[8] *Republic of Korea v Elliott Associates* [2026] EWHC 368 (Comm). {**27.3/ 1659-1732**}

the treaty. The standing offer is capable of acceptance by a qualifying investor of the other State in respect of disputes over alleged claims falling within the scope of the offer contained in the treaty. At the point of such acceptance of the standing offer, which usually takes place when a person claiming to be a qualifying investor submits a request for arbitration, an arbitration agreement between the State and the investor comes into existence[9]. However, even then, there is no valid arbitration agreement in respect of disputes *which fall outside the scope* of the standing offer. The offer to arbitrate is limited (inter alia) by reference to (a) the persons to whom it is made (here, "*an investor of the other Contracting Party*") and (b) the subject matter of the dispute (in this case, "*disputes with respect to investments*").

18. A person purporting to accept the standing offer to arbitrate *qua* "*investor*" cannot thereby expand the State's consent to arbitration beyond the scope of the offer to arbitrate actually made by the Contracting States in the BIT; if he is not in fact an "*investor*" as defined, or does not in fact have an "*investment*" as defined, or otherwise purports to refer claims to arbitration which fall outside the offer, in each instance that raises a question of "*substantive jurisdiction*". Here, that person was Mr Stava and he could not refer to arbitration a claim or claims arising from events which occurred after he had ceased to own or hold the investment in question. The dispute relating to that claim (or claims) was not a "*dispute relating to an investment*" because there was no investment of his after that point in time. The owner of the shares was the Liechtenstein trustee. **{21.1/657-659}**

19. So far as concerns s.30(1)(c), the analysis also turns on viewing Article 9 as a standing offer to arbitrate. Even if an investor attempts to request arbitration over a claim which falls outside the scope of the standing offer - because the claim relates to a period of time when he does not own or hold the investment (whether that be before, or after he no longer, owns or holds the investment) - it is not a dispute which has been submitted to arbitration "*in accordance with the arbitration agreement*". The scope of the arbitration agreement is determined by the terms of the standing offer to arbitrate made by each of the Contracting States. **{33.1/3380}** **{21.1/657-659}**

[9] See e.g. *Republic of Ecuador v Occidental* [2005] EWCA Civ 1116, [2006] QB 432 at [18]ff and *Gold Reserve v Bolivarian Republic of Venezuela* [2016] EWHC 153 (Comm), [2016] 1 WLR 2829 at [17]. See also [124] of the CA Judgment. **{34.6/3428-3431}** **{34.1/3390}** **{6/277}**

20. One final introductory point is that in this field, focussing on the actual scope of consent to arbitration by the Contracting States is particularly important. There is a crucial distinction between: (a) an arbitration offer made by a State in this context and (b) the commercial situation where there is an arbitration agreement agreed between the parties as part of a commercial contract between them. As to the latter, according to the well-known principle established by the House of Lords in *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [2007] 4 All E.R. 951 at [13], it should be assumed that businessmen who have entered into an arbitration agreement in their commercial contract would want to have *all* their disputes resolved in a single forum. In other words, there is a presumption in favour of taking a broad view of the scope of the arbitration agreement in such commercial context.

21. The *Fiona Trust* principle has no application to treaty arbitration. States are a different kind of actor. Investment treaties derogate from the default position under public international law, namely the absence of jurisdictions in which individuals and companies can bring claims against States. States are not to be held to have given away more sovereignty than they actually gave away in the treaty wording, including by the standing offer to arbitrate.

22. Absent an applicable investment treaty containing an offer of arbitration[10], or another applicable international treaty such as the ECHR, a person who has an investment in a host State cannot bring any *international law claim* against that State, even if it has confiscated, unfairly treated or diminished the value of his investment. He must either, if he can, encourage the State of which he is a national to bring a diplomatic protection claim on his behalf on the international plane (i.e. as between the two States)[11], or he must resort to himself seeking relief before the Courts of the host State (given that there will likely be State immunity in respect of any claims sought to be brought by

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[10] Most investment treaties do but some do not contain an offer of arbitration to the investor, for example Germany-Pakistan BIT (1959), Germany-Malaysia BIT (1960), Switzerland-Tunisia BIT (1961), and Switzerland-Ivory Coast BIT (1962). The desirability or otherwise of investor-State dispute settlement has been the subject of considerable recent debate. For example, Australia announced a policy in November 2022 of no longer including ISDS in investment treaties; its 2024 BIT with the UAE does not provide for investor-State arbitration. Other recent examples of investment protection treaties which do not provide for ISDS include the Brazil-India Investment Cooperation and Facilitation Treaty (2020) and the Brazil-UAE Co-operation and Facilitation Investment Agreement (2019). {**36.1/ 3713-3722**}

[11] *Republic of Ecuador v Occidental* [2005] EWCA Civ 1116, [2006] QB 432 at [14]-[15]. {**34.6/ 3426-3427**}

him in any third party State Court). Thus, in the commercial context, there is the *Fiona Trust* presumption, presumptively referring all related disputes to arbitration. That presumption exists because it is viewed as being sensible, in the commercial context, to refer everything to the one forum. That does not apply here, because in the treaty context (unlike the commercial one) it can make good sense for the offer of arbitration in respect of treaty breaches to be interpreted as no wider than the scope of the treaty itself as the Court of Appeal held in respect of the treaty in *Korea v Elliott*. **{27.13/ 1964-1985}**

B: The Court of Appeal decision in *Korea v Elliott Associates* [2025] EWCA Civ 905

23. Section C below contains detailed submissions on the standing offer to arbitrate contained in the BIT. The reasoning of the Court of Appeal in the present case, with the key paragraphs being [123]-[133] of the CA Judgment, is analysed in detail in Section E below. However, it is convenient to note that in [130] of that judgment the Court of Appeal drew support for its own reasoning (that the objection in question was not one of "*substantive jurisdiction*") from a first instance decision which has since been reversed, namely the first instance Judge's (also Foxton J, as he then was) decision in *Korea v Elliott*. In that case, Foxton J had reasoned, similarly to his reasoning in the present case, that the scope of arbitration offer contained in the part of the treaty relating to arbitration should be decided independently of the provisions as to the scope of the treaty as a whole. **{6/277-279}** **{34.7/ 3432-3450}**

24. Foxton J's decision in the *Korea v Elliott* case was overturned on appeal by a differently constituted panel of the Court of Appeal (which gave its judgment not long after the CA Judgment in this case). That panel correctly held (albeit of course in the context of a differently worded treaty) that the scope of the offer to arbitrate in the US/Korea Free Trade Agreement (FTA), in Article 11.16 thereof, was subject to the claimant bringing itself within the scope of the investment chapter of the treaty (as set down in the "*scope and coverage*" provision, Article 11.1). Article 11.1 provided, in summary, that Chapter 11 (the investment chapter of the FTA) applied where there was a measure relating to a covered investment or an investor of the other party. **{34.7/ 3432-3450}** **{27.13/ 1964-1985}** **{36.2/ 3724; 3732-3734}**

25. In so holding, the Court of Appeal in *Korea v Elliott* rejected the investor's contention, wrongly accepted by Foxton J, that questions as to the "*scope*" of the treaty – i.e. whether the treaty applied to the claim – were themselves referred to arbitration. **{27.13/ 1964-1985}**

Satisfaction of the scope provision went to jurisdiction. The offer to arbitrate claims for breach of the treaty was thus *co-extensive* with the investment protection afforded by the treaty[12]. The logic of that decision is unassailable; given the matters discussed at paragraphs 19-22 above, a key factor in the interpretation of the offer to arbitrate by the Contracting States is the scope of the treaty as a whole to which the Contracting States have agreed. There is no presumption in favour of a broad interpretation in this context, and there is no sensible reason why the offer of arbitration over treaty claims should be *wider* in scope than the scope of the substantive treaty protection. It is submitted that the same applies here on the correct interpretation of the Treaty including in particular Articles 2 and 9, albeit that the treaty wording is of course different.

26. Relevantly, the Court of Appeal in the *Korea v Elliott* case also noted (in contrast to the Court of Appeal in the present case): {**27.13/ 1964-1985**}

> *"... there is nothing inherently surprising or unworkable about the Contracting Parties to NAFTA and the Contracting Parties to the Treaty having limited the right of investors to arbitrate to circumstances in which the substantive protections under the Treaty were engaged, not merely when it was alleged that they were engaged*"

27. This is an important observation. It contradicts what the Court of Appeal in this case said or implied in its judgment. One can take it further by asking rhetorically: why would the Contracting States wish to consent to investment treaty arbitrations alleging breaches of the treaty being brought against them in terms which are *wider* than the scope of the substantive obligations they have consented to in the relevant treaty?

28. Therefore, any standing offer to arbitrate contained in an investment treaty should be scrutinised carefully to see what offer of arbitration is actually being made by the Contracting States; it would be a rare and unusual case where the Contracting States consent to arbitrate a dispute about alleged liability under a treaty's substantive provisions in respect of an "*investment*" of an "*investor*" which is not, or no longer,

[12] *Korea v Elliott* (CA) (supra) e.g. [61]. {**27.13/1983**}

protected under the scope of substantive protection afforded by the treaty at the time when the events complained of occurred.

29. Equally important, as the Court of Appeal in *Korea v Elliott* pointed out, jurisdiction is based on facts, *not mere allegations*. The relevant person must prove that he is in fact an "*investor*", and equally there must *in fact* be an "*investment*" at the relevant time in order for there to be jurisdiction. If it can be established, as it has been here, that a person no longer owns or holds the relevant qualifying investment when the alleged cause of action in respect of it arises, there is no reason to suppose that a State would offer to arbitrate a dispute about a former investment with a person who no longer owns or holds the affected investment at the time of the breach in question. Were it otherwise, so that what is a matter of "*substantive jurisdiction*" turned not on actual facts but on *mere allegations* by claimants, the decisions of an arbitral tribunal could be wrongly insulated from challenge. That was clearly not the intention of Parliament: see the observations in the DAC report referred to at paragraph 63 below, which recognised that jurisdiction turns on actual facts. {27.13/1964} {**33.2/ 3382-3386**}

30. The treaty language held to raise a point of "*substantive jurisdiction*" within the meaning of the Act by the Court of Appeal in *Korea v Elliott* was materially identical to treaty language relied upon in other arbitral awards (*Mesa Power v Canada*; *Gallo v Canada*), on which CR relied below to support its case that the type of objection it makes here is jurisdictional. Without any meaningful analysis, the Court of Appeal dismissed those awards as not considering a jurisdictional point ([130]). This was wrong. This error is addressed in more detail at paragraphs 79-83 below. {**27.13/ 1964-1985**} {**37.16/ 4113-4128**} {**37.29/ 4308/4314**}

C: Detailed submissions on interpretation of the offer to arbitrate

31. As explained above, the key question at issue is one of the correct interpretation of the standing offer of arbitration in Article 9(1) of the BIT, applying public international law principles of treaty interpretation. It is submitted that the correct interpretation of that offer, based on the ordinary meaning of the words used in Article 9 and set in the context of the treaty as a whole, is that there was no offer to arbitrate with an investor in respect of a dispute over an alleged cause of action which arose *after* he ceased to own or hold the investment in question. That was the case here, given that Mr Stava had disposed of his interest in the shares by the documents he executed in late May {**21.1/ 654-660**} {**2[illegible]- 1109-1124**}

2011 and the alleged claims which are the subject of this objection arose out of facts which occurred after he was no longer the owner of any interest, including in 2014. After such disposal, he no longer had an "*investment*". The shares ceased to be an "*investment*" for the purposes of the treaty protection, as they were no longer an investment "*of*" or "*by*" Mr Stava. "By" is used in Article 2, Article 3, Article 4(1), whereas "of" is used in Articles 4(2) and 6(1) and 11, with 6(2) referring to investors *whose* investments. i.e. the terms "by" and "of" are seemingly used interchangeably. This is regardless of whether or not Mr Stava could still be regarded as an "*investor*" in respect of matters occurring after his disposal.

32. The Court of Appeal focussed on whether Mr Stava was an investor (see e.g. [126]) but much more important here is whether he could invoke a "*dispute with respect to an investment*" (within the meaning of Article 9) relating to a claim arising out of facts which occurred after his disposal of the shares into the Koruna Trust. It is submitted that he could not. The position can be tested by reference to a person who is an undoubted investor with some qualifying investments, but who seeks to bring a claim in respect of another asset which does not qualify as a protected investment. In such a case, the objection that the States' offer to arbitrate in Article 9 does not extend to a dispute about such an asset is plainly an objection to substantive jurisdiction, even though he is an investor with other potential claims which *are* covered by the arbitration offer. That is because the claims he seeks to bring to arbitration regarding that non-qualifying asset are not "*with respect to an investment*" within the meaning of Article 9. **{6/277}** **{21.1/657-659}** **{23.1/1109-1124}**

33. The BIT is to be interpreted in line with the rules set out in the VCLT, which reflect customary international law.[13] In *MSC Mediterranean Shipping Co SA v Stolt Tank Containers BV* [2023] EWCA Civ 1007, [2024] 1 All ER (Comm) 364 at [61], the Court of Appeal summarised this task as being:[14] **{29.32/2417-2421}** **{27.10/1899}**

[13] *JTI Polska v Jakubowski* [2023] UKSC 19, [2024] A.C. 621 at [23]-[25]. In the investment treaty context, see *Tatneft v Ukraine* [2018] EWHC 1797 (Comm), [2018] 1 W.L.R. 5947 at [38(1)]. **{27.9/1874-75}**

[14] Cited with approval most recently in *Korea v Elliott* [2026] EWHC 368 (Comm) at [87] (Foxton LJ) where it was noted that "*"Context" for Article 31 purposes can include "any structure or scheme underlying a provision or the treaty as a whole" (Gardiner Treaty Interpretation 2nd (2015), [4.2.23]).*" Although this is a judgment delivered in the High Court, **{34.10/3461}** **{27.3/1681}**

"*to ascertain the ordinary meaning of the terms used in their context and in the light of the Convention's object and purpose, with recourse to supplementary means of interpretation either to confirm the meaning thus ascertained or, in the strictly limited cases identified in article 32(a) and (b), to determine the meaning.*"

34. In conducting this task, it "*would be wrong to read article 31 as reflecting something like the so-called "golden rule" of statutory interpretation where one starts with the ordinary meaning of the words and then moves to other considerations only if the ordinary meaning would give rise to absurdity*".[15] Instead, the process is a unitary one in which good faith, ordinary meaning, context and object and purpose are all equally important, primary considerations.[16]

35. As for the considerations set out in Article 31 of the VCLT, in addition to "*ordinary meaning*" of the provision in question: **{29.32/ 2420-21}**

    a. "*Context*" must normally[17] come from within the four corners of the treaty and will usually comprise (a) other parts of the clause being interpreted, (b) other articles, or (c) preambles.[18]

    b. Similarly, the "*object and purpose*" of a treaty is typically derived from the treaty's title and/or preamble as a starting point and confirmed by reference to the full text;[19] it is not to be derived by reference to factors *external* to the treaty's text.[20] It is wrong to suppose that "*object and purpose*" is somehow subsidiary to ordinary meaning. It is not. As Lord Sumption explained in *Al-Malki v Reyes* [2017] UKSC

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it was delivered by Foxton LJ after he had been elevated to the Court of Appeal, as a result of his original judgment in the High Court having been overturned by the Court of Appeal and remitted to first instance.

[15] *Moohan v Lord Advocate* [2014] UKSC 67, [2015] A.C. 901 at [64] (Lord Kerr), cited in *JTI Polska*, at [27]. **{27.9/ 1875-1876}**

[16] Ibid. See also Gardiner, *Treaty Interpretation* (Oxford, 3rd ed), pp. 35 [4.1], 40-42, [4.2]-[4.3]; p. 44-45, [4.3]-[5]; and Dörr and Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2nd edn), pp. 561, 580. **{38.8/4519; 4520-4522; 4523-4524}**

[17] Article 31(2) and (3) expressly provide for limited sources of context other than the treaty's text, but CR understands it to be common ground that there are no such sources of context relevant to the issues in these proceedings. **{38.6/4489 ;4492}**

[18] Gardiner, p. 214-231; see also Article 31(2) of the VCLT. **{38.8/ 4550-4567}**

[19] Gardiner, p. 238-240, [5.3.2]. See for example *Case concerning the Territorial Dispute (Libya v. Chad)* [1994] ICJ Reports 6, at [52]. **{38.8/ 4568-4570}**

[20] Dörr and Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2nd edn), p. 587. **{35.7/ 3711-3712}**

61, [2019] AC 735 at [11] treaties are not "*to be interpreted in a spirit of pedantic literalism*". {**38.6/4493**}

c. The rules concerning "context", "object and purpose" and "good faith" are closely linked to the accepted principle of effectiveness, or *effet utile*. Treaty provisions are to be interpreted so as to give them their fullest weight and effect, in such a way that a reason and a meaning can be attributed to every part of the text. This principle is an integral part of the general rule of interpretation in Article 31[21].

36. Applying these rules and principles here, **first**, the "*ordinary meaning*" of the phrase in Article 9(1) "*disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party*" is that there is an offer to arbitrate disputes in relation to *investments of* the putative claimant. Self-evidently, if that person does not have, or no longer has, the investment in question when the, or a, claim arises or is alleged to arise, then there is on the face of it no offer to arbitrate a dispute over that claim, just as there would be no offer if the person had never owned the investment in the first place. The ordinary meaning of the phrase is favourable to CR's position. It is Mr Stava who needs to find words which are not within Article 9 in order to extend its meaning to something different. {**21.1/657**} {**21.1/657-659**}

37. **Second**, in terms of "*context*", Article 2 is crucial. Article 2 is important both by way of context to the interpretation of Article 9 and as a provision in its own right, which must be given effect under the principle of effectiveness. Here, the parallel with the decision of the Court of Appeal in *Korea v Elliott* is important. Article 2 is entitled "*Scope of application*". It delineates the scope of the whole treaty ("*The present Agreement shall apply…*"), which obviously includes Article 9. This means what it says, and fulfils exactly the same purpose as the scope clause in *Korea v Elliott*. The scope of the offer to arbitrate in Article 9 cannot be properly interpreted without reference to Article 2 and the scope of the treaty as a whole. {**21.1/654; 657**} {**27.13/1964-1985**}

38. Article 2 limits the scope of the Treaty. It defines the investments to which the Treaty applies, viz "*investments … by investors*", provided also that certain other criteria set down in Article 2 are met. It thus makes clear that a claim in respect of the period before an investor has or makes an investment is outside the scope of the Treaty {**21.1/654**}

[21] Dörr and Schmalenbach, supra, pp.578-579 {**38.6/4490-4491**}

protection and is therefore a matter of consent and hence "*substantive jurisdiction*". Logically, the same must also be true of the period *after* complete divestment of an investment. If the asset in question does not qualify as an investment because it does not satisfy Article 2, then it is not an investment for the purposes of the Treaty as a whole. The theme of investments being "*by*" or "*of*" an "*investor*" runs through the Treaty. When an investor *disposes* of his investment (which occurred here in 2011), there is no longer an investment *by* or *of* that investor, so that any new alleged infringement of Treaty rights which occurs after such disposal (which allegedly occurred here after disposal and in particular in 2014) cannot come within the scope of the Treaty or of the offer to arbitrate. This is so notwithstanding that Article 2(1) also establishes an initial time threshold after which investments must be made in order to be protected under the BIT, namely 1st January 1950.

39. Other provisions of the Treaty also indicate how Article 9(1) should be interpreted. Article 1(2) refers to the types of protected investments that a person could have. The language suggests a connection of ownership or holding between the protected person and the assets. There is no language to suggest that it includes rights which a person formerly held but no longer holds. It would not be a normal use of language for someone to refer to shares that they sold last week as "my investments". Similarly, the phrase "*returns*" in Article 1(3) inherently suggests, and the examples given presuppose, a flow of the benefits of investment back to the investor. That again requires a subsisting connection between the investor and the investment. {**21.1/653-657**}

40. With these considerations in mind, Article 2(2) of the Treaty is also significant. It provides that "*the present Agreement shall not affect the rights and obligations of the Contracting Parties with respect to investments that are not within the scope of the Agreement*". However, if a State is being compelled to arbitrate in response to a claim by a person who no longer owned or held the investment when the alleged relevant breach of treaty occurred, and the State is being left to raise the point as a defence to the merits of the claim only (a point of "*admissibility*"', as it is sometimes put), then the State's obligations *are being affected* both because (a) it is being compelled to arbitrate, even though there is, on a proper analysis, no substantive claim at all and (b) as a result of being so compelled, it is exposed to the attendant risk of an {**21.1/654**}

unchallengeable, adverse and incorrect decision against it, with damages potentially extending to many millions or even billions.

41. It is to be noted that Article 2(1) also provides certain other jurisdictional criteria, which are not set out in Article 9, but which nevertheless plainly are jurisdictional in nature, limiting the scope of the offer to arbitrate. Pursuant to Article 2(1), investments must be (a) "*in the territory*" of the respondent State and (b) made later than 1 January 1950. These criteria must be met for the Treaty (including Article 9) to apply to the investment at all; and the reference in Article 9 to "*investments*" in respect of which an offer to arbitrate is made is a reference only to such investments. Thus, the former point (i.e. the territorial requirement) would be a jurisdictional point in respect of a claim made in respect of an investment in say Canada, even if the investor also had a claim in respect of another investment located in the territory of CR. The latter point (i.e. timing of investment) would also be a jurisdictional point, even if the breaches in question occurred after 1 January 1950. {**21.1/654; 657-659**}

42. A further point of context supporting CR's approach is that substantive treaty provisions apply where there is an investment and, conversely, not where there is not an investment. One would expect Article 9 to be interpreted in the same way. Key substantive provisions are contained in Article 4. Article 4(1) creates an obligation not to impair "*by unreasonable and discriminatory measures"* an investment. This could not apply to a given investor in respect of measures taken *before or after* that investor owns or holds the investment alleged to have been affected by the measures in question; each of the examples of offending measures – *"management, maintenance, enjoyment, extension, sale and liquidation"* – cannot affect an investor *before he owns or after he no longer owns* the investment in question. {**21.1/655; 657-659**}

43. Article 4(2) creates an obligation to provide "*fair and equitable treatment*" of "*the investments of investors*". Again, this cannot apply *before an investor owns an investment or after the investor has parted with his investment* and it is now owned by another person (here, LNR Trust Reg). This is consistent with, and supports, CR's approach to the interpretation of the phrase "*dispute with respect to investments*" in Article 9. In CR's submission, Articles 5 and 6 are likewise consistent with, and to some extent support, its interpretation – they are addressed in a separate section below. {**21.1/ 655-659**}

44. **Third**, CR's interpretation is consistent with the "*object and purpose*" of the Treaty. Mr Stava's interpretation is inconsistent with it. The "*object and purpose*" of the Treaty can be ascertained from looking at the aims stated in the Preamble of "*intensify[ing] economic cooperation to the mutual benefit of both States"*, *"creatin[ing] and maintain[ing] favourable conditions for investments by investors*", and "*recognising the need to promote and protect foreign investments with the aim to foster the economic prosperity of both States*". It would make no sense to interpret the offer to arbitrate in Article 9 as applying to disputes over former investments arising out of facts occurring after disposal of the investments. That would not serve the object and purpose of the Treaty from the perspective of either the Contracting States or of potential investors. {**21.1/652; 657-659**}

45. It would be an error of principle to assume that the preambular language and/or considerations of object and purpose require the Court to prefer outcomes that result in a wider interpretation of the offer of arbitration. Jurisdictional provisions in investment treaties are to be interpreted neither liberally (i.e. pro-investor) nor restrictively (i.e. pro-State): e.g. *Swissbourgh v Lesotho* [2018] SGCA 81 at [61]-[63]. {**35.6/ 3617-3618**} On the contrary, as already noted in paragraphs 21-22 above, the default position of State parties under public international law is a relevant consideration: see *ICS Inspection and Control Services Limited v Argentina*, PCA Case No 2010-9, Award on Jurisdiction 10 February 2012, [281]: {**37.13/ 3904**}

> *"The absence of a forum before which to present valid substantive claims is thus a normal state of affairs in the international sphere. A finding of no jurisdiction should not therefore be treated as a defect in a treaty scheme that runs counter to its object and purpose in providing for substantive investment protection."*[22]

46. Nothing in the *object and purpose* supports treating the objection arising from disposal of an investment as a mere point of so-called "admissibility" (whatever that means), rather than as an aspect of the scope of the States' consent to arbitration, which is the approach adopted in respect of other "no investment" objections. Objections based on

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[22] See also *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award of 13 September 2006, [95] "*what has to be applied is not some abstract principle of investment protection in favour of a putative investor who is not a party to the BIT and who at the time of its conclusion is not even known, but the intention of the States who are the contracting parties*…". {**37.26/ 4287-4288**}

the non-existence of a protected "*investment*" include the following, which are all recognised as raising jurisdictional issues:[23] (a) the factual existence of an asset, which is an obvious initial jurisdictional issue;[24] (b) whether such asset qualifies by reason nature or type as being an "investment" as defined in Article 1(2) and hence within the scope of the protection afforded by Treaty;[25] (c) whether the asset was acquired and alienated before 1950 so that it is not covered by the start of the time period specified in the Treaty (as required by Article 2(1)); (d) whether it exists outside the relevant territory so that it is outside the territorial scope of the Treaty (as required by Article 2(1))[26]; (e) whether the investor acquired the investment in question only after the breach had already occurred (see discussion below of the decision of Butcher J in *Tatneft v Ukraine* [2018] EWHC 1797 (Comm), [2018] 1 W.L.R. 5947). There is no good reason to hold that an objection such as that here – that the asset in question had been disposed of by the claimant investor before a relevant alleged breach of Treaty occurred, so that at the time when the asserted claim arose it was not an "*investment*" of the "*investor*" and there is no offer to arbitrate such claim/s – is not similarly jurisdictional in nature relating to the scope of the consent to arbitrate.

{21.1/ 653-654}

{34.10/ 3453-3485}

47. Other changes in circumstances give rise to undoubted jurisdictional effects. For example, if an investor becomes a non-national (in the case of an individual investor), or is redomiciled to another State or no longer regarded as a national of a Contracting State (in the case of a corporate investor, such as happened when Mr Stava ceased to control Diag Human SE here), there would be no jurisdiction. Or, if the BIT has been notified for termination, per Article 12, there would be a period of time after which the BIT was no longer binding and in force and after the expiry of such period, there would

{21.1/ 660-661}

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[23] Indeed, Foxton J recognised that the characterisation of the issue "*whether there was an investment*" as jurisdictional has "*long been accepted*" by investment tribunals, English decisions and by the Singapore Court of Appeal in *Swissbourgh Diamond Mines (Pty) Limited v Kingdom of Lesotho* [2018] SGCA 81 at [93]: see August Judgment, [40]. At trial in this case, the Court considered as part of the s.67 challenge the questions whether assets said to be investments had existed, whether they qualified as an "*investment*" within the meaning of that term under the BIT and whether they had been made within Czech territory: see generally August Judgment [39] *et seq*.

{35.6/ 3634-3635}

{13/495}

{13/ 497-498; 501; 515}

[24] See e.g. August Judgment, [49], [60], [102] – [103]; *Swissbourgh* [2018] SGCA 81 at [105], [108].

{35.6/ 3641-3643}

[25] See e.g. August Judgment, [49] *et seq*, [93] – [95] and the voluminous materials referred to there.

{13/ 512-514}

[26] See August Judgment, [110]. See also e.g. *Swissbourgh* [99].

{13/517}

be no jurisdiction for any claim based on events after that. Thus, there is no reason to regard an investment of a given investor as 'once made, always susceptible to arbitration' (which appears to have been the Court of Appeal's view), even in respect of events which occur after the investor in question has disposed of it. {35.6/3638}

48. **Finally**, "*Good faith*" also plays a role in the unified process of interpretation under Article 31 of the VCLT. It has a special meaning in this context and connotes a degree of reasonableness[27]. It supplements object and purpose. It is not a good faith interpretation in this sense to hold that the Contracting States consented to arbitrate with an investor who has disposed entirely of his investment (especially, as here, for reasons of succession planning) so that he can claim treaty protection based on a formerly held investment in respect of alleged breach/es of treaty which occurred after such disposal. {29.32/2420-2421}

49. To interpret the BIT in such a way that an objection on this ground does not relate to consent to arbitration, despite all other investment-related objections being regarded as jurisdictional (see paragraph 46 above), would be unreasonable, unprincipled and not reading the Treaty in good faith in the required sense. It would require the Court to conclude that Contracting States had agreed (i) to offer to arbitrate treaty claims that are doomed to failure and (ii) that if (because the tribunal errs) they are not dismissed, the States are to be taken to have agreed to accept the risk of unreviewable error with potential financial consequences equivalent to the annual budgets of government departments. That potential risk is compounded if the investment in question is something like regularly traded shares in a public company, where the class of former investors who previously held the investments and might be affected by post-disposition conduct could be very large indeed. It is hard to comprehend why the Contracting States might offer to arbitrate disputes in respect of the same investment with both existing and prior investors (who have disposed of their investment entirely). {21.1}

50. To sum up, when the BIT here is interpreted bearing in mind the ordinary meaning of the words used in Article 9(1) and the other factors specified in Article 31 of the VCLT, it is clear that the standing offer of arbitration does not extend to a dispute regarding Mr Stava's claims regarding the alleged breaches arising from conduct after he had {21.1/657} {29.32/2420-2421}

{38.8/4528-4529; 4534-4535}

[27] Gardiner, p. 183-184, [2.2]; p. 189-190, [2.4.2].

disposed of his investment. The Court of Appeal was wrong to hold that it did and that there was not a question of "substantive jurisdiction" in issue. The reasoning of the Court of Appeal in *Korea v Elliott*, which decided a similar issue, is to be preferred. {**27.13/ 1964-1985**}

51. There is no proper basis for treating this situation as different from one where the investor has no qualifying investment at the relevant time, as was held to be an objection to substantive jurisdiction by Butcher J in *Tatneft v Ukraine* (supra). The objection here and the relevant objection in that case are two sides of the same coin. In *Tatneft v Ukraine* the claimant did not have an "*investment*" at the time of the breach because it had not yet acquired the investment; here, Mr Stava had alienated the investment by the time of the breach to which the objection in question applies. There is no reason of interpretation or principle why those situations should be treated differently, and international law does not do so. Further, Butcher J in *Tatneft v Ukraine* rightly regarded the objection as jurisdictional under s.30, even though it was not stated in express terms in the clause in the treaty there which contained the offer to arbitrate. {**34.10/ 3453-3485**}

D: Mr Stava's reliance on Articles 5 and 6

52. Mr Stava places reliance on Article 5(1)(d). Article 5 as a whole is a free transfer provision, providing a guaranteed free transfer of the returns from investments, including in Article 5(1)(d) free transfer of the proceeds of liquidation of the investment. Here, Mr Stava's disposal of the shares into the Koruna Trust was gratuitous; his objective being succession planning (and also to avoid third-party asset enforcement). This provision therefore has no application here and he has not claimed for alleged breach of it. {**21.1/ 655-656**} {**23.1/ 1109-1124**}

53. Nevertheless, it appears that Mr Stava contends that Article 5 is relevant because it is said to show that an investor must be able to bring an arbitration claim in respect of conduct after he has parted with his investment. He appears to contend that claims for alleged breach of other provisions of the Treaty (which he does bring) must also be treated as "*disputes with respect to an investment*". This is not so. There are several answers to his reliance on Article 5. {**21.1/ 655-656**}

54. The requirement of continuing to hold the original investment in question can of course be expressly disapplied in specific instances. Such disapplication was mentioned by the Tribunal in *Alcor v. Czech Republic*, PCA Case No. 2018-45, Award, 2 March 2022

at [273]: "*The tribunal, however, prefers the analysis in Aven, which confirms the conclusion at which the Tribunal had already arrived, namely that, unless there are special circumstances, or the treaty otherwise provides, it is a requirement of jurisdiction that the claimant still hold the investment at the date of commencing proceedings"* (emphasis supplied). That is one answer to the point made by Mr Stava based on the treatment of "*proceeds*" in Article 5. {**37.3/3791**} {**21.1/655-656**}

55. Further, converting an investment into the proceeds of that investment is not the same thing as the gratuitous disposal of the investment which occurred in the present case; in the former situation, there is still an investment, albeit in a changed form. An investor who made an investment and then converts that investment into the proceeds of the investment still has a form of investment (i.e. the proceeds). The claim is not therefore by someone who no longer has any investment: the investment subsists, but in a different form.

56. If Mr Stava had sold the shares (rather than placing them in trust), then the shares would no longer have been a protected investment, but if repatriation of the proceeds of sale had been impeded by the host State, there would be a claim for breach of the free transfer provision (Article 5). Such a claim could readily be described as giving rise to a dispute "*with respect to*" an investment and hence falling within the scope of the arbitration offer, especially as it is obvious that it must have been the intention of the State Parties that this specific type of claim would be capable of enforcement by arbitration pursuant to Article 9. Article 5 is a specific provision which extends protection in respect of the proceeds of an investment into a period after the investment itself has been disposed of. The fact that such was the evident intention of the parties does not in any way undermine the general point that it was their intention that claims for substantive breaches of the principal investment protections contained in Article 4 of the BIT could not be brought in respect of events affecting the original investment after its disposal. {**21.1/655-659**}

57. Turning to Mr Stava's reliance on Article 6, this is a Treaty provision regarding expropriation and similar measures. Mr Stava contended in his Notice of Objection to the grant of PTA that "*the provision on expropriation must be able to be invoked by an* {**21.1/656**}

investor after it has lost its investment"[28]. This point does not support Mr Stava's argument, because CR's argument is not inconsistent with what Mr Stava says. The objection on which CR relies in the present case is not that a claimant must continue to hold the asset/s which are said to constitute the investment at the time of starting the arbitration in order for the Tribunal to have jurisdiction to consider a claim regarding past conduct.[29] Rather, it is that jurisdiction extends only to disputes "*with respect to investments*", and that when there is no longer an investment because, as here, it has been transferred away to another person, the disputes related to claims that arise after that transfer do not constitute a dispute with respect to an investment which the original investor can raise. There is nothing in Article 6 which indicates that an investor can bring a claim for conduct said to constitute an expropriation of an asset which occurred after he ceased to own or hold that asset.

58. In fact, the wording of both Article 6(1) and (2) supports CR's case: Article 6(1), third line, applies to treatment of "*investments of investors of [the other] Contracting Party]"; and Article 6(2), first line, applies in respect of "investors of one Contracting Party whose investments have suffered losses ...*" in war, etc. That supports CR's general point, that the Treaty's substantive provisions protect investments of / by investors and hence gives rise to the question: why would the offer to arbitrate have been intended to extend more broadly? Thus, Article 6 is part of the "context" which supports CR's interpretation of the standing offer to arbitrate, not Mr Stava's. {**21.1/656**}

E: CR's principal criticisms of the decision of the Court of Appeal

59. In the present case, the Court of Appeal correctly proceeded on the basis, for the present purpose of deciding whether or not a question of "*substantive jurisdiction*" was engaged, that Mr Stava no longer owned or held the shares from 2011 as a result of the documents which he had executed in late May 2011. This had already been found as fact by Foxton J in relation to the claim as made by Diag Human SE.

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[28] At [8].

[29] Though CR does note that there is one line of ISDS jurisprudence which *does* take that approach: see e.g. *Alcor v Czech Republic*; *Aven v Costa Rica* ICSID Case No. UNCT/15/3, Final Award, 18 September 2008, with the Tribunal in the latter case stating that "*an investor who disposes of ownership of the investment in question before arbitral proceedings should not be eligible to seek the Treaty's protection, unless special circumstances are present*". Such jurisprudence makes an exception to allow claims to be brought in some limited circumstances. {**37.3/3773-3793**} {**37.4/3794-3798**}

60. However, the Court then fell into initial error in agreeing (in [90]) with what the trial Judge had said in [145] of his March Judgment, set out above. It said: *"He correctly identified at [145] that the effect of this objection is that even if Mr Stava is Swiss and made the investments which the tribunal found he made, all of which were made long before June 2011 (none of which is now open to challenge) the tribunal would have no jurisdiction to determine the dispute about whether Mr Stava retained those investments after June 2011*". {6/268} {11/422}

61. This is a flawed point, and an incorrect starting point which misunderstands the nature and effect of the objection. Under the Act, to which this arbitration is subject, the position is straightforward. A tribunal in an English seated arbitration *does* have the power to rule on its own jurisdiction. This is the effect of s.30 of the Act, which enacts the doctrine of *Kompetenz-Kompetenz*[30]. That section expressly makes this clear by stating in terms that a tribunal may rule on its own "*substantive jurisdiction*". The power to rule on jurisdiction necessarily carries with it the power to determine all facts and issues which are necessary to be decided to rule on the jurisdictional objection which has been raised. This was recognised in the DAC report which preceded the Act: see the next but one paragraph below. {33.1/3380}

62. Thus, contrary to what the Court of Appeal stated, if the objection was one of *"substantive jurisdiction"* (as CR submits), the Tribunal would have had the power to "*to determine the dispute about whether Mr Stava retained those investments after June 2011",* as this was a fact which had to be examined in exercising the Tribunal's power to rule on the objection. It would have that power in the course of making its ruling on jurisdiction, just as it would have had the power to decide *any issue of law or fact* which is relevant to deciding a jurisdictional issue over which it has *Kompetenz-Kompetenz*. {6/268}

63. In this respect, the DAC Report tellingly observed: *"A challenge to jurisdiction may well involve questions of fact as well as questions of law. Since the arbitral tribunal cannot rule finally on its own jurisdiction, it follows that both its findings of fact and its holdings of law may be challenged. The regime for challenging such awards is set*

[30] See Departmental Advisory Committee on Arbitration Law Report on the Arbitration Bill, February 1996 at [137]. {33.2/3383}

out in Clause 67"[31]. Of course, the ultimate point at issue is not (as the Court of Appeal described it in [90] and Foxton J described it in his [145]) whether Mr Stava retained an investment after the disposal of the shares into the Koruna Trust but, rather, whether the tribunal has jurisdiction *over an alleged cause of action* (i.e. alleged breach of the Treaty) derived from events which occurred *after* such disposal. The Tribunal certainly did have the power under s.30 to rule on that issue (and on any facts or issues which were relevant to doing so). {6/268} {11/422} {33.1/3380}

64. Under the Act, such ruling by a tribunal on its own substantive jurisdiction, exercising its power under s.30, is not final. This is because, guided by the DAC Report[32], Parliament has decided that such rulings by the tribunal on its "*substantive jurisdiction*", which it has power to make, shall be ultimately subject to control by the Court in the form of its decision on a challenge under s.67 (if one is brought by the losing party under the ruling). Under this section the loser on any such ruling - whether the loser is the person asserting jurisdiction or the person asserting the absence of it - may challenge the tribunal's ruling, without any precondition. {33.1/3380} {26.1/ 1642-1644}

65. Thus, at [90], the Court of Appeal started from an incorrect legal position. One can see this error infecting or influencing its reasoning later in the judgment. See for example the first sentence of [132], where the Court criticised the decision of the arbitral tribunal in *Alcor*: *"The tribunal in that case [Alcor] obviously considered that it had jurisdiction to decide the dispute in relation to those matters, despite the fact that it characterised the objection as one pertaining to "jurisdiction" rather than the merits of the underlying claim"*. This was clearly intended as a reference back to what had been stated erroneously in [90]. However, although there were oddities in the wording of its reasoning, there was nothing substantively wrong with the decision of the *Alcor* tribunal on this point. It was in line with *Kompetenz-Kompetenz* and the position under the Act, as described above. {6/268; 278-279}

66. Thereafter, the Court erred in its interpretation of the Treaty and thus in its identification of the scope and subject matter of the offer made in Article 9. The Court incorrectly held that to qualify as an investor a claimant needed only to have made a {21.1/ 657-659}

[31] At [143].
[32] See e.g. [138], [143] and [276]. {33.2/ 3383-3386}

qualifying investment "*after the date of the Treaty*", and that this was the only point in time at which the link between the claimant and the "*investment*" needed to exist (at [126]). The Court then approached Article 9 on that footing. {**6/277**}

67. It is submitted, however, that for the reasons explained in Section C above this process of reasoning was erroneous. Once Mr Stava had disposed of his investment, he no longer owned or held an "*investment*" for the purpose of any new Treaty breaches that might occur after such disposal, and there could not be new events giving rise to a new "*dispute with respect to*" his former investment (the shares) which he would be entitled to refer to arbitration under Article 9. {**21.1/ 657-659**}

68. To be clear, CR does *not* argue in the present proceedings that after disposal of the shares Mr Stava lost his ability to bring arbitration claims in respect of breaches of the Treaty which had occurred *before* the disposal when he was an "*investor*" owning or holding an "*investment*". Therefore, the Court's reasoning on that topic in [126] of its judgment does not address the correct point. {**6/277**}

69. The Court was also wrong to conclude that Article 9 and in particular the words "*disputes with respect to investments*" in that Article, read in its proper context, do not require the investor to own or hold the investment at the time of the alleged breach of Treaty for the dispute about that breach to fall within the scope of the offer to arbitrate (at [127]), and that if an investor parts with an investment that raises a mere a question of admissibility of a claim in respect of a subsequent dispute relating to the investment after his disposal (at [129]). {**21.1/ 657-659**} {**6/ 277-278**}

70. The Court of Appeal wrongly focussed at [126] on the requirement to be an "*investor*", regardless of the separate requirement to have an "*investment*" and for the dispute which it is sought to refer to arbitration to be a dispute "*with respect to investments*". Answering the question of *who* is a protected investor does not answer the question about *what* is protected by the BIT and in respect of disputes over which assets (if any) the offer to arbitrate is made. If the asset in respect of which a given claim is brought is not an "*investment*" by or of the "*investor*" to which the Treaty in fact applies, at the time when the alleged cause of action arises, there is and can be no dispute "*with respect to an investment*" with regard to that claim. This is so regardless of whether the claimant himself qualifies as a protected "*investor*" of one of the States in question. {**6/277**}

Whether someone is an "*investor*" raising a dispute is "*with respect to an investment*" is always jurisdictional, for Article 9 permits only such disputes to be arbitrated and by such person; and also because the Treaty as a whole, including Article 9, only applies to "*investments by investors of the other Contracting Party*" (per Article 2) (emphasis supplied) and the asset on which Mr Stava relies ceased to be such an investment when he disposed of it. {**21.1/654; 657-659**}

71. In the present case, it had been held in the Award by the Tribunal that there were breaches of Treaty which occurred at different points in time, both before and after 2011 when Mr Stava disposed of his investment[33]. However, one can easily imagine a case where the *only* alleged breach or breaches take place *after* the investor ceases altogether to own or hold an investment. The Court's erroneous reasoning in this case if applied to that situation (i.e. where the only dispute has arisen after disposal of the investment) would apparently mean that a tribunal has (exclusive and final) jurisdiction to decide such a claim, without the ability to challenge such decision under s.67. That makes no sense whatever. The substantive obligations under the Treaty stop applying to assets with which an investor has parted, as the assets in question are no longer an investment *"of"* or "*by*" the claimant, and equally any dispute is no longer a dispute "*with respect to investments*". It is plainly a jurisdictional question whether an investment is still owned or held by the claimant or has been parted with. What is more, it would be futile to hold that the tribunal has jurisdiction over a non-existent claim, serving neither the interests of the State nor of the investor. {**21.10**} {**26.1/ 1642-1644**}

72. The Court of Appeal, however, reached the opposite conclusion. It is submitted that it was wrong to do so. An objection that a dispute relating to a claim which cannot be brought in respect of an investment which the claimant does not own or hold at the time of the breach is obviously jurisdictional under both s.30(1)(a) and (c), given how those sub-sections should be approached in this context. This applies just as much *after* the investment has been divested, as it does *before* the investment has been acquired (as was held by Butcher J as he then was in *Tatneft v Ukraine* (supra)). {**33.1/3380**} {**34.10/ 3453-3485**}

73. It might be argued by Mr Stava that this is an attempted, impermissible attack on the tribunal's decision on the merits. That is not so. It is not unusual for a jurisdictional

[33] Pre-2011, see e.g. [699], [745]-[751]. Post-2011, see e.g. [829]. {**21.10/956; 967-972; 993**}

issue to mirror, or overlap with, what would otherwise be only a defence. But in such a situation it does not follow that the objection itself is not properly characterised as a jurisdictional issue.[34] The classic instance in the commercial context is where there is a dispute as to whether the matrix contract which contains the arbitration agreement was ever concluded. This raises both a question of substantive jurisdiction, namely whether there was a valid arbitration agreement, and a merits issue, namely whether the matrix contract was concluded[35]. It was for this reason, as the DAC noted, that the Act left it to the tribunal to decide whether to make its decision on jurisdiction in the form of a separate ruling or as part of an award on the merits, noting that *"[i]ndeed, in some cases it may be simply impracticable to rule on jurisdiction, before determining merits*"[36].

74. For all the above reasons, it is submitted that the reasoning of the Court of Appeal in [126]-[129] is wrong. Paragraph [130] has been addressed in Section B above. **{6/277-278}**

F: International decisions

75. As for the public international law and other cases relied upon by CR below and again in this Court, whilst it is accepted that these are in the main not concerned with what is or is not a question of *"substantive jurisdiction*" under the Act, the Court of Appeal was wrong not to view those as supporting CR's submissions (at [130]-[133]). There is no system of binding precedent in public international law but the reasoning in the following cases is instructive and does support CR's appeal. **{6/278-279}**

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[34] See e.g. *Korea v Elliott* [2025] EWCA Civ 905 at [69], not following Foxton J's erroneous assertion in that case that an overlap with merits counted against a point being jurisdictional (as quoted at [24]). **{27.13/1985}**

[35] See for example *LG Caltex Gas Co Ltd v China National Petroleum Corp* [2001] EWCA Civ 788, [2001] 1 WLR 1892 at [80]: "*The issue of whether the respondents were party to the two contracts was a central issue in the dispute as to liability. The applicants were urging that Mr Harris had jurisdiction to determine liability. Mr Harris, after a hearing that lasted three weeks, has decided the central issue against them. Because that issue was also the issue that determines jurisdiction, the applicants are now able to reopen it. The judge considered this result unjust. I am not persuaded that it is. Where an issue on which jurisdiction turns is also an issue relevant to liability, each party will be in a position, subject to making any necessary reservations, to reopen that issue before the court if the arbitrator's ruling on jurisdiction goes against them. In this instance it is the applicants who have profited from this situation.*" See also *Primetrade AG v Ythan Ltd* [2005] EWHC 2399 (Comm), [2006] 1 All E.R. 367, a case which arose on the statutory contract by operation of the Carriage of Goods by Sea Act. **{34.3/3401}** **{34.5/3407-3410}**

[36] At [146]. **{33.2/3384}**

76. As the International Court has held multiple times, in public international law, questions regarding the scope of consent are jurisdictional.[37] The same type of objection as made by CR here had been described as "*jurisdictional*", and succeeded, in investment treaty cases such as *Phoenix v Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, [68]-[71] and *Vöcklinghaus v Czech Republic*, UNCITRAL, Final Award, 19 September 2011, [165]. One should not lightly assume that experienced arbitrators would use the term "*jurisdictional*" but mean something other than "*jurisdiction*" or "*consent to arbitrate*", i.e., an objection covered by s.30 of the Act; and on a proper analysis of those decisions, that is what they did. The CA erred in holding that, in *Phoenix* and *Vöcklinghaus*, the issue decided was only about the scope of treaty obligations – i.e., of substantive obligations. An objection can and will often go *both* to the merits (scope of the treaty) and to jurisdiction (scope of the offer to arbitrate), as the *Korea v Elliott* case illustrates; it is no less a jurisdictional objection because it can also be taken as a merits issue: see paragraph 73 above.

{37.20/ 4191}

{37.31/ 4369}

77. The distinguished former International Law Commission member, Prof Sean D. Murphy, referred to the decision in the *Vöcklinghaus case* as finding that the tribunal had no jurisdiction where the investor retained no legal or beneficial ownership in the investment at the time of the alleged breach, and he cited it for the proposition that: "*If an investor makes an investment prior to the date on which the State adopted the disputed measure, but that investment no longer exists as of that date, then likewise the tribunal has no jurisdiction ratione temporis"*[38]. The international arbitral practice was summed up by Markus Burgstaller and Agnieska Zarowna in an article published in 2019 as follows:

{37.31}

> "*Once the investment is transferred, any subsequent state actions pertaining to such investment can no longer form a basis of the transferor's claim. However, this is not to say that the transferor ceases to be in a position to bring an investment claim for the perceived violations of an investment treaty prior to the disposal of*

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[37] See *Mutual Assistance in Criminal Matters (Djibouti v France),* Judgment, 4 June 2008, [48], in which the Court held that "*in determining the scope of the consent expressed by one of the parties, the Court pronounces on its jurisdiction and not on the admissibility of the application*", citing also *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)* Judgment, 3 February 2006, [88].

{35.2/ 3528-3529}

[38] Temporal Issues Relating to BIT Dispute Resolution, ICSID Review, Vol.37 No.102 (2022), p.58

{38.10/ 4595}

the investment, i.e., when the transferor still owned or controlled the investment. The relevant time when an investor needs to own or control an investment to claim substantive protection and to avail itself of access to dispute resolution mechanisms contained in an investment treaty appears to be when the alleged breach of treaty occurred. There is abundant international arbitral practice to that effect"[39].

78. Many awards state a principle that, for a tribunal to have jurisdiction regarding a claim/s, a claimant must show it owned/held the investment at the time of alleged treaty breaches, e.g., *Levy v Peru*, ICSID Case No. ARB/11/17, Award, 9 January 2015, [147]; *Gallo v Canada*, Award, 15 September 2011, [328]; *Libananco v Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, [127]; *Mesa Power v Canada*, PCA Case No. 2012-17, Award, 24 March 2016, [326]; *B-Mex v Mexico*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019, [145]; *Pey Casado v Chile*, PCA Case No. 2017-30, Award, 28 November 2019, [265]; *Cementownia v Turkey*, ICSID Case No. ARB(AF)/06/2, Award, 17 September 2009, [112]. This is consistent only with the objection here being one of jurisdiction. **{37.23/4250}** **{37.29/4314}** **{37.15/3954}** **{37.16/4123-4124}** **{37.5/3802}** **{37.19/4161}** **{37.7/3822}**

79. The Court of Appeal did not analyse these decisions in any detail in its judgment. It simply stated at [130] in respect of all of them that when considering the objection the relevant tribunal was not addressing jurisdiction in the sense used by s.30 (i.e. existence or scope of consent to arbitrate) but instead was dealing only with the scope of the relevant Treaty obligations. The Court of Appeal considered *that* question had been referred to arbitration for (exclusive) determination by the Tribunal. This analysis of such decisions is incorrect. Indeed, it is unsustainable in light of the decision in *Korea v Elliott*. Two of those decisions – *Gallo v Canada* and *Mesa Power v Canada* – justified their analysis on this point by reference to materially identical treaty language to the language which the Court of Appeal in *Korea v Elliott* held did go to consent to arbitrate and did therefore create a requirement of substantive jurisdiction. **{6/278}** **{33.1/3380}** **{37.29/4308-4314}** **{37.16}** **{27.13}**

80. As noted above, in *Korea v Elliott* the Court of Appeal considered whether the offer to arbitrate in Article 11.16 of the US-Korea FTA applied only where the "*scope*" provision in Article 11.1 of that agreement was satisfied. Article 11.1 provided, in **{36.2/3724; 3732-3734}**

[39] "*Effects of disposal of Investments on Claims in Investment Arbitration*" [2019] 36 J Int Arb 231 at 233, 234. **{38.4/4452-4453}**

summary, that Chapter 11 (the investment chapter of the FTA) applied where there was a measure relating to a covered investment or an investor of the other party. Korea contended that there was no such measure in that case and therefore no offer to arbitrate. The investor contended, and Foxton J held, that the question whether Article 11.1 was complied with was a question of the substantive scope of the obligations in Chapter 11 and not one going to the scope of consent to arbitrate. The Court of Appeal reversed that decision, which was inconsistent with a long line of arbitral awards which had accepted that compliance with the scope provision in Article 11.1 was jurisdictional. It held (rightly) that the scope provision in Article 11.1 qualified the application of the entirety of Chapter 11, including the offer to arbitrate. **{27.13/1985}**

81. The passages in *Gallo v Canada* and *Mesa Power v Canada* on which CR relied before the Court of Appeal, and on which it relies here, which state that the tribunal will only have jurisdiction to consider a claim if the investor held the alleged investment at the time of the alleged breach, justify that conclusion by reference to the materially identical treaty wording as under consideration in *Korea v Elliott.* This can be seen in *Mesa Power* at [324] *et seq*, in which passages from *Gallo v Canada* are quoted. These two cases are plainly instances in which the relevant tribunal was approaching the objection as one going to jurisdiction in the sense of consent to arbitrate. **{37.29}** **{37.16/4122-4128}**

82. Of course, CR accepts that the treaty wording at issue there differs from the wording at issue here but the principle is the same. The treaty language being considered in *Gallo v Canada* and *Mesa Power v Canada,* was a combination of (i) a scope provision – namely, that Chapter 11 NAFTA (i.e. the investment chapter) applied to measures adopted by a State "*relating to*" an "*investment of investors by another Party*" and (ii) an offer to arbitrate claims for breach of an obligation in Section A of Chapter 11. It was held that this combination created a jurisdictional requirement that the investor hold the asset at the time of the alleged breach. **{37.29}** **{37.16}**

83. Here, similarly, there is, (i) a scope provision providing that the Treaty applies to investments by investors of the other contracting party (Article 2(1) – which is not satisfied once the asset is transferred to a third party); (ii) there is a provision that the Treaty is not otherwise to affect the rights and obligations of contracting parties (Article 2(2)); and (iii) the offer to arbitrate is in respect of disputes "*with respect to investments*" between a contracting State and an investor of the other State, which **{21.1/654}**

requires the relevant asset to be an investment (i.e. an investment by or of an investor) for there to be an offer to arbitrate in respect of it. If there is no investment at the time of the alleged breach, the Treaty does not apply and there is no offer to arbitrate. That is jurisdictional here, just as it was in *Gallo v Canada* and *Mesa Power v Canada*. {37.29} {37.16}

84. As the Court of Appeal in *Korea v Elliott* noted, its approach to treating that language as jurisdictional was consistent with many awards "*published by tribunals comprising a long list of highly respected international arbitrators*" which "*uniformly reached the same conclusion*" as the Court of Appeal: [63][40]. {27.3/1676}

85. The ICJ in *Azerbaijan v Armenia*, Judgment, 12 November 2024, was clear that a jurisdictional limitation can apply even if not stated in a compromissory clause (akin to Article 9 here, being the basis of the arbitration agreement which comes into existence when the offer contained in Article 9 is accepted) and that the scope of the compromissory clause should be interpreted in line with the scope of the substantive obligations of the treaty. The ICJ had no difficulty in interpreting the compromissory clause at issue in that case as subject to a temporal jurisdictional limit, even though that was not expressed in that clause. It thus contains an interpretive principle consistent with reading Article 9 as subject to the jurisdictional limit in Article 2. {35.1/ 3486-3525} {21.1/654; 657-659}

86. Lastly, *Alcor Holdings Ltd v Czech Republic* confirms CR's position. The tribunal in *Alcor* (chaired by Sir Christopher Greenwood, the former UK Judge at the ICJ) viewed the point before it, which turned on the phrase "*who invest*", as going to the consent to arbitrate: *Alcor* [253]. As discussed above, the tribunal was fully entitled so to decide in light of its *Kompetenz-Kompetenz*. Further, there is nothing unusual about a jurisdictional objection overlapping with or even being identical to what is otherwise a merits issue (see paragraph 73 above). {37.3/ 3785-3786}

87. In the Court of Appeal, the Respondents relied upon an early NAFTA[41] case, *Mondev v USA*[42]. In that case, a tribunal considering claims for breach of Articles 1105

[40] It was also consistent with the position adopted by both the United States and Korea in an exchange of diplomatic notes with which the Court of Appeal was provided in Korea, though given its decision on interpretation it did not need to decide whether those notes were admissible: [64]. {27.3/ 1676-1677}

[41] i.e. North American Free Trade Agreement.

[42] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002. {37.17}

(minimum standard of treatment) and Article 1110 (expropriation) of NAFTA had to consider an argument by the respondent that, because the investment project had failed and a creditor had foreclosed on a mortgage, from that point on a relevant company had not actually had the rights that were being relied upon as an investment and therefore no claim could be brought regarding that time period.

88. The tribunal rejected that argument on the facts, noting that in relevant domestic litigation where that company had asserted rights, the defendant to such claims had not raised the defence that it did not have them. However, the tribunal went on to say that in any event

> "*the Tribunal concludes that NAFTA should be interpreted broadly to cover any legal claims arising out of the treatment of an investment as defined in Article 1139, whether or not the investment subsists as such at the time of the treatment which is complained of. Otherwise, issues of the effective protection of investment at the international level will be overshadowed by technical questions of the application of local property laws and the classification of local property interests affected by foreclosure or other action subsequent to the failure of the investment".* **{37.17/4149}**

89. That was dealing with a very particular situation, namely whether forcible changes in title to an asset after the investment has failed, and which were *related to its failure*, affect the ability to bring a claim. This does not undermine CR's case here that once Mr Stava – voluntarily – disposed of the shares into a Liechtenstein trust, claims regarding their *subsequent* treatment are not claims within the scope of the offer to arbitrate disputes with respect to investments. Insofar as it is suggested that this case stands for a general principle that the offer to arbitrate covers a situation where an investor has voluntarily disposed of his investment that is incorrect. Such an approach would make *Mondev* an outlier when compared with the other authorities discussed at paragraphs 76 to 78 above. **{37.17}**

G: Points taken in the Respondents' Notice

90. The Respondents have given notice in their Notice of Acknowledgement dated 14 January 2026 of two reasons why they will apparently contend that a different result should follow here. {20/649-650}

91. Paragraph 1 of the Respondents' Notice refers to how the objection was characterised in the arbitration and the Tribunal's view of it as going to "*standing*", and contends that this is a point of "*admissibility*" not substantive jurisdiction. Even if the Respondents were correct that the *only* point taken about the trust in the arbitration was an objection of standing (which they are not[43]), the characterisation of how matters were presented in the arbitration is immaterial at this stage. Foxton J concluded that the objection in question was not barred by s.73, i.e. he was satisfied that it *had* been sufficiently advanced in the arbitration as an objection to substantive jurisdiction (a conclusion that was not appealed at any stage), albeit he went on to conclude that on proper analysis it is not such an objection (hence this appeal). Hence, the agreed question at issue on this Appeal is whether the objection raised is a question of "*substantive jurisdiction*" within the meaning of s.30 of the Act. That issue, as such, did not and could not arise in the arbitration. That is an issue which arises *only* in Court proceedings under the Act and it is for the English Courts to decide; they are in no way constrained by how the matter was described in the arbitration or by the tribunal. {20/649} {26.1/1648} {33.1/3380}

92. The Respondents then assert that being an issue of "*standing*" the issue is regarded as one of "*admissibility*" in public international law. CR does not accept that is correct; it does not accept that the issue was only advanced as an issue of "*standing*", or that an issue that might be one of standing cannot also be one of jurisdiction. In any event, CR has referred above to decisions made under international law, which hold that the issue is jurisdictional as it relates to the scope of the States' consent to arbitrate disputes. Arguments about the utility of the concept of "*admissibility*" are addressed below, as the Respondents also rely upon this in paragraph 2 of the Notice of

[43] E.g. Counter-Memorial at [201] – [205] (in the section headed "III. Jurisdiction"): Rejoinder at [471] – [473]; Post Hearing Brief p.60. {42/4671-4675} {43/4676-4678}

{21.9/737}

Acknowledgement. This first ground therefore does not assist Mr Stava either to resist the Appeal or to uphold the Order made by the Court of Appeal. {20/649}

93. Paragraph 2 of the Notice of Acknowledgement pursues the submission that the objection is properly characterised as one of "*admissibility*". That term does not have a settled meaning even in public international law or the field of ISDS arbitration. There is no concept of admissibility under the Act, or in English law in general; the relevant question is solely whether the objection in question raises an issue of "*substantive jurisdiction*", as defined in the Act, as has been agreed in the SFI. If it does, then the Court has the powers under s.67 in relation to the award. If it does not, then the Court has no power to intervene under s.67. There is no need to consider (a) what "*admissibility*" means (either generally in public international law, or in English law) or (b) whether the objection is or is not one of "*admissibility*". Further, decisions by other State courts on what is or is not treated *by them* as a question of '*admissibility*" under their own arbitration law are of no, or at best limited, assistance here – this is because the English Courts have to apply the English law statutory definition of "*substantive jurisdiction*" in s.30. This second ground also leads nowhere. {20/649} {26.1/ 1642-1644} {33.1/3380}

94. A third point taken in the Respondents' Notice is addressed in the next section concerning relief.

H: Relief

95. Because the Courts below decided that CR's objection based on disposal of the shares did not raise a question of "*substantive jurisdiction*", there has not yet been a decision on the merits of CR's objection or, if successful, its effect on the Award. There has been no argument in either Court below on the legal test applicable for upholding the objection nor on whether it is satisfied on the facts of this case.[44] The focus has been exclusively on whether the objection is jurisdictional in nature, or not. {21.10}

96. If CR's appeal succeeds in establishing that an issue of substantive jurisdiction is raised, the Court of Appeal's dismissal of the Second Appeal should be overturned and

[44] Both parties gave undertakings to Foxton J that if the appeal were to succeed, the parties would be bound by the fact findings made in the "*post-June 2011*" challenge to the Award in favour of Diag Human SE: see the Order of Foxton J dated 11 April 2024, [6(a)]; August Judgment, [169]. {12/482} {13/532}

the matter should (as happened in *Korea v Elliott*) be remitted to the Commercial Court to determine the s.67 objection and, if it succeeds, the consequences of that challenge for the Award. These consequences would include not only the effect of the challenge itself on the Award but also the fact that Foxton J reserved the ability to apply to restore a particular s.68 challenge in certain circumstances, which would include if CR succeeded in its challenge – that s.68 challenge relates to the Tribunal's failure to decide the impact on Mr Stava's claim of the fact that he held only 53.4% of Conneco in 1992: see SFI [65.3]. {26.1/1642-1644} {26.1/1645-1647} {1/38}

97. At paragraph 3 of the Notice of Acknowledgement Mr Stava contends that the "*Order appealed against*" should be upheld, because he contends that the fact that Mr Stava divested himself of his shareholding in Diag Human SE did not affect the Tribunal's jurisdiction over his claim for loss which, on the Tribunal's findings, he had already suffered. The Order appealed against on this Appeal is paragraph 2 of the Court of Appeal's Order dated 28 July 2025, which stated that "*The Second Appeal is dismissed*", that being the appeal against Foxton J's decision that there was no issue of "*substantive jurisdiction*" raised by the relevant objection[45]. {20/650} {8/362}

98. The matters referred to in paragraph 3 of the Notice of Acknowledgement do not constitute a reason to reject the Appeal or to uphold the Order made by the Court of Appeal. {20/650}

99. Although the Respondents' Notice of Acknowledgement is cast in terms of the upholding the "*the Order appealed against*", it might be that Mr Stava intends to argue that this Court should not remit the matter to the Commercial Court or should limit the scope of issues arising on remission before the Commercial Court or the relief available to that Court following its determination. It is not clear what Mr Stava is contending should be done, or should not be done, by this Court. Henshaw J appeared to note the ambiguity of this passage at a recent hearing in the Commercial Court at which he ordered the adjournment of related challenges to the Award under ss.67 and 68 raising live issues which are still pending in any event.[46] His decision to adjourn was at least {20/649-650} {26.1/1642-1647}

[45] March Judgment, [145]-[147], [232(ii)]; Order of Foxton J dated 11 April 2024, [1] {11/422; 449}

[46] During the course of argument Henshaw J appeared to consider that [3] of the Notice of Acknowledgement is ambiguous (if necessary, the transcript of the hearing can be provided). {12/480-481}

partly on the basis that resolution of those challenges needed to be decided *after* these appeals.

100. CR's position is that this Court should decide the sole issue on this appeal (namely, whether the Courts below were wrong to hold that the objection does not raise an issue of "*substantive jurisdiction*"). It should set aside paragraph 2 being the relevant part of the Order of the Court of Appeal (dismissing the appeal against Foxton J's decision that the relevant objection was not one of "*substantive jurisdiction*"); the matter should be remitted to the Commercial Court to decide the actual s.67 challenge and the consequences of that; and this Court should not impose any restriction or qualify what relief should or may be granted by the Commercial Court consequent upon a successful s.67 challenge before it. It should not pre-emptively decide any question of consequential relief that would arise at first instance if the challenge were to succeed. This is especially so bearing in mind (i) the other pending challenges, recently adjourned by Henshaw J,[47] and (ii) the additional challenge under s.68 which Foxton J held could be restored as set out in paragraph 96 above. Not leaving all consequential matters to the Commercial Court would risk cutting across decisions not yet made by that Court, in circumstances where this Court has insufficient information available to it to justify taking that risk.

{8/362}

{26.1/ 1642-1644}

{26.1/ 1645-1647}

101. It is unclear to what extent the Respondents may seek to go further into consequential matters, notwithstanding the narrowness of this appeal on the sole agreed question of law. If and insofar as the Court permits them to do so, CR will refer to the following matters in addition:

    a. The Tribunal found three breaches of the Treaty: namely, (i) in 1992, when the Bojar Letter was sent; (ii) during the Commercial Arbitration (in respect of which it said no loss was suffered); and (iii) in connection with the Review Proceedings. The latter included a breach in 2014 when the 2014 Resolution was issued, cancelling the 2008 Award. That was, of course, after Mr Stava had disposed of

[47] This is a challenge to an award made by the Tribunal following a remission of one issue by Foxton J, namely whether damages awarded should be reduced by 30% because of an assignment by Diag Human SE relating to the claims in the Commercial Arbitration. That Remittal Award is itself now being challenged which, if successful, has the potential to affect the quantum section of the Award: *Czech Republic v Diag Human SE* [2026] EWHC 2023 (Comm) (3 July 2026).

{22.5/ 1102-1108}

his shares in Diag Human SE and therefore of any indirect interest in its assets, including the 2008 Award.

b. The Tribunal awarded damages in the sum of the 2008 Award. The Tribunal's approach of using the 2008 Award as the basis for the relief it awarded (i.e. deciding that the 2008 Award was to be recognised in international law, and that CR remained bound in international law by payment obligations under the 2008 Award, despite the 2008 Award actually having been cancelled by the 2014 Resolution) hinged on its conclusion that the 2014 Resolution was not to be recognised as a matter of international law[48]. That finding was itself dependent upon, or influenced by, its finding that there was a breach of the Treaty in 2014 when the 2014 Resolution was issued[49] (and also on the finding of an overall breach in respect of the review proceedings, which ran from 2008 to 2014[50]). If the Tribunal lacked jurisdiction over post-disposal breaches, the Tribunal's reasoning on causation and quantum cannot stand. So, even if (as to which, see below) the Tribunal is to be interpreted as having decided to quantify the losses suffered in 1992 by reference to the 2008 Award (which is the point which Mr Stava advances in the Notice of Acknowledgement [3]), the Tribunal's reasoning in making the Award in favour of Mr Stava is founded on, or at the least influenced by, determinations on matters over which it had no jurisdiction. Mr Stava cannot show that the damages awarded can be "severed" from the parts of the Award affected by the jurisdictional error.[51] **{21.10}** **{20/650}**

c. In any event, CR does not accept that the Tribunal did decide that Mr Stava had suffered losses for the 1992 Bojar Letter breach in the amount quantified in the 2008 Award. Instead, on the true interpretation of the Tribunal's decision, what it did was to award damages at Award [1033]-[1034] for the "*Review Proceedings*" **{21.10/ 1053-1054}**

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[48] See Award, [1028] – [1030], [1033]. The reasoning there is based on reasoning earlier in the Award at e.g. [829]. **{21.10/993; 1052-1053}**

[49] Award, [829]. The potential impact on quantum of a lack of jurisdiction post-2011, in particular by reference to the 2014 Review breach, was recognised by Foxton J at August Judgment, [263] – [264]. **{13/567}**

[50] The Tribunal's findings of breach regarding the Review Proceedings are summarised at SFI [40]. **{1/23-25}**

[51] For a recent formulation of the approach to determining the consequences of setting aside part of an award as outside jurisdiction, see *Korea v Elliott* [2026] EWHC 368 (Comm) at [251] – [254]. **{27.3/ 1726-1727}**

breach discussed in b. above, and, having done so, at Award [1036]-[1039] it did not award any *further* damages in respect of the 1992 breach. That does not mean that it concluded that Mr Stava had actually suffered losses in 1992 in the amount quantified in the 2008 Award and he was to be awarded damages in that sum independently of whether damages in that amount were being awarded for the Review Proceedings breach. The Award should not be read in that way as it would introduce inconsistency: the Tribunal specifically said earlier in the Award that it was duty bound to examine the record before it and reach a decision based on the facts of this case (Award, [506]) and not simply defer to awards in the Commercial Arbitration. The Award should not be interpreted in such a way that in the quantum section the Tribunal did the very thing it said earlier in the Award it would not do. Mr Stava relies in paragraph 3 of Notice of Acknowledgement upon the CA Second Judgment to support his position. However, the *ratio* of that decision is that the success of the jurisdictional objection *against Diag Human* SE did not provide a basis for revisiting the quantum award. Paragraphs 20 – 21 of the CA Second Judgment (on which Mr Stava presumably relies) were premised on all jurisdictional objections against Mr Stava having failed, which of course would not be the position if this appeal succeeds. Those paragraphs specifically acknowledge that divestment by Mr Stava *could* affect his claims. The Court of Appeal was not considering the question that would arise if the jurisdictional objection against Mr Stava which is the subject of this appeal were to succeed.

{**21.10/ 896-897**}

{**20/650**}

{**7/353**}

d. Further, as Foxton J found, CR had relied in the arbitration upon the transfer into trust as a complete answer to the entire claim: August Judgment, [254]; SFI, [50]. It is hard, against that background, to understand how Mr Stava can contend that if CR succeeds in establishing that it has an objection to substantive jurisdiction regarding his claim, and in the context of such jurisdictional objection the Court holds (as it must, given that it is common ground) that Mr Stava ceased to own Diag Human SE after it was transferred into trust, it could be said that that could have no potential impact on his claim. CR's case in the arbitration was that after the disposal, he could not seek relief regarding enforcement of the 2008 Award once he had given it away.[52]

{**13/ 564-565**}

{**1/29-30**}

[52] As noted at SFI, [49.3].

{**1/29**}

e. Finally, paragraph 3 of Mr Stava's Notice of Acknowledgement focuses upon the alleged lack of impact upon quantum. However, a finding of breach made without jurisdiction is itself something in respect of which CR is entitled to relief under s.67, so a focus on quantum does not prevent the need for the matter to go back to the High Court. {20/650}

102. Thus, CR's position is that, if this appeal succeeds, and if its jurisdictional challenge in the Commercial Court regarding Mr Stava then succeeds, the Award as made cannot stand and any damages to which Mr Stava will be entitled will be, at the very least, very substantially lower, and possibly zero.

I: Other Matters

103. The merits of the underlying claims are irrelevant to the single issue that the Court has to decide on this appeal. However, at every stage of this litigation Mr Stava (and Diag Human SE) have sought to refer the Courts to the underlying merits and other matters, as they see them, and to findings made by the Tribunal. CR therefore says the following in anticipation of that approach being continued by them.

104. For the reasons set out at paragraphs 101-102 above and paragraphs 105-110 below, CR's perspective is very different.

105. The position in 1992 was that: (i) Conneco had entered into contracts with only a small number of institutions regarding the supply of blood products and had some low level of infrastructure related to such contracts – there was only limited performance under such contracts, (ii) Mr Stava had only a c. 53.4% indirect holding in Conneco,[53] (iii) Conneco had failed in its efforts to be selected in tenders to provide blood plasma derivatives for use by Czechoslovak medical institutions, and (iv) the Ministry of Health had "*longstanding concerns*"[54] about Conneco.

106. CR (as represented by successive politicians responsible for this matter over the years) finds it hard to understand that there was a breach of the Treaty vis à vis Mr Stava when the Minister of Health sent the "Bojar Letter" in 1992, such that he is now entitled to

[53] Foxton J held that the Tribunal failed to determine the impact of this point on damages to which Mr Stava was entitled for the 1992 breach: March Judgment, [230]. {11/448}

[54] Award, [667]. {21.10/946}

the damages awarded by the Tribunal (i.e. 100% of the damages awarded, CR says wrongly, by the 2008 Award).[55] This is all the more so given that (a) the Tribunal held that it had no jurisdiction to consider the claims challenging the outcome of the tenders (i.e. it could not consider a claim that there was a Treaty breach because Conneco had not been chosen); (b) the Ministry of Health ordered State health institutions to contract only with the companies chosen by the tender, i.e. not with Conneco; and (c) the Tribunal held that such orders not to contract with Conneco were *lawful* under the Treaty: they were issued in good faith, based on the Ministry's concerns vis-à-vis Conneco and its business model. In other words, it held that from the perspective of the Treaty, the State *had been entitled* to tell its institutions not to contract with Conneco.

107. Diag Human SE[56] (i.e. as Conneco came to be called) has *already received* substantial compensation regarding the sending of the Bojar Letter. It brought a claim in the Commercial Arbitration i.e. a damages claim for sums purportedly due to Diag Human SE under Czech commercial and competition law rules relating to the sending of the Bojar Letter. Diag Human SE was awarded approximately USD 11m by an award in 2002, *which CR paid*. CR firmly believes that this sum was more than ample compensation for the very limited steps that had been taken towards launching a blood plasma business.

108. The Commercial Arbitration tribunal later ordered additional payment of approx. USD 350 million by the 2008 Award (split approximately equally between principal and interest). CR contends that the 2008 Award is seriously flawed including as to quantum. {**21.10**} It sought review of that award pursuant to the review procedure in the arbitration agreement. The 2008 Award was cancelled in 2014 by the 2014 Resolution. However, the Tribunal held that resolution, and conduct leading up to it, also to be a breach of the Treaty; and then ordered relief which in CR's submission depends upon, or at the

[55] CR's position is, of course, that the Tribunal did not order damages regarding the 1992 breach it held existed: see para 101(c) above.
[56] At that time, it was named Diag Human a.s.

very least is arguably affected by, its (erroneous) conclusion that there were breaches in the post-disposal period, including in 2014.

109. It was while the review proceedings were pending that Mr Stava gave away all of his interest in Diag Human SE (and therefore his *indirect* interest in the 2008 Award[57]) when he settled his shares in Diag Human SE into trust. Despite having given away Diag Human SE, Mr Stava's (false) case to the Tribunal, which the Tribunal appears to have accepted,[58] was that he continued to own Diag Human SE. It is now common ground, based on common ground in the evidence of the Liechtenstein lawyers who gave evidence to the Commercial Court that he had no such or any ownership interest.

110. Despite the above, and as matters stand, the BIT Award in Mr Stava's favour is for the full value of the 2008 Award (which itself purported to calculate losses caused by Czech law breaches in the early 1990s), even though (i) Mr Stava had only held 53.4% of Conneco at the time of the underlying breach in 1992; and (ii) Mr Stava gave whatever interest he had in the 2008 Award away when he settled Diag Human SE into trust (cf. his case to the Tribunal, which it accepted). **{21.10}**

111. In the English set aside proceedings, it became clear that other important parts of Mr Stava's witness evidence given to the Tribunal were wrong. Further, he committed a flagrant breach of purdah, communicating with his counsel and a foreign lawyer (who was also his expert in the proceedings, who had the usual duties to the Court) while sequestered during cross-examination including seeking to influence the course of his re-examination.[59]

112. From CR's perspective, an outcome that Mr Stava is entitled to a sum of over USD 800m, would reflect a serious injustice in the circumstances outlined above, in which

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[57] Which, for the avoidance of doubt, the Tribunal did *not* in any event hold to be an investment.
[58] Award, [403]: "*Respondent contends that, after the Lawbook Transaction was concluded, in mid-2011, Mr. Stava no longer owned or controlled Diag Human SE. This is refuted by the record of these proceedings*." **{21.10/861}**
[59] August Judgment, [11]-[14]. **{13/ 487-488}**

it considers itself to be amply justified in seeking to do what it can to protect the interests of Czech taxpayers

J: Conclusion

113. CR's appeal should be allowed and the question of "*substantive jurisdiction*" raised by CR's objection remitted to the Commercial Court for determination, for the following **REASONS**:

a. The single question to be determined on this appeal is: were the Courts below correct to hold that the relevant objection made by CR - namely, that Mr Stava had disposed of his interest in the shares in Diag Human SE before the events occurred which gave rise to certain of his claims and therefore no longer had any "*investment*" - was not one of "*substantive jurisdiction*" as defined in s.30 of the Act and hence could not be raised under s.67? **{33.1/3380}** **{26.1/ 1642-1644}**

b. It is neither necessary nor helpful to redefine the question at issue on this appeal as being one of whether the objection in question was one of "*admissibility*" or not; there is no such concept recognised by the Act, or by English law generally. The task of the Courts in this context is to *apply* the provisions of the Act, the relevant terms being those in s.30(1), based on the Court's *interpretation* of the arbitration agreement in question as a matter of public international law. **{33.1/3380}**

c. The Court of Appeal erred in answering the relevant question to the effect that the relevant objection was not one of "*substantive jurisdiction*": it should instead have held that this objection fell under s.30(1)(a) and/or (c) of the Act and could therefore be adjudicated under s.67. It should then have remitted the matter to the Commercial Court for the objection to be tried and determined, and its impact on the Award to be decided by that Court (bearing in mind other pending or potential challenges to the Award are also before that Court). **{33.1/3380}** **{26.1/ 1642-1644}**

d. The Court of Appeal (and Foxton J before it) started its consideration of the issue by posing the wrong question and answering it incorrectly in light of its misunderstanding of the approach required by the *Kompetenz-Kompetenz* principle (enshrined in s.30), which empowers the tribunal to decide all issues of law or fact which are required to be decided by it in order to determine a **{33.1/3380}**

jurisdictional objection. It is also a mistake to suppose that because an objection may go to the scope of the treaty obligations it does not also go to the scope of the offer to arbitrate, as the case of *Korea v Elliott* illustrates.

e. The Court of Appeal then erred in its application (or interpretation) of s.30 of the Act, because it erred in its interpretation of the offer of arbitration contained in Article 9 of the BIT, having regard to the ordinary meaning of the terms of that offer in their context and having regard to the BIT's object and purpose, and the good faith interpretation of it, as part of a single combined operation, and likewise erred in its interpretation of, and/or failed to give proper effect to, Article 2 of the BIT: it thus held incorrectly that the offer of arbitration did apply in respect of a dispute over an investment which arose out of matters occurring after that investment had been disposed of entirely by the investor. That was an incorrect interpretation of the scope of the offer to arbitrate in the BIT and of the Contracting States' consent to arbitrate, which constituted their standing offer to arbitrate capable of acceptance by a qualifying investor. **{33.1/3380}** **{21.1/ 654-659}**

f. The correct, or at the least a strongly arguable, interpretation of the offer of arbitration is that it conditions the Contracting States' consent to arbitration in respect of the claims brought by Mr Stava on there being a subsisting link between him and the affected "*investment*" at the time when the facts occur from which a disputed claim concerning the treatment of that investment arises.

g. Accordingly, in respect of the claims brought by Mr Stava, there is a question of "*substantive jurisdiction*" as to whether the offer to arbitrate in Article 9 of the BIT does not extend to alleged conduct or breaches (and any loss consequent upon the same) arising after a person who was previously a qualifying investor has disposed entirely of their investment, as was the case here. **{21.1/ 657-659}**

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28th September 2026