UKSC/2025/0177

IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM THE COURT OF APPEAL
[2025] EWCA Civ 588
B E T W E E N :

THE CZECH REPUBLIC

Claimant/Appellant

and

(1) DIAG HUMAN SE
(2) JOSEF STAVA

Defendants/Respondents

DEFENDANTS'/RESPONDENTS' WRITTEN CASE

References are in the following form:

- *to the appeal bundle: {**Vol/Tab/Page**};*
- *to the first instance judgment of Foxton J dated 8 March 2024: (March Judgment/[para number]);*
- *to the first instance judgment of Foxton J dated 9 August 2024: (August Judgment/[para number]);*
- *to the judgment of the Court of Appeal (the "**CA**") dated 7 May 2025: (CA Judgment/[para number]);*
- *to the Statement of Facts and Issues dated 28 May 2026: (SOFI/[para number]);*
- *to the arbitral award dated 18 May 2022: (Award/[para number]); and*
- *to the Claimant's Written Case dated 28 September 2026: (CWC/[para number]).*

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A. INTRODUCTION

1. The primary issue for determination by this Court is whether a challenge by the Czech Republic ("**C**") to the Award (described as the "**Stava 2011 Challenge**" or the "**Stava 2011 Objection**") is properly characterised as a jurisdictional challenge, as defined by subsections 1(a) and/or (1)(c) of section 30 of the Arbitration Act 1996 (the "**AA96**"). {TAB21.10/738} {TAB33.1/3380}

2. It is no longer open for debate that Mr Stava (i) was an "*investor*", (ii) had made an "*investment*" in the Czech Republic, and (iii) had submitted a "*dispute with respect to an investment*" to the Tribunal, and the Tribunal had jurisdiction over a dispute which Mr Stava submitted to it. This is a consequence of all of C's other challenges to the Award failing.

3. The issue for this Court is whether or not the Treaty contains a jurisdictional limitation such that the Tribunal lacked jurisdiction over (what might perhaps be described as) part of that dispute and was unable to consider "*breaches*" by C which occurred after June 2011 as a result of certain transactions which Mr Stava entered into in 2011.

4. This issue depends on the correct interpretation of the offer to arbitrate contained in Article 9 of the Agreement between the Czech and Slovak Federal Republic and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments of 5 October 1990 (the "**Treaty**" or the "**BIT**"). The offer to arbitrate in Article 9 is broadly framed and it allows "*investors*" to submit to arbitration "*disputes with respect to investments*". As both the CA and Foxton J (as he then was) correctly determined, there is no basis for reading into Article 9 a jurisdictional restriction of the type contended for by C, and therefore the Stava 2011 Challenge is not properly characterised as a jurisdictional challenge under s.30 of the AA96. {TAB21.1/651} {TAB21.1/657}

5. As explained below (see paragraph 7), the conduct by C which occurred after June 2011 relates to a very small part of a two-decade-long campaign of reprehensible and corrupt conduct launched by C against Mr Stava. The fact that C considers it a "*serious injustice*"[1] if it were to be required to pay compensation to Mr Stava is not a good reason to treat the Stava 2011 Objection as a jurisdictional objection. It is

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[1] CWC/[112]. {TAB4/185}

inherent in the concept of arbitration and the structure of the AA96 that a party may be unable to reopen findings by a tribunal with which it disagrees. Mr Stava is bound by such findings in the same way that C is bound.

(1) Background to the Stava 2011 Challenge

6. By a request for arbitration dated 22 December 2017, Ds commenced an arbitration against C pursuant to the Treaty. In doing so, Ds accepted the offer to arbitrate contained in Article 9 of the Treaty.[2]

7. Pursuant to an award dated 18 May 2022, an eminent Tribunal awarded Ds a sum which, with interest, now totals c.US$750 million in damages and post-award interest and found that C had engaged in a reprehensible campaign of corruption and wrongdoing against Ds (the "**Award**"). The Tribunal did not find it necessary to determine all of the claims relied upon by Ds. However, it found that there had been three breaches of the Treaty by C: {TAB21.10/738}

   (1) In 1992, the Czech Minister of Health sent a letter to Diag Human's key business partner, Novo Nordisk (the "**Bojar Letter**"). The Bojar Letter resulted in Novo Nordisk terminating its co-operation with Diag Human. The Tribunal determined that there was no legitimate purpose for the Bojar Letter; it represented a clear and manifest breach of the fair and equitable treatment standard in Article 4(2) of the Treaty, and in particular the prohibition on bad faith and abusive conduct.[3]

   (2) In 1996, Conneco (of which Diag Human SE is a successor) commenced a commercial arbitration against C in order to seek compensation for damage caused by the Bojar Letter (the "**Commercial Arbitration**"). There were three awards issued in the Commercial Arbitration: an Interim Award in 1998, a partial award in 2002 and then a final award in 2008 (the "**2008 Award**"). The Tribunal determined that C abused its sovereign powers by interfering in the Commercial Arbitration, and that this amounted to a breach of the fair and

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[2] The CA overturned the first instance judgment of the Trial Judge and determined that Diag Human SE was not an "*investor*" within the meaning of the Treaty and therefore it was unable to accept the offer to arbitrate in the Treaty. That decision by the CA is the subject of the appeal by Ds (UKSC/2025/0176) (the "**Control Appeal**").

[3] Award/[698]-[699] {**ref**}. {TAB21.10/956}

equitable treatment standard in Article 4(2) of the Treaty.[4] This second treaty breach related to conduct which took place prior to the issuance of the 2008 Award.

(3) Pursuant to a procedure provided for under Czech law and agreed to in their arbitration agreement, C applied to review the 2008 Award. In 2014, a resolution was issued by the Review Tribunal which "*discontinued*" the Commercial Arbitration (the "**Review Proceedings**" and the "**2014 Resolution**"). However, the Tribunal found that the entire Review Proceedings were riddled with due process violations of a level and gravity affecting principles of such importance that the entire Review Proceedings, and by necessary implication the 2014 Resolution, were in breach of Article 4(2) of the Treaty.[5] These due process violations included an attempt by C, and in particular the Ministry of Health, in late 2009 to corrupt the Review Tribunal so as to procure an outcome favourable to C.[6] The Tribunal found there were five violations of due process in breach of Article 4(2). Four violations arose from conduct antecedent to June 2011, and only one from conduct subsequent to June 2011 and even that commenced prior to the end of 2011. {TAB21.1/655}

8. As the Review Proceedings and the 2014 Resolution were not entitled to recognition under international law, the Tribunal concluded that from the perspective of international law the 2008 Award had not been cancelled.[7] The Tribunal determined that the recognition of the 2008 Award would compensate Ds for the damage that they suffered as a result of C's interference in the Review Proceedings.[8]

9. Thus, the Tribunal awarded damages in an equivalent amount to that awarded in the 2008 Award. The Tribunal identified two routes to that relief: the first route in respect of the breach of the Treaty resulting from the Bojar Letter (paragraph 7(1) above), for which it deferred to the assessment of damages in the 2008 Award; and the second route for the due process breaches (paragraph 7(3) above), which, according to the Tribunal, the non-recognition on the international plane of the 2014 Resolution

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4 Award/[752] {**ref**}. {TAB21.10/972}

5 Award/[796] {**ref**}, [829] {**ref**}. {TAB21.10/984}{TAB21.10/993}

6 Award/[823] {**ref**}. See also SOFI/[40]. {TAB21.10/991} {TAB1/23}

7 Award/[829] {**ref**}.

8 Award/[1030] {**ref**}. {TAB21.10/1053}

compensated appropriately.[9] Mr Stava (who had not been a party to the Commercial Arbitration) fell to be treated as a privy of Diag Human SE.[10]

(2) The Stava 2011 Challenge pursued in the English courts

10. C brought a number of challenges to the Award under both s.67 and s.68 of the AA96. {TAB26.1/1642} This included a challenge vis-à-vis Mr Stava on the basis of certain transactions entered into in 2011 (the Koruna Trust and Lawbook Transactions).[11] In summary, Mr Stava entered into a transaction as a result of which his shares in Diag Human SE were by midnight on 31 December 2011 vested in a Liechtenstein law trust called the 'Koruna Trust'. Mr Stava was Settlor and Protector of the Trust, as well as a discretionary beneficiary under it.[12]

11. C contended that as a result of this transaction, Mr Stava had "*no standing to claim*". C subsequently amended its details of claim to also allege that there was no jurisdiction to consider a claim by Mr Stava regarding events post-dating June 2011. It is not in dispute that immediately prior to the events of June 2011 Mr Stava directly owned all the shares in Diag Human SE and controlled it.

12. The Trial Judge adjourned part of C's challenge and, at a first hearing, determined:

    (1) Whether certain challenges by C were precluded in whole or in part by s.73 of the AA96. {TAB26.1/1648}

    (2) To the extent that such challenges were not precluded by s.73, whether certain challenges pursued by C were properly jurisdictional challenges which could be pursued pursuant to s.67 of the AA96.

13. As far as Mr Stava is concerned, the Trial Judge determined, *inter alia*, in the March Judgment that:

    (1) C was precluded by s.73 from challenging Mr Stava's status as a Swiss "*investor*" (March Judgment/[124]-[127]). {TAB11/415}

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9 See Foxton J's Ruling-1 on PTA dated 25 October 2024 at [8] {**ref**}. {TAB15/610}

10 Award/[1038] {**ref**}. {TAB21.10/1054}

11 SOFI/[42]-[46] {**ref**}. {TAB1/25}

12 The transaction is also addressed in Ds' skeleton which was filed in the Control Appeal. See Ds' Written Case in the Control Appeal at paragraphs 8, 99 and 111. {**ref**}. {TAB2/46}

(2) The challenge which C was permitted to pursue in respect of the Koruna and Lawbook Transactions was limited to breaches post-dating June 2011 (i.e., the Stava 2011 Objection) (March Judgment/[121(i)]). Any broader challenge was precluded by s.73. {TAB11/414} {TAB26.1/1648}

(3) The Stava 2011 Objection was not properly characterised as going to the Tribunal's jurisdiction within the meaning of s.30 AA96 (March Judgment/[146]). {TAB33.1/3380} {TAB11/422}

14. The consequence of these findings was that Foxton J dismissed the Stava 2011 Objection. He granted permission to appeal his finding that the Stava 2011 Objection was not jurisdictional. However, no permission to appeal was sought by or granted to C in respect of his determination as to the scope of the challenge which C was permitted to advance.

i. The CA Judgment

15. The CA concluded that Foxton J was correct in characterising the Stava 2011 Objection as not being jurisdictional within the meaning of s.30 AA96. As explained at CA Judgment/[126]: {TAB6/277}

> *"The offer to arbitrate in Article 9 is an offer made to a qualifying investor who, after 1 January 1950, makes a qualifying investment in the Czech Republic. When someone becomes a qualifying investor in a qualifying investment (as we must assume for these purposes Mr Stava did, since that is no longer open to challenge) that is the point in time at which the rights to protection which the Treaty confers are vested in them. The offer is capable of being accepted by such a person even if they have in the meantime disposed of their investment, because they are still someone who made a qualifying investment after the date of the Treaty. In order to establish substantive jurisdiction, therefore, the point in time at which there must be a link between the investor and the investment is the time at which the investment is made."*

16. Before the CA, C sought to advance an alternative objection to the effect that irrespective of whether a claimant is an investor in an investment at the time of the alleged breach, they must continue to hold that investment as <u>at the date of the commencement of arbitration</u> (described as "*variant 2*") (CA Judgment/[101]). The CA determined that "*we have no doubt that it is not*" open to C to rely on variant 2 (CA Judgment/[134]). C did not seek to appeal this aspect of the CA's judgment. {TAB6/271} {TAB6/279}

ii. The CA Second Judgment

17. While the CA dismissed the appeal concerning Mr Stava, it upheld a separate appeal relating to Diag Human SE and determined that the award in favour of Diag Human SE should be set aside (CA Judgment/[195]). C contended that the effect of this decision was also to result in setting aside the award in Mr Stava's favour. This was disputed by Mr Stava. The CA allowed three rounds of written arguments and then held a one-day hearing to determine whether its decision to set aside the award in favour of Diag Human had any impact on the award in favour of Mr Stava. It determined that the award in favour of Mr Stava remained unaffected (the "**CA Second Judgment**"). {TAB6/297} {TAB7/348}

> *"The fact that Mr Stava divested himself of his shareholding in Diag SE did not affect the tribunal's jurisdiction over his claim for loss which, on the tribunal's findings, he had already suffered. Whether that divestment meant that his claim ought to fail was a point going to the merits of the claim and not the tribunal's jurisdiction over that claim. It was therefore a matter for the tribunal and not the court."* (CA Second Judgment at [21]) {TAB7/353}

18. C sought but was denied permission to appeal against the CA Second Judgment.[13]

19. The remainder of this Written Case is structured as follows:

    (1) **Section B** addresses the interpretation of Article 9(1) of the Treaty. {TAB21.1/657}

    (2) **Section C** addresses a number of additional criticisms which C makes of the CA Judgment.

    (3) **Section D** explains why a principled approach to distinguishing jurisdiction and admissibility confirms the position arrived at through the treaty interpretation process.

    (4) **Section E** explains why C's position in the arbitration confirms that the Stava 2011 Objection is not jurisdictional.

    (5) **Section F** addresses various authorities relied on by C and explains why those authorities (concerning different objections and/or differently worded treaties) offer little assistance to the Court.

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[13] This is described as Ground B in the order of the Supreme Court dealing with the Parties' applications for permission to appeal {**ref**}. {TAB16/621}

(6) **Section G** explains why, if the Court were to determine that the Stava 2011 Objection was jurisdictional, the Court should still uphold the order of the CA.

(7) **Section H** summarises why the Court should dismiss C's appeal.

B. THE INTERPRETATION OF ARTICLE 9(1) OF THE TREATY

20. Both Foxton J and the CA were correct to conclude that Article 9(1) did not impose a substantive jurisdictional requirement that an investor hold or own an investment at the time of the breach, and that Article 9(1) requires only that the subject matter of the dispute is "*investments*".[14]

21. Ds' submissions on this issue are structured as follows.

(1) **Section 1** sets out the applicable principles of treaty interpretation.

(2) **Section 2** addresses the relevant terms of the Treaty.

(3) **Section 3** addresses the proper interpretation of Article 9(1), applying the relevant principles: {TAB21.1/657}

(i) ordinary meaning;

(ii) the context by reference to (a) Article 2; (b) the substantive standards of protection, particularly Articles 5, 6 and 7. It also addresses (c) C's misplaced reliance on Articles 1(2) and 1(3); {TAB21.1/654} {TAB21.1/655} {TAB21.1/653}

(iii) the object and purpose of the Treaty; and finally

(iv) the role of good faith.

22. A proper application of the principles in context demonstrates that Article 9(1) requires only that the subject matter of the dispute is "*investments*".

(1) The applicable principles of treaty interpretation

23. The general or basic rule of treaty interpretation is set out in Article 31(1) of the Vienna Convention on the Law of Treaties (the "**VCLT**") {**ref**}. This requires a court "*to ascertain the ordinary meaning of the terms used in their context and in the light of the [relevant treaty's] object and purpose, with recourse to supplementary means of interpretation … to confirm the meaning thus ascertained*": *MSC Mediterranean* {TAB29.32/2420}

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[14] CA Judgment/[126]-[127], March Judgment/[145]-[146]. {TAB6/277} {TAB11/422}

Shipping Co SA v. Stolt Tank Containers BV [2024] 1 All E.R. (Comm) 364; [2023] EWCA Civ 1007 at [61] {**ref**}. {TAB34.4/3406}

24. As the CA emphasised by reference to *JTI Polska Sp Z.o.i. v. Jakubowski* [2023] UKSC 19; [2024] A.C. 621 (CA Judgment/[154]), Article 31 involves a "*single combined operation*" {**ref**}. However, the starting point for treaty interpretation is the text, which is presumed to be the authentic expression of the intentions of the parties: *Ping An v. Belgium*, Award, 30 April 2015 (Collins (P), Sands, Williams) at [165] {**ref**}. {TAB34.2/3391} {TAB6/286} {TAB37.21/4225}

(2) The terms of the Treaty

25. Article 9 of the Treaty contains an offer by the Contracting Parties to the Treaty to arbitrate disputes with investors of the other Contracting Party, i.e. an offer by the Czech Republic to arbitrate disputes with Swiss investors and an offer by Switzerland to arbitrate disputes with Czech investors. It provides in relevant part:

> *"(1) For the purpose of solving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party and [without] prejudice to Article 10 of this Agreement (Disputes between Contracting Parties), consultations will take place between the parties concerned.*
>
> *(2) If these consultations do not result in a solution within six months, the dispute shall upon request of the investor be submitted to an arbitral tribunal. Such arbitral tribunal shall be established as follows…"* {**ref**} {TAB21.1/657}

26. The Preamble provides that the two States:

> *"Desiring to intensify economic cooperation to the mutual benefit of both States,*
>
> *Intending to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party,*
>
> *Recognizing the need to promote and protect foreign investments with the aim to foster the economic prosperity of both States"* {**ref**} {TAB21.1/652}

27. Article 1(1) defines "*investor*" to mean:

> *"(a) natural persons who are nationals of that Contracting Party in accordance with its laws;*
>
> *(b) legal entities, including companies, corporations, business associations and other organizations, which are constituted or otherwise duly organized under the law of that Contracting Party and have their seat,*

together with real economic activities, in the territory of that same Contracting Party;

(c) legal entities established under the law of any country which are, directly or indirectly, controlled by nationals of that Contracting Party or by legal entities having their seat, together with real economic activities, in the territory of that Contracting Party." {**ref**} {TAB21.1/653}

28. Article 2 is titled "*Scope of Application*" and it provides as follows:

> *"(1) The present Agreement shall apply to investments in the territory of one Contracting Party by investors of the other Contracting Party, if the investments have been made later than 1st January 1950 in accordance with the laws and regulations of the former Contracting Party.*
>
> *(2) 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."* {**ref**} {TAB21.1/654}

29. The substantive standards of protection of investments are also set out in the Treaty. While some of these protections refer to investments by, of, or made by investors, others do not. Notably, Article 7 (which provides that an investor is entitled to the more favourable of treatment under the Treaty or under legislation of either State – commonly referred to as a "*national treatment standard*") refers to treatment of "*the investor*", without referring to an "*investment*".

> *"If provisions contained in the legislation of either Contracting Party entitle the investor to a treatment more favourable than is provided for by the present Agreement, those provisions shall prevail over the terms set forth by this Agreement."* {**ref**} {TAB21.1/657}

30. A number of substantive standards expressly apply in circumstances in which an investor no longer holds an investment. These include Article 6(1) which provides for protection against uncompensated expropriations:

> *"Neither of the Contracting parties shall take, either directly or indirectly, measures of expropriation, nationalization or any other measure having the same nature or the same effect against investments of investors of the other Contracting Party, unless the measures are taken in the public interest, on a non discriminatory basis, and under due process of law, and provided that provisions be made for effective and adequate compensation. The amount of compensation, interest included, shall be settled in the currency of the country of origin of the investment and paid without delay to the person entitled thereof without regard to its residence or domicile."* {**ref**} {TAB21.1/656}

31. Article 5 guarantees the "*free transfer*" of certain payments. It provides in part as follows:

"Each Contracting Party in whose territory investments have been made by investors of the other Contracting Party shall grant those investors the free transfer of [payments] relating to these investments, particularly of:

...

(d) the proceeds, including possible capital appreciation, arising from the sale or the partial or total liquidation of the investment." {**ref**} {TAB21.1/655}

32. Furthermore, and as explained below (see paragraphs 59(2) and 61(2)), other standards of protection in the Treaty, while not specifically expressed to apply in circumstances in which an investor no longer holds an investment, do in fact continue to apply.

(3) The proper interpretation of Article 9(1) of the Treaty

i. Ordinary meaning of the terms

33. To bring itself within the jurisdiction of an arbitral tribunal constituted under the Treaty, an investor must meet the jurisdictional requirements of Article 9 of the Treaty. Article 9(1) of the Treaty contains limited jurisdictional requirements. They {TAB21.1/657} are that there be a dispute:

    (1) with respect to investments, and

    (2) between a Contracting Party and an investor of the other Contracting Party.

34. The CA correctly described the ambit of Article 9(1) as "*wide*" (CA Judgment/[127]). {TAB6/277} It only requires that the dispute between a Contracting Party and qualifying investor be "*with respect to investments*".

35. The ordinary meaning of a "*dispute with respect to investments*" is that the subject matter of the dispute must relate to an investment.[15] As explained by both the CA[16] and Foxton J,[17] it does not entail any jurisdictional requirement that the investment be held by the investor at the time of each and every alleged breach. The question of whether an investor can bring a claim in respect of particular breaches is, at most, a question of standing, i.e. of admissibility of particular claims. It is not a question of substantive jurisdiction, whereas the question of whether particular conduct amounts

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[15] As to the definition of "*dispute*" see *Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, PCIJ, Series A, No. 2, p.11: "*A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons*" {**ref**}. {TAB35.4/3577}

[16] CA Judgment/[126]. {TAB6/277}

[17] March Judgment/[146]. {TAB11/422}

to a breach of the Treaty goes to the merits. Thus, the fact that an investor may not hold an investment at the time of each and every alleged breach may be relevant to admissibility or merits of the dispute, but it is not a question of substantive jurisdiction within the scope of s.67 AA96. {TAB26.1/1642}

36. This conclusion is supported by the ordinary meaning of "*with respect to*" or "*in respect of*". The Cambridge Dictionary defines those two phrases as "*in connection with something*" {**ref**}. In the context of Article 9(1), it requires a connection or relation with the subject matter of an "*investment*". {TAB38.1/4385} {TAB21.1/657}

37. C seeks to limit the scope of Article 9(1) so as to reach the conclusion 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*" (CWC/[31]), and that "*if [a] 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 [Article 9(1)] no offer to arbitrate a dispute over that claim*" (CWC/[36]). That conclusion does not follow from the words which appear in Article 9(1): the key words are simply a "*dispute with respect to investments*". C's interpretation would require Article 9(1) to be redrafted as follows, with additions in red, relocated words in green, and deleted words struck through: {TAB4/155} {TAB4/158}

> "*(1) For the purpose of solving disputes ~~with respect to investments~~ between a Contracting Party and an investor of the other Contracting Party with respect to investments and concerning claims for breach of the substantive provisions of this Agreement for which the alleged cause of action for the, or a, claim arises, or is alleged to arise, at a time when the investor owns or holds the relevant investment and [without] prejudice to Article 10 of this Agreement (Disputes between Contracting Parties), consultations will take place between the parties concerned.*"

38. This strained reading is in no sense "*the ordinary meaning to be given to the terms of the treaty*", and neither good faith nor the context of the Treaty can justify such a radical departure from the clear terms of the Treaty. As explained by Sir Humphrey Waldock, the International Law Commission's Special Rapporteur on the law of treaties, international judicial decisions confirm that "*it is not the function of*

interpretation to revise treaties or to read into them what they do not expressly or by necessary implication contain."[18]

39. C contends that the ordinary meaning of Article 9(1) is "*that there is an offer to arbitrate disputes in relation to investments of the putative claimant*" (CWC/[36]). {TAB4/158} But even if it were permissible to imply "*of the investor/claimant*" after "*investments*" in Article 9(1), that would not be sufficient to convey the temporal limitation for which C contends (as to which see paragraph 61 below). Further and in any event, that implication would render Article 9(1) inconsistent with the substantive standards of protection set out in the Treaty (as to which, see paragraphs 52-62 below).

40. C suggests that Ds require "*the Court to read into Article 9 an extension which is not expressly stated and for which there is no rational justification*" (CWC/[14]), and "*to find words which are not within Article 9 in order to extend its meaning to something different*" (CWC/[36]). {TAB4/149} C does not identify what those words would be, and its assertion is patently incorrect. A dispute "*with respect to investments*" contains no temporal limitation, and no requirement to continue to own/hold the investment at the time of breach or time of a cause of action accruing. No extension, and no additional words, are needed to reach the conclusion that both Foxton J and the CA did, i.e. that a "*dispute with respect to investments*" entails only that the subject matter of the dispute relates to an investment.

41. Before turning to the other elements relevant to the interpretation of Article 9, Ds address C's assertion in its second ground of appeal that the CA erred in its interpretation of the term "*investor*" in Article 1(1)(a) of the Treaty.[19] In its Written Case, C contends that the CA "*wrongly focussed ... on the requirement to be an 'investor'*" rather than "*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'*" (CWC/[70]). {TAB4/169}

42. C's criticism of the CA is misplaced.

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[18] Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur, Yearbook of the international Law Commission (1964) Vol. II, p. 56 {**ref**}. {TAB38.2/4438}

[19] C's Grounds of Appeal at [11] {**ref**}. {TAB18/635}

(1) Mr Stava was a Swiss national and therefore an "*investor*" within the meaning of the Treaty at all relevant times and it is not open to C to contend otherwise (March Judgment/[124]-[127] and see paragraph 13(1) above). {TAB11/415}

(2) The "*investor*" requirement is separate from the "*investment*" requirement. There is no need for a person or legal entity to hold an investment to satisfy the definition of "*investor*".

(3) The relevant temporal requirement identified by the CA arises not from Article 1 of the Treaty (as suggested by C) but instead arises from Article 2 of the Treaty (which concerns the "*Scope of application of the Treaty*" (see CA Judgment/[126])). {TAB6/277}

43. Instead, and as elaborated below, the CA correctly concluded that "*[w]hen someone becomes a qualifying investor in a qualifying investment (as we must assume for these purposes Mr Stava did, since that is no longer open to challenge) that is the point in time at which the rights to protection which the Treaty confers are vested in them.*" (CA Judgment/[126]).

ii. The context

44. The context for the purposes of treaty interpretation can include other provisions of the Treaty. Three aspects of the context are addressed here: (a) Article 2; (b) the substantive investment protection standards in the Treaty; and (c) Article 1. The Preamble is addressed in **subsection iii** below, when discussing the object and purpose of the Treaty. {TAB21.1/654} {TAB21.1/653}

(a) Article 2

45. Article 2(1) of the Treaty (set out in full in paragraph 28 above) provides that the Treaty applies to investments in the territory of a Contracting State, if they have been made later than 1 January 1950 in accordance with the host State's law. Article 2(2) is a savings provision, for any rights and obligations of the Contracting States with respect to investments not within the scope of the Treaty.

46. Neither paragraph indicates any temporal requirement other than that the investment be made later than 1 January 1950. The ordinary meaning of this provision is not that the scope of protected investments is limited to investments held by an investor at the time of the alleged breach. Rather, the fact that Article 2(1) makes express

provision for a specific temporal requirement in respect of "*investments*" (made after 1 January 1950) supports the contention that, had the Contracting States intended to include further temporal limitations on the offer to arbitrate in Article 9, they would have also done so expressly. {TAB21.1/657}

47. The fact that Article 2(1) contains jurisdictional requirements – which are not also reflected in Article 9(1) – does not assist C in establishing that there is a further jurisdictional requirement, which is nowhere to be found in the text of the Treaty itself (cf. CWC/[41]). {TAB21.1/654} {TAB4/160}

48. C also contends that because Article 2(1) limits the scope of the Treaty to "*investments ... by investors... [i]t 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 protection ... Logically, the same must also be true of the period after complete divestment of an investment*" (CWC/[38]). As to that argument: {TAB4/158}

    (1) The inference C contends for does not follow, whether as a matter of logic or proper analysis. Article 2(1) does impose one express temporal limit: it excludes all investments made prior to 1 January 1950. This is a clear, simple and straightforward rule. There is no basis for deriving from this rule a further one on the exclusion of investments made after 1 January 1950 in certain conditions.

    (2) The requirement that an investment be made "*by*" an investor after a certain date continues to be satisfied by that investor even after divestment. To read Article 2(1) as requiring that the investment continue to be held/owned by the investor at the time of "*the alleged cause of action for the, or a, claim arises, or is alleged to arise*" is far beyond the ordinary meaning of the terms: it is to add a condition which was not agreed by the Treaty parties.

    (3) Further and in any event, that implication would render Article 9(1) inconsistent with the substantive standards of protection set out in the Treaty (as to which, see paragraphs 52-62 below).

49. C contends that Article 2(2) "*is also significant*", because it provides that the Treaty "*shall not affect the rights and obligations of the Contracting Parties with respect to investments that are not within the scope of the Agreement*", and if a State is "*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", it is being compelled to arbitrate, and it is exposed to the risk of a decision against it with significant financial consequences (CWC/[40]). With respect, the argument is entirely circular. Article 2(2) confirms that the rights and obligations are preserved with respect to investments not within the scope of the Treaty. Article 2(2) does not delineate the scope of the Treaty, and it does not in any way impose any substantive jurisdictional limitation which is not otherwise found in the Treaty itself. {TAB4/159} {TAB21.1/654}

50. The CA explained the import of Article 2 at CA Judgment/[126]: {TAB6/277}

> *"The offer to arbitrate in Article 9 is an offer made to a qualifying investor who, after 1 January 1950, makes a qualifying investment in the Czech Republic. When someone becomes a qualifying investor in a qualifying investment (as we must assume for these purposes Mr Stava did, since that is no longer open to challenge) that is the point in time at which the rights to protection which the Treaty confers are vested in them. The offer is capable of being accepted by such a person even if they have in the meantime disposed of their investment, because they are still someone who made a qualifying investment after the date of the Treaty. In order to establish substantive jurisdiction, therefore, the point in time at which there must be a link between the investor and the investment is the time at which the investment is made."*

51. In its Grounds of Appeal, C took a point on Article 2 which was not developed in its Written Case, although it did assert in its Written Case that the reasoning in the relevant paragraph of the CA Judgment was wrong (CWC/[74]). For completeness, C is wrong to suggest that the CA disregarded Article 2 of the Treaty or that Article 2 imposed "*no constraints*" on the disputes to which Article 9 applies.[20] {TAB4/171}

    (1) C seeks to take the last sentence of paragraph 127 of the CA Judgment out of context. The CA accepted that Article 2 of the Treaty limited the offer to arbitrate in the Treaty. However, it was not prepared to read into either Article 2 or Article 9 a far-reaching limitation of the type contended for by C. {TAB6/277}

    (2) C's contention that the CA disregarded the territorial scope of the Treaty is misguided for similar reasons. The CA considered that Article 2 of the Treaty limited the scope of Article 9. The fact that it did not mention the "*territorial*"

[20] C's Grounds of Appeal at [15]-[16] {**ref**}. {TAB18/637}

scope in paragraph 127 of its Judgment reflects the fact that this particular limitation was not in issue before the CA.

(b) The substantive standards of protection in the Treaty

52. C relies on the substantive standards of protection in the Treaty as context to the interpretation of Article 9(1). It is not clear from C's case, however, which of the specific terms in Article 9 would have its ordinary meaning informed by this context and how. {TAB21.1/657}

53. What is notable about the substantive standards of protection is that they expressly protect an investor against a State's conduct in a number of circumstances in which the investor has ceased to hold the investment. This is a clear contextual element militating against the insertion of new words in Article 9 so as to read it as imposing a jurisdictional requirement that an investor continue to own/hold the investment at the time of "*the alleged cause of action for the, or a, claim arises, or is alleged to arise*". Such a requirement would be plainly inconsistent with those substantive protection standards.

54. For example, Article 5 of the Treaty (set out in paragraph 31 above) guarantees the free transfer of, *inter alia*, the "*proceeds*" arising from the sale or the liquidation of an investment. This standard of protection applies to the "*proceeds*" of a sale rather than to the investment itself, and could only apply in circumstances where an investor has disposed of an investment. {TAB21.1/656}

55. C appears now to contend that Article 5 is to be interpreted as specifically disapplying the requirement of continuing to hold the investment (CWC/[54]), referring to the award in *Alcor v. Czech Republic* {**ref**}. However, as explained in paragraph 110 below, in *Alcor* the tribunal was interpreting the definition of "*investors*" in the Czech-UAE BIT, "*natural or juridical persons **who invest** in the territory of the other Contracting State*" {**ref**} (emphasis added). Here, (a) the objection under consideration does not relate to Mr Stava's status as an "*investor*", which is not open to challenge, and (b) the Treaty does not define "*investors*" as "*persons who invest*". Further, C appears to be characterising Article 5 as expressly disapplying the otherwise applicable requirement of continuing to hold an investment: it even goes so far as to suggest this was "*the evident intention of the parties*" (CWC/[56]). The basis on which that intention is said to be derived is not explained. There is nothing {TAB4/164} {TAB37.3/3773} {TAB37.3/3786} {TAB4/165}

in the terms of Article 5 that suggests it is disapplying a general rule, or that it extends the offer to arbitrate in Article 9(1) on some exceptional basis. Nor does Article 9(1) contain any kind of exception or extension of the offer to arbitrate in respect of Article 5. This argument simply cannot be sustained. {TAB21.1/655} {TAB21.1/657}

56. C also contends that when an investment is converted into proceeds, "*there is still an investment, albeit in a changed form … (i.e. the proceeds). …the investment subsists, but in a different form*" (CWC/[55]). The basis of this argument is not understood. The definition of "*investment*" in Article 1(2) is broad but does not cover proceeds of the sale of an investment. It does not cover cash in the bank. Furthermore, it is impossible to reconcile C's assertion here with its extensive argument before Foxton J on its "*no investment*" objection, in respect of which it persuaded Foxton J that "*investment*" has at least some inherent meaning (August Judgment/[95]), including the elements of contribution, risk, and duration. {TAB4/165} {TAB21.1/653} {TAB13/513}

57. Separately and additionally, Article 6(1) of the Treaty protects an investor from uncompensated expropriations. A State party to the Treaty may lawfully expropriate the investment of an investor provided that the expropriation complies with certain conditions, including that an investor is accorded due process and provided with effective and adequate compensation. That compensation shall be paid without delay, but it is most likely to be paid after an investor no longer holds that investment. An investor continues to be entitled to the protections of the Treaty even though they no longer hold the investment, and a tribunal may be called upon to consider conduct by the State during this period when an investor no longer holds the investment. This may require a tribunal to consider, *inter alia*, whether an investor was afforded due process,[21] and was provided with effective and adequate compensation during this period. {TAB21.1/656}

58. C contends that Article 6 does not assist Ds, because C does not contend that a claimant must continue to hold the investment at the time of commencing arbitration, only that it must continue to hold the investment at the time of the conduct said to constitute an expropriation (CWC/[57]). This represents a change in C's case because before both Foxton J and the CA it sought to contend that an investor needs to hold {TAB4/165}

[21] See, for example, *JSC CB Privatbank v. The Russian Federation*, PCA Case No. 2015-21, Partial Award, 4 February 2019 (Dupuy (P), Bethlehem, Mikulka), at [280] {**ref**}. {TAB37.14/3912}

the investment at the time the request for arbitration is filed.[22] Both courts have held that C is precluded from advancing such a case.[23]

59. However, whether – on C's approach – the temporal limitation for jurisdiction to be read into Article 9(1) is for the investor to hold the investment at the time of breach or at the time of commencing proceedings, the analysis remains the same: the asset is no longer the investor's investment, and the investor could no longer meet the jurisdictional requirement to be read into Article 9(1), because it has been divested of its investment. {TAB21.1/657}

    (1) This is no answer to the point identified in the paragraph 57 above, namely that the wrongful state conduct might only occur after an investor has lost its title (i.e., the breach might only occur when the State fails to provide prompt, adequate and effective compensation).[24]

    (2) Article 6(2) of the Treaty requires that an investor shall be treated the same way as other categories of investors in respect of, *inter alia*, indemnification and compensation arising from losses due to war, armed conflict, revolution, emergency or rebellion. Such an investor may well have ceased to hold their investment due to war, armed conflict, revolution, emergency or rebellion but they remain entitled to be indemnified or compensated on a non-discriminatory basis vis-à-vis those other categories of investors. {TAB21.1/656}

60. C also argues that the wording of Articles 6(1) and 6(2) supports its case, because Article 6(1) applies to treatment of "*investments of investors*", and Article 6(2) refers to "*investors ... whose investments have suffered losses*" (CWC/[58]). But at the time of accepting the offer to arbitrate, an investor whose investment has been expropriated will not – on C's case – have an "*investment[] by [an] investor*"; and an investor who has ceased to hold their investment due to war, armed conflict, revolution, emergency or rebellion cannot be described as an "*investor whose investments*", at least not in the sense of the present tense. Thus C's contention that these provisions support its interpretation of Article 9(1) cannot be sustained. {TAB21.1/656} {TAB4/166}

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[22] CA Judgment/[101]. {TAB6/271}

[23] CA Judgment/[134]; March Judgment/[121(i)]. {TAB6/279} {TAB11/414}

[24] See, for example, *Tidewater Investment Srl, Tidewater Caribe, CA v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award, 13 March 2015 (McLachlan (P), Rigo Sureda, Stern), at [122]-[123] {**ref**}, [145]-[146] {**ref**}. {TAB37.28/4299} {TAB37.28/4307}

61. C also relies on substantive protection provisions that it contends emphasise the need for a connection between the investment and investor, and contends that "*[o]ne would expect Article 9 to be interpreted in the same way*" (CWC/[42]). It relies specifically on the fair and equitable treatment standard in Article 4(2), and the obligation not to impair an investment by unreasonable or discriminatory measures in Article 4(1) (CWC/[42]-[43]). However, this argument suffers from the same fatal flaws as C's reliance on Article 2(1). Specifically: {TAB4/160} {TAB21.1/655}

    (1) An investment is made *by* an investor at the time of investment, and that investment remains made *by* that investor even after divestment.

    (2) Furthermore, the Contracting Parties cannot have intended the term "*of*" to have the narrow meaning contended for by C. Arbitral decisions make clear that those standards of protection continue to apply even after an investor ceases to hold that investment. For example, the fair and equitable treatment standard (reflected in Article 4(2) of the Treaty) continues to provide protection to investors who are litigating claims before the domestic courts of the host State even after they no longer hold their investment.[25]

    (3) Different provisions in the Treaty use different connecting terms. Even if a temporal requirement was found to apply to certain of the substantive protection standards, it cannot apply to all of them: Article 7 (the "*national treatment standard*") refers to treatment of "*the investor*", without referring to an "*investment*", while Articles 5 and 6 (discussed in paragraphs 54-57 above) explicitly extend to circumstances in which an investor no longer holds/owns an investment. Thus, even if there were some basis for inferring from the language of "*investments of investors*" or "*investments by investors*" a limitation on the scope of application of that specific substantive standard, there would be no basis for interpreting the Article 9 offer to arbitrate as limited to the same scope. Put simply, there could be no "*expectation*" that Article 9 is to be interpreted "*in the same way*" where: (a) some of the substantive standards impose a limit on scope; (b) some do not; and (c) others explicitly extend to circumstances in which an investor no longer holds/owns an investment. {TAB21.1/657} {TAB21.1/655} {TAB21.1/657}

[25] See discussion of *Mondev v. USA* below at paragraphs 96-100. {TAB37.17/4129}

(4) Furthermore, if Article 9 were "*interpreted in the same way*" that C says Article 4(2) should be interpreted, this would mean that Article 9 could not be invoked by an investor who no longer held their investment at the time of the commencement of arbitration. This is because (on C's case) Article 9 would no longer apply. The consequence of this would be that an investor could not bring a claim even if the reason they had lost title in their investment was wrongful conduct on the part of one of the Contracting Parties. {TAB21.1/657} {TAB21.1/655}

62. In summary, this relevant context (i.e., the substantive protections in the Treaty) demonstrates that an investor may be entitled to the benefit of standards of protection under the Treaty even after they cease to hold the investment. That suggests that there is no jurisdictional limitation in Article 9 of the Treaty as contended for by C.

(c) C's misplaced reliance on Articles 1(2) and 1(3) of the Treaty {TAB21.1/653}

63. C relies on two further provisions of the Treaty. However, it is apparent that neither provides relevant context to the interpretation of Article 9(1) of the Treaty.

64. C first relies on the definition of "*investments*" in Article 1(2) and contends that "*[t]he language suggests a connection of ownership or holding between the protected person and the assets*" (CWC/[39]). C has not identified the specific language in Article 1(2) on which it relies nor has it elaborated, except to state that "*[i]t would not be a normal use of language for someone to refer to shares that they sold last week as 'my investments'*" (CWC/[39]). For the avoidance of doubt, "*my investments*" does not appear in the definition in Article 1(2), nor does it refer in any way to "*investments*" held or owned by any specific person. There is simply no basis to suggest that Article 1(2) supports C's interpretation of Article 9(1): it is, at best, neutral. {TAB4/159}

65. C also relies on the definition of "*returns*" in Article 1(3) and contends that it "*inherently suggests, and the examples given presuppose, a flow of the benefits of investment back to the investor*", which "*requires a subsisting connection between the investor and the investment*" (CWC/[39]). Even if it were correct that "*returns*" entails a flow of benefits back to an investor, there is no specific temporal requirement in Article 1(3); such "*returns*" may well have been earned and received before divestment. Indeed, the fact that Article 5(1) protects the free transfer of "*returns on investments*", alongside "*the proceeds… arising from the sale or the* {TAB21.1/653} {TAB4/159} {TAB21.1/655}

partial or total liquidation of the investment" suggests that no temporal requirement (or "*subsisting connection*") can be implied into the Article 1(3) definition.

iii. Object and purpose of the Treaty

66. As noted in paragraph 26 above, the Preamble expresses the object and purpose of the Treaty as "*[i]ntending to create and maintain favourable conditions for investments by investors*" and encouraging, protecting and promoting foreign investments {**ref**}. Unsurprisingly, when dealing with BITs with similar objects and purposes to this Treaty (i.e. the encouragement, promotion and protection of foreign investments), investment tribunals have interpreted provisions on the coverage of treaty protection generously.[26] For example, in *Guaracachi America, Inc. v. Bolivia* the tribunal relied on the object and purpose of the BIT "*to promote and protect foreign investment*" to conclude that "*the BIT would require clear language in order to exclude coverage of indirect investments*".[27] {TAB21.1/652}

67. In the present case, the broad economic and commercial object and purpose of the Treaty justifies a broad jurisdiction being conferred on tribunals established under the Treaty, absent specific limitations in the offer to arbitrate. It is this offer of a neutral forum for the resolution of "*disputes with respect to investments*" which is central to the structure of the Treaty. The Treaty would not "*promote and protect*" or "*create and maintain favourable conditions for*" foreign investments without this.

68. Further, the Preamble refers to "*favourable conditions for investments by investors*". That language is in broad and general terms, refers to no temporal conditions, and certainly not to a specific and distinct temporal jurisdictional requirement for each and every claim that may be brought to arbitration. Such an interpretation would prevent investors from bringing claims for a direct expropriation. That would actually serve to encourage States to take expropriatory measures (in preference to less direct measures having an impact on investments) and would not engender "*favourable conditions for investments by investors*" in any sense. {TAB21.1/652}

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[26] *SGS v. Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004 (El-Kosheri (P), Crawford, Crivellaro), at [116] {**ref**}. {TAB37.24/4260}

[27] *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, 31 January 2014 (Júdice (P), Conthe, Vinuesa), at [352]-[353] {**ref**}. {TAB37.11/3885}

69. C contends that "*[i]t 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*" (CWC/[45]). {TAB4/161} It refers, in this context, to the fact that there is no default compulsory jurisdiction for claims against States (CWC/[45]). Ds do not argue that such outcomes are to be "*preferred*" by the Court. Rather, in interpreting the offer to arbitrate, it is important to bear in mind that part of the object and purpose of the Treaty (specifically, "*promote and protect*" and "*create and maintain favourable conditions for*" investments) is served by the offer to arbitrate. States may of course elect to impose conditions on that offer to arbitrate through specific terms.[28] As it was expressed by one investment tribunal, "*the State can shape its consent as it sees fit by providing the conditions under which it is given – in other words, the conditions subject to which an 'offer to arbitrate' is made to the foreign investors.*"[29] The Contracting States did so here by imposing a temporal limitation in Article 2(1): the relevant {TAB21.1/654} investment must be made after 1 January 1950. But the object and purpose of the Treaty is not served by the implication of further conditions which the Contracting States did not express in their Treaty. That argument has all the more force in circumstances where these Contracting States did elect to impose one temporal limitation to the scope of the Treaty, and yet they did not elect to impose the temporal limitation now contended for by C.

70. The fact that there is no default compulsory dispute resolution forum for claims against States likewise does not suggest that the offer to arbitrate in Article 9(1) {TAB21.1/657} should be interpreted restrictively, or subjected to conditions which the Contracting States did not agree to. Indeed, the fact that such jurisdiction is not compulsory and is exceptional only serves to reinforce that the offer to arbitrate is central to the object and purpose of this Treaty; to "*promote and protect*" and to "*create and maintain favourable conditions for*" foreign investments.

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[28] *Addiko Bank AG v. Republic of Croatia,* ICSID Case No. ARB/17/37, Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU Acquis, 12 June 2020 (Kalicki (P), Olík, Tawil) at [197] {**ref**}; S. Schill et al., *Schreuer's Commentary on the ICSID Convention* (3rd ed., 2022) at [950] {**ref**}. {TAB37.1/3762} {TAB38.12/4660}

[29] *ST-AD GmbH v. The Republic of Bulgaria,* PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013 (Dupuy (P), Torres Bernárdez, Lalonde), at [337] {**ref**}. {TAB37.25/4271}

iv. Good faith

71. In the interpretative process, good faith does not have an entirely independent function: it is part and parcel of the other elements of Article 31(1) (ordinary meaning, context, and object and purpose), and it is "*the combination of good faith and taking account of object and purpose [that] results in an outcome that is more likely to reflect effectively the true intentions recorded in the text than would a purely literal approach*".[30] Those intentions find their clearest expression in the terms of the Treaty itself, and good faith does not operate to imply terms or conditions that are not agreed by the treaty parties. Further, as explained in **subsection iii** above, the specific object and purpose of this Treaty is not served by the implication of further conditions on the offer to arbitrate, which the Contracting States did not express in their Treaty. {TAB29.32/2420}

72. Contrary to C's assertion (see CWC/[48]-[49]),[31] there is nothing in the CA's interpretation or the interpretation contended for by Ds which is either unreasonable or inconsistent with its purpose. The principle of good faith cannot justify a rewriting of the Treaty, such as that proposed by C. To do so would involve disregarding the ordinary meaning of Article 9. {TAB4/163} {TAB21.1/657}

73. It is worth reiterating in this context that the interpretation of Article 9 as found by Foxton J and the CA, and as contended for by Ds, does not preclude a State from raising the issue of the effects of a disposal on a claim in arbitral proceedings. But that issue would be a matter going to admissibility and/or merits, rather than substantive jurisdiction. C's presentation of the injustice of the interpretation given to Article 9(1) by Foxton J and the CA is in effect a criticism of Article 9 and/or of s.67 AA96, and it bears reminding that, if any substantial injustice were suffered, a respondent State remains entitled to raise any available challenge under s.68 AA96. {TAB26.1/1642} {TAB26.1/1645}

C. C'S CRITICISM OF THE DECISION OF THE COURT OF APPEAL AND THE TRIAL JUDGE

74. C contends that the Trial Judge and then the CA misunderstood the concept of *Kompetenz-Kompetenz* and that this criticism infected or influenced the CA's

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30 R. Gardiner and J. Klingler, *Treaty Interpretation* (3rd ed., 2026), p.184, at [2.3] {**ref**}. {TAB38.8/4529}

31 As to C's assertion that Mr Stava disposed of his investment for reasons of succession planning, see August Judgment/Annex 3/[20] where Foxton J addressed the purposes of the Koruna Trust. {TAB13/579}

reasoning.[32] Neither the Trial Judge nor the CA misunderstood the concept of *Kompetenz-Kompetenz* and even if they did there is no support for the assertion that this alleged error affected their reasoning.

75. C's criticisms of the following reasoning by Foxton J are misplaced:

> *"[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"* (March Judgment [145]-[146]). {TAB11/422}

76. First, Foxton J was correct in concluding that the wording of Article 9 which extends to "*disputes with respect to investments*" is sufficiently broad to encompass a dispute as to whether an investor continues to retain ownership or control of (what was found to be) an "*investment*".

77. Second, Foxton J was correct to highlight one of the potential difficulties which flow from C's position. C did in fact rely on the Koruna Trust/Lawbook Transaction in its arguments on quantum. It contended that the effect of these transactions was to reduce the damages to which Ds were entitled. In doing so, it necessarily contended that the Tribunal did have jurisdiction to determine its contention that damages should be reduced on this basis. C's real complaint (which was also the subject of an

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[32] See CWC/[10]-[11]; [59]-[74]. {TAB4/148} {TAB4/166}

unsuccessful s.68 challenge)[33] is that it feels aggrieved by this decision on the merits by the Tribunal.

78. Indeed, one of the difficulties with C's position is explained by the tribunal in *Alcor v. Czech Republic*, a decision on which C places considerable but selective reliance. C notes (but does not attempt to explain) what it describes as "*oddities in the wording of [the] reasoning*" in that case.[34] The *Alcor v. Czech Republic* tribunal explained: {TAB37.3/3773}

> *"If jurisdiction is made to depend upon a claimant establishing that it suffered a treaty breach before the sale of its investment, then in order to decide whether or not it has jurisdiction to determine the case on its merits, a tribunal would first have to rule on the merits of the case. That puts the cart before the horse and cannot be right."*[35]

79. C says that the CA's misunderstanding of this case and the principle of *Kompetenz-Kompetenz* was responsible for "*infecting or influencing*" its reasoning.[36] This is wrong. Contrary to what is suggested by C,[37] the approach of the CA started with and focussed on treaty interpretation. The CA found little assistance from international awards which considered differently worded treaties and different objections.

80. C says that it does not argue in the present proceeding that the Tribunal lacked jurisdiction over breaches which occurred before Koruna Trust/Lawbook Transaction, and it suggests that the CA's reasoning at paragraphs [126] and following does not therefore address the correct point.[38] This submission obscures a number of points. It is clear that the CA did address the correct point. {TAB11/416}

    (1) Before Foxton J and the CA, C did in fact argue that the effect of the Trust/Lawbook Transaction was to preclude Mr Stava from bringing any claim at all (including in respect of breaches which occurred before June 2011). Both Foxton J and the CA held that C was precluded from advancing such a case which was described by the CA as "*variant 2*".[39]

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33 March Judgment/[225]-[227]. {TAB11/447}

34 CWC/[65]. {TAB4/168}

35 *Alcor Holdings Ltd v. Czech Republic*, PCA Case No. 2018-45, Award, 2 March 2022 (Greenwood (P), Wilmot-Smith, McRae) at [263] {**ref**}. {TAB37.3/3788}

36 CWC/[65].

37 CWC/[66]. {TAB4/168}

38 CWC/[68]. {TAB4/169}

39 CA Judgment/[134]-[141]; March Judgment/[121(i)]. {TAB6/279} {TAB11/414}

(2) The CA did understand the difference between the Stava 2011 Objection and "*variant 2*". For example, at paragraph 127 of the CA Judgment it was explained that "*[t]he ambit of the arbitration provision is wide. It does not require that the investor hold the investment at the time of the breach, nor at the time of the acceptance of the offer to arbitrate (although these points may be relevant to the merits of any claim)*."[40]

(3) A number of the cases on which C relies before this Court are in fact cases which address "*variant 2*". Further, a number of the authorities relied upon by C contradict each other. For example, the *Alcor v. Czech Republic* tribunal found that the relevant investment needed to be held by the investor at the time that the request for arbitration is filed (i.e., variant 2)[41], yet an article relied on by C and said to summarise international practice takes the opposite position[42].

81. C says that the substantive obligations under the Treaty stop applying to assets (investments) with which the investor has parted, and that it would be futile to hold that a tribunal has jurisdiction over a claim which it says would be non-existent in such a circumstance.[43] This argument is premised on a number of incorrect assumptions.

(1) C is wrong to say that investment treaty protections stop applying when an investor ceases to hold an investment (see paragraphs 52-62 above).

(2) The fact that a claim is bad in law is no reason to conclude that the Contracting Parties did not agree to arbitrate such a dispute. Tribunals do have jurisdiction to decide on claims which are either futile or non-existent. A futile or non-existent claim might be dismissed on the basis that it is inadmissible (e.g., an

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40 CA Judgment/[127]. {TAB6/277}

41 *Alcor Holdings Ltd v. Czech Republic*, PCA Case No. 2018-45, Award, 2 March 2022 (Greenwood (P), Wilmot-Smith, McRae) at [273] {**ref**}. C suggests in fn.29 of its Written Case that claims may be allowed in certain special circumstances when an investor no longer holds an investment at the time that the arbitration is commenced. In *IC Power Asia Development Ltd v. The Republic of Guatemala,* PCA Case No. 2019-43, Final Award, 7 October 2020 (van den Berg (P), Tawil, Vinuesa) at [384] {**ref**}, it was suggested that this required only that an investor must have a "*valid*" reason for bringing a claim. {TAB37.3/3791} {TAB4/166} {TAB37.12/3897}

42 See CWC/[77] (quoting an article by Burgstaller and Zarowna). {TAB4/172}

43 CWC/[71]. {TAB4/170}

investor lacks standing) or subject to a summary determination mechanism of the type which is becoming increasingly common in arbitration.[44]

(3) C's argument contains an implicit, but incorrect, assumption that the offer to arbitrate in Article 9 of the Treaty is limited to breaches of the Treaty. There are a number of instances in which one of the substantive treaty provisions in the Treaty has not been breached (or is inapplicable) but it remains open for an investor to bring a claim based on the offer to arbitrate in Article 9. The offer to arbitrate in the Treaty is sufficiently broad to allow an investor to bring a claim on legal bases outside the Treaty (e.g., breach of a foreign investment law, breach of customary international law or breach of an investment agreement).[45] {TAB21.1/657}

82. The oddity of the present case is that what was presented by C as a quantum argument (which the Tribunal had jurisdiction to decide) is also said to be a jurisdictional objection (see paragraph 77 above). C says that a jurisdictional issue may mirror or overlap with the merits, and gives the example of a case in which there is a dispute as to whether a matrix contract containing an arbitration clause is ever concluded.[46] However, such an objection bears no resemblance to the Stava 2011 Objection. In the example provided by C, a tribunal would have no jurisdiction at all if a matrix contract containing an arbitration clause had not been validly concluded. As explained above (see paragraph 2), it is no longer open to C to dispute the fact that Mr Stava (i) was an "*investor*", (ii) made an "*investment*" in the Czech Republic, and (iii) submitted a "*dispute with respect to investments*" to arbitration pursuant to Article 9 of the Treaty.

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44 See for example ICSID Rules 2022, Rule 41 (Manifest Lack of Legal Merit) {**ref**}. {TAB36.3/3758}

45 Dolzer, Kriebaum and Schreuer, *Principles of International Investment Law* (3rd ed., 2022), p.396 {**ref**}. {TAB38.5/4484}
Vivendi v. Argentina, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002 (Yves Fortier (P), Crawford, Fernández Rozas) at [55]: "*Article 8 deals generally with disputes "relating to investments made under this Agreement between one Contracting Party and an investor of the other Contracting Party." It is those disputes which may be submitted, at the investor's option, either to national or international adjudication. Article 8 does not use a narrower formulation, requiring that the investor's claim allege a breach of the BIT itself. Read literally, the requirements for arbitral jurisdiction in Article 8 do not necessitate that the Claimant allege a breach of the BIT itself: it is sufficient that the dispute relate to an investment made under the BIT*" {**ref**}. {TAB37.30/4321}

46 CWC/[73]. {TAB4/170}

D. A PRINCIPLED APPROACH TO THE DISTINCTION BETWEEN JURISDICTION AND ADMISSIBILITY CONFIRMS THE CORRECTNESS OF DS' POSITION

83. Ds' position is that the question of whether or not the Stava 2011 Objection is an objection going to jurisdiction should be resolved by interpreting the terms of the Treaty in accordance with the applicable rules of treaty interpretation. However, a principled and coherent distinction between jurisdiction and admissibility also leads to the same result and confirms the correctness of the conclusion reached through the treaty interpretation process described above.[47] Ds do not suggest that this is determinative of the proper interpretation of Article 9(1), but only that it confirms the correctness of the interpretation found by Foxton J and the CA. {TAB21.1/657}

84. Professor Douglas has put forward an "*objective test to distinguish between preliminary objections relating to jurisdiction and admissibility*" which he explains as follows:

> *"The principles are twofold.* ***First****, if the preliminary objection were to be sustained, would it lead to the conclusion that it is inappropriate for the tribunal to exercise its adjudicative power in any circumstances? If the answer is affirmative, then the issue is properly characterised as one of jurisdiction and the possibility of judicial review is justified because the issue relates to whether the tribunal has adjudicative power at all. An indicium of a jurisdictional objection is that it takes aim at the tribunal rather than the claim.* ***Second,*** *if the preliminary objection were to be sustained, would it lead to the conclusion that it is inappropriate for the tribunal to rule upon the specific claim or counterclaim on the merits? If the answer is affirmative, then the issue is properly characterised as one of 'admissibility' and the exclusion of the possibility of judicial review is justified because the issue is within the adjudicative power of the tribunal to resolve.*"[48] (Emphasis added.)

85. In respect of the Stava 2011 Objection the answer to the two questions posed by Professor Douglas is as follows:

    (1) First, if the objection were sustained, it would not lead to the conclusion that it would be inappropriate for the tribunal to exercise its adjudicative power in any

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[47] Ds' Notice of Acknowledgement at [2] {**ref**}. {TAB20/649}

[48] Z. Douglas, *The International Law of Investment Claims* (2009), p.148 at [311] (footnotes omitted) {**ref**}. See also J. Paulsson, "Jurisdiction and Admissibility" in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (2005) p.616 at [601] {**ref**}. {TAB38.7/4500} {TAB38.11/4637}

circumstances; it would only go to claims for breach after 1 January 2012. Thus the objection is not properly characterised as jurisdictional.

(2) Second, if the objection were sustained, it would lead to the conclusion that it would be inappropriate for the tribunal to rule upon the specific claims on the merits – here, of breaches occurring after June 2011. Thus, the objection is properly characterised as non-jurisdictional.

86. In its Grounds, C made an argument that is not repeated in the Written Case. It complains that the effect of the CA Judgment is that different outcomes are reached as between Diag Human SE and Mr Stava (a matter of principle and practicality, it says).[49] As to that:

(1) There is no reason of principle or practicality why different jurisdictional challenges grounded in different provisions of a treaty and aimed at differently placed claimants should give rise to the same outcome. The challenge on which C succeeded related to whether Diag Human SE was an investor, whereas the challenge directed at Mr Stava relates to whether, even though he had made an investment, he still held the investment at the time of breach (it not being open to C to challenge his status as an investor or the fact that he had made an investment).

(2) Whereas the challenge vis-à-vis Diag Human SE might present a complete answer to the claims pursued by Diag Human SE, even if the challenge vis-à-vis Mr Stava were found to be a jurisdictional challenge and upheld, it would at most affect a (very) limited part of the claim he pursued in the arbitration. It could not provide a complete answer to the claims presented by him because on any view it could not affect the jurisdiction of the tribunal over breaches by C occurring prior to June 2011 (which encompasses almost the entirety of the breaches held to have been committed by C).

(3) In rejecting Ds' reliance on an issue estoppel, Foxton J determined that the issues which arose vis-à-vis Mr Stava and Diag Human SE were not the same

[49] C's Grounds of Appeal at [18] {**ref**}. {TAB18/639}

issue even if the objections "*may involve traversing the same factual enquiry*".[50]

87. C contends that there is no good reason why the Stava 2011 Objection should be treated differently to other objections which C says are jurisdictional.[51] The objections it has identified are not, however, comparable.

    (1) Four of the five objections identified by C concern the *ratione materiae* question of the very existence of a protected investment.

    (2) The fifth objection identified by C concerns the situation in which the alleged breach occurs before an investor acquires an investment. Both Foxton J and the CA were correct to conclude that *Tatneft* was distinguishable.[52] Butcher J's {TAB34.10/3453} conclusion in *Tatneft* considered that his conclusion followed from the principle of non-retroactivity of treaties.[53] That principle has no application in the present case. It is not correct to suggest that the Stava 2011 Objection and the objection in *Tatneft* are two sides of the same coin as C asserts.[54]

88. C says that certain changes in circumstances (e.g. loss of nationality) have jurisdictional effect and it appears to suggest that for this reason the Stava 2011 Objection should also be treated as jurisdictional.[55] However, the issue before this Court is to be resolved through the process of treaty interpretation rather than C's flawed attempts to assimilate very different situations.

E. C'S POSITION IN THE ARBITRATION CONFIRMS THAT THE STAVA 2011 OBJECTION IS NOT JURISDICTIONAL

89. Objections which relate to standing are properly characterised as objections which do not go to the question of substantive jurisdiction. Consistently with that principle,

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50 August Judgment/[259]. {TAB13/565}

51 CWC/[46]. {TAB4/161}

{TAB6/279} 52 CA Judgment/[133]; March Judgment/[147]. {TAB11/422}

53 *Tatneft*, [84]-[87] {**ref**}. {TAB34.10/3473}

54 CWC/[51]. {TAB4/164}

55 CWC/[47]. {TAB4/162}

investment tribunals commonly treat standing objections as objections to admissibility.[56]

90. C recognised that the objection was non-jurisdictional in its own pleadings in the arbitration. In the Request for Bifurcation (the pleading which set out C's request that jurisdictional issues be bifurcated) the issue of the transfer of shares in mid-2011 was raised as a potential "*bar to the admissibility of [the] claims*"[57], and of *"standing to assert the claims in this arbitration*".[58] As the Trial Judge concluded, this was raised in the Request for Bifurcation "*as an issue which was expressly not jurisdictional*".[59] The Tribunal accepted C's own characterisation of the objection, as put in the Request for Bifurcation, and in discussing it in the Award, characterised it as an argument "*that Claimants lack standing*".[60] {TAB21.3/66.5}

91. C suggests it is incorrect that the only point taken was an objection to standing, referring to various of its pleadings (CWC/[91] and footnote 43). Ds note that: {TAB4/177}

    (1) The paragraphs of the Counter-Memorial cited by C are in the introductory paragraphs of a pleading and the objection is not referred to in the four listed objections which followed this introductory part.

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[56] See *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic,* ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004 (Orrego Vicuña (P), Gros Espiell, Tschanz) at [57] {**ref**}. {TAB37.10/3882} See also *South West Africa*, Second Phase, Judgment, ICJ Reports 1966, p.43 at [76] {**ref**} (treating the {TAB35.5/3586} capacity of the applicants to advance the particular claim as concerning admissibility), and Z. Douglas, {TAB38.7/4502} *The International Law of Investment Claims* (2009), at [743], [745] {**ref**}, [817] {**ref**}; *Deutsche* {TAB38.7/4507} *Telekom v. India*, PCA Case No. 2014-10, Interim Award, 13 December 2017 (Kaufmann-Kohler (P), Price, Stern) at [156] {**ref**}; *Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. {TAB37.9/3873} ARB/16/32, Award, 18 February 2020 (Rigo Sureda (P), Alexandrov, Stern) at [137]-[140] {**ref**}. See {TAB37.27/4296} also *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 {TAB37.8/3859} August 2012 (Dupuy (P), Brower, Bello Janeiro) at [145] {**ref**}, [154] {**ref**} (treating disposition as {TAB37.8/3863} relating to standing).

[57] Respondent's Request for Bifurcation, dated 7 December 2018, at [60]: "*Claimant's failure to discharge their burden to prove that they have standing to seek protection under the BIT is another bar to the admissibility of their claims*" {**ref**}. {TAB21.3/692}

[58] Respondent's Request for Bifurcation, dated 7 December 2018 at [64]: "*Claimants also fail to explain and disclose details of the trust structure underlying Mr. Stava's claim of ownership and control over Diag Human SE — which is key to determining whether both Claimants in fact have standing to assert the claims in this arbitration*" {**ref**}. {TAB21.3/695}

[59] March Judgment/[115]. {TAB11/413}

[60] Award/[414] {**ref**}. {TAB21.10/863}

(2) The cited paragraphs of the Rejoinder concluded with an assertion that "*Mr Stava cannot assert any claims in respect of events that occurred after June 2011*", language which connotes standing/admissibility rather than jurisdiction.

(3) The cited page of the Rejoinder cross refers back to the Request for Bifurcation, quoting from the language there, which explicitly referred to "*standing*" {**ref**}. {TAB43/4678}

92. In sum, in none of these pleadings did C articulate the objection as one going to jurisdiction. C's own characterisation of its objection as standing (and thus as admissibility) adds weight to the correct legal analysis, which indicates that the objection is not an objection to substantive jurisdiction within the scope of s.30 of the AA96.[61]

F. THERE IS NO INCONSISTENCY WITH THE DECISIONS OF ENGLISH COURTS AND INTERNATIONAL TRIBUNALS

93. C contends that the CA's approach is inconsistent with decisions of international tribunals and the English courts. However, C accepted that none of the cases cited by it were "*on all fours*".[62]

94. There is an underlying contradiction in C's position: it contends that the specific terms of the Treaty are determinative; yet it complains that the CA should have been persuaded by cases based on different treaty provisions and raising different objections.

(1) International decisions

95. As to the relevance of these investment awards, Ds note at the outset that:

(1) None of the awards cited by C concerned the application of s.30(1) of the AA96 which sets out a confined list of matters which will be considered as going to substantive jurisdiction, relevantly whether there is a valid arbitration agreement (s.30(1)(a)); and what matters have been submitted to arbitration in accordance with the arbitration agreement (s.30(1)(c)). {TAB33.1/3380}

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[61] In its Grounds of Appeal, C argued that the present appeal raised an issue of public importance because it would allow this Court to consider the distinction between "*jurisdiction*" and "*admissibility*". It contended that this issue would be of significant international importance (C's Grounds of Appeal at [31]) {**ref**}. C now says that this issue does not arise and that the international position is not relevant (i.e., the decision will not be of international importance) (CWC/[93]). {TAB18/643} {TAB4/178}

[62] CA Judgment/[102]. {TAB6/271}

(2) The question of whether a matter goes to "*substantive jurisdiction*" for the purposes of s.30(1) AA96 cannot be determined on the basis of whether an investment treaty tribunal has characterised a certain matter as jurisdictional or otherwise, and still less on the basis that a tribunal uses the term "*jurisdiction*" without further analysis or consideration. What is relevant is whether the matter goes to one of the issues identified in s.30(1)(a)-(c) AA96.

(3) Investment tribunals do not commonly engage in an analysis of the characterisation of objections as going to jurisdiction, admissibility, or indeed the merits. In the absence of an analysis of the point, a tribunal's reference to "*jurisdiction*" in dealing with a particular objection does not necessarily mean that it considered it to mean "*substantive jurisdiction*", as opposed to admissibility or the merits. For example, it will often be irrelevant to a tribunal whether it lacks jurisdiction or should not exercise jurisdiction because a claim is inadmissible. The Court should therefore approach investment treaty awards with some caution.

i. Mondev v. USA

96. The decision of a NAFTA tribunal in *Mondev v. USA* supports Ds' case. The award was made by an eminent tribunal comprised of Sir Ninian Stephen (former justice of the High Court of Australia), Judge Stephen Schwebel (former President of the ICJ), and Professor James Crawford (who was later to become a judge of the ICJ). In that case the tribunal explained that an investor might still bring a claim, whether or not the investment subsists at the time of the treatment which is complained of. {TAB37.17/4129}

97. The underlying dispute related to a failed real estate venture in Boston. The intention was that Mondev's subsidiary, LPA, would develop, build, own and manage the project.[63] The project however failed and the mortgagee foreclosed on the mortgage in February 1991, almost three years before NAFTA entered into force on 1 January 1994.[64] It was for this reason that the tribunal concluded that Mondev was unable to bring a claim for the expropriation of its investment.[65]

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[63] *Mondev International Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 (Stephen (P), Crawford, Schwebel) at [1] {**ref**}, [37] {**ref**}. {TAB39/4662} {TAB37.17/4130}

[64] *Mondev International Ltd v. United States of America* at [45] {**ref**}. {TAB37.17/4134}

[65] *Mondev International Ltd v. United States of America* at [73] {**ref**}. {TAB37.17/4143}

98. Mondev however had brought legal proceedings in the US courts in 1992 and appeals remained pending at the time that NAFTA entered into force. The tribunal accepted that it could adjudicate on claims by Mondev but only in so far as those claims concerned the conduct of the United States courts (i.e., the only conduct which occurred after NAFTA had entered into force).[66]

99. The US sought to challenge Mondev's standing on the basis that it had no subsisting investment in the project as at 1 January 1994 (i.e., the date on which NAFTA entered into force). The United States relied on the fact that all rights in the project had become vested in the mortgagee upon foreclosure. The tribunal rejected this submission:

> "*the Tribunal would again observe that Article 1105, and even more so Article 1110, will frequently have to be applied after the investment in question has failed. In most cases, the dispute submitted to arbitration will concern precisely the question of responsibility for that failure. To require the claimant to maintain a continuing status as an investor under the law of the host State at the time the arbitration is commenced would tend to frustrate the very purpose of Chapter 11, which is to provide protection to investors against wrongful conduct including uncompensated expropriation of their investment and to do so throughout the lifetime of an investment up to the moment of its "sale or other disposition" (Article 1102(2)). On that basis, 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.*"[67]

100. C seeks to distinguish *Mondev v. USA* on the basis it was dealing with "*a very particular situation, namely whether forcible changes in title to an asset after the*

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[66] *Mondev International Ltd v. United States of America* at [75] {**ref**}. {TAB37.17/4143}

[67] *Mondev International Ltd v. United States of America* at [91] {**ref**}. {TAB37.17/4149}

investment has failed, and which were related to its failure, affect the ability to bring a claim."[68] This attempt to distinguish this case does not withstand scrutiny.

(1) The loss of title did not affect the ability of Mondev to bring a claim.

(2) The tribunal clearly had in mind the common situation in which an investor loses title as a consequence of the State action which might then be the subject of a treaty claim. However, its decision is clearly not confined to that situation. Mondev's loss of title was the consequence of the actions of a private third party (for which the USA could not have been held responsible even if NAFTA had been in force) deciding to foreclose on a mortgage.

(3) The implicit suggestion by C that a tribunal (before being able to exercise jurisdiction) might need to adjudicate on why an investment failed and/or whether there were forcible changes in title linked to the failure of an investment is not only an unattractive and impractical suggestion[69] it is untethered from the text of the Treaty.

ii. Daimler v. Argentina {TAB37.8/3840}

101. *Daimler v. Argentina* supports Ds' case. The issue there was whether Daimler retained the right to bring a claim following the transfer of its investment – an issue which the tribunal characterised as a matter of standing (i.e., not jurisdictional).[70] In concluding that Daimler had not relinquished its right to bring an investment treaty claim the tribunal observed as follows:

> *"there may be good reasons not to impose a continuous ownership requirement. For example, in cases of expropriation, an investor will by definition no longer own the investment at the time of lodging the arbitration claim. Yet this should not preclude the investor from obtaining the compensation due under the BIT. Moreover, to impose a continuous ownership requirement may defeat the ends of justice in cases where the sale of the investment was forced – e.g. under domestic*

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[68] CWC/[89]. {TAB4/176}

[69] See paragraph 78 above.

[70] *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012 (Dupuy (P), Brower, Bello Janeiro) at [135] {**ref**}, [154] {**ref**}. {TAB37.8/3853} {TAB37.8/3863}

bankruptcy laws, where the bankruptcy itself may have been caused by some act of the respondent state in violation of the BIT."[71]

iii. Vöcklinghaus v. Czech Republic {TAB37.31/4322}

102. This is one of two cases identified by C (the other decision being *Phoenix v. Czech Republic*) in respect of which it says that the same type of objection as the Stava 2011 Objection was treated as "*jurisdictional*" and succeeded.[72] That is wrong. This case did not involve the sale of an asset which was held to have been an "*investment*" (before such sale). {TAB37.20/4162}

103. Mr Vöcklinghaus (described in the award as PV) brought a claim in respect of, *inter alia*, his 50% shareholding in a Czech company (KOMFORT). He claimed that the manner in which KOMFORT had been declared bankrupt constituted a violation of the Czech-German BIT. It was common ground that this 50% shareholding was an investment.[73] However the Czech Republic objected to claims advanced by Mr Vöcklinghaus in respect of repayment of money loaned to KOMFORT through a separate company (MFT-K).

(1) The *Vöcklinghaus* tribunal concluded that these loans were not investments within the meaning of the treaty because "*credits from third parties*" were specifically excluded from the types of assets which fell to be treated as investments.[74] Having concluded that these loans were not investments, the tribunal then went on to consider nevertheless whether Mr Vöcklinghaus had standing to claim in respect of these loans.

(2) The tribunal concluded that Mr Vöcklinghaus lacked a legal or beneficial interest in MFT-K after it was sold on 8 March 2001. This was seven months prior to KOMFORT being placed into bankruptcy. The tribunal concluded that "*the Tribunal holds that it has no jurisdiction to hear PV's claims in respect of receivables owed to MFT-K by KOMFORT.*"[75] However, as explained above, these receivables were not (and had never amounted to) an investment which

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[71] *Daimler Financial Services AG v. Argentine Republic* at [142] {**ref**}. {TAB37.8/3857}

[72] CWC/[76]. {TAB4/172}

[73] *Vöcklinghaus v. Czech Republic*, UNCITRAL, Final Award, 19 September 2011 (Beechey (P), Klein, Lévy) at [137] {**ref**}, [41] {**ref**}. {TAB37.31/4361} {TAB37.31/4336}

[74] *Vöcklinghaus v. Czech Republic* at [172] {**ref**}. {TAB37.31/4371}

[75] *Vöcklinghaus v. Czech Republic* at [165] {**ref**}. {TAB37.31/4369}

grounded the tribunal's jurisdiction. It was instead Mr Vöcklinghaus's shares in KOMFORT which were his investment.

iv. Phoenix v. Czech Republic

{TAB37.20/4162}

104. This is the second case identified by C in respect of which it says that the same type of objection as the Stava 2011 Objection was treated as "*jurisdictional*" and succeeded. This case is readily distinguishable.

(1) The *Phoenix* tribunal determined that the relevant investor had not made an investment at all.[76] It was therefore unnecessary for the tribunal to determine whether the sale of an asset (which was not an investment) had an impact on its jurisdiction.

(2) It was not contested in that case that a sale of Phoenix's subsidiary occurred on 8 January 2008 and it appears from the award that Phoenix was not seeking any compensation in respect of the period after the sale.[77]

(3) Therefore, although the *Phoenix* tribunal observed that it lacked jurisdiction in respect of acts directed against companies which ceased to be Phoenix's subsidiaries after this sale,[78] it appears that (i) the tribunal was not being asked to exercise jurisdiction in respect of such acts, and (ii) the existence of jurisdiction does not appear to have been in issue between the parties.[79] Therefore, the conclusion of the tribunal on which C is relying is not only unsupported by reasoning; it was also never the subject of argument between the parties.

v. Gallo v. Canada and Mesa Power v. Canada

{TAB37.29/4308}
{TAB37.16/4113}

105. C criticises the CA's analysis of two additional decisions on which C relied: *Gallo v. Canada* and *Mesa Power v. Canada*.[80] Its criticism is misplaced as C has misconstrued what the CA said about these decisions.

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[76] *Phoenix v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 (Stern (P), Bucher, Fernández-Armesto) at [145] {**ref**}. {TAB37.20/4220}

[77] *Phoenix v. Czech Republic* at [45] {**ref**}. {TAB37.20/4180}

[78] *Phoenix v. Czech Republic* at [70]-[71] {**ref**}. {TAB37.20/4191}

[79] *Phoenix v. Czech Republic* at [70] {**ref**}.

[80] CWC/[79]. {TAB4/173}

106. The CA concluded that "*[w]e find the awards cited to us are of very limited assistance, and that they provide no reasoned basis for us to conclude that the objection at issue here is a matter going to substantive jurisdiction within the meaning of s.30 AA 1996.*"[81] The CA was correct to reach the conclusion that it did.

107. Both decisions concerned proceedings under Chapter 11 of NAFTA. The provisions on Scope and Dispute Settlement in NAFTA are very similar to the corresponding provisions in the Korea-US FTA in *Korea v. Elliott* which are discussed below. As explained below and is obvious (see paragraph 116), these provisions, and indeed the entire structure of the dispute settlement process, are radically different to the provisions of the Treaty. {TAB27.13/1964}

108. Furthermore, both *Gallo v. Canada* and *Mesa Power v. Canada* concerned a different jurisdictional objection from the Stava 2011 Objection. In both of these cases the objection being made was that the relevant breach by Canada had pre-dated the investor's acquisition of the relevant investment.[82] There is no inconsistency between the conclusion reached by those tribunals and the conclusion reached by the CA.

vi. Alcor Holdings Ltd v. Czech Republic

{TAB37.3/3773}

109. C says that although there were "*oddities in the wording of its reasoning*",[83] the decision in *Alcor v. Czech Republic* confirms its position.[84] It says that the tribunal in *Alcor v. Czech Republic* viewed the "*point*" as going to consent to arbitrate.

110. The CA was correct to conclude not only that the decision in *Alcor* concerned a different jurisdictional objection but also that "*it is quite clear … that the decision turned on the language of that particular investment treaty and in particular on whether the claimant fell within the definition of 'investor'*" (CA Judgment/[131]). The relevant objection in *Alcor* concerned whether the claimant in that case was an "*investor*". {TAB6/278}

(1) The *Alcor* tribunal accepted that the offer to arbitrate in Czech-UAE BIT "*can be accepted only by a person or entity who, at the moment of acceptance, falls*

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[81] CA Judgment/[130]. {TAB6/278}

[82] *Vito G. Gallo v. Canada*, PCA Case No. 2008-03, Award, 15 September 2011 (Fernández-Armesto (P), Castel, Lévy) at [321] {**ref**}; *Mesa Power Group LLC v. Canada*, PCA Case No. 2012-17, Award, 24 March 2016 (Kaufmann-Kohler (P), Brower, Landau) at [319] {**ref**}, [706(i)] {**ref**}. {TAB37.29/4312} {TAB37.16/4121} {TAB40/4664}

[83] CWC/[65]. {TAB4/168}

[84] CWC/[86]. {TAB4/175}

within that defined class."[85] However, the definition of "*investor*" in the Czech-UAE BIT defines "*investors*" as "*natural or juridical persons who invest in the territory of the other Contracting State*". The definition of "*investor*" in the Treaty contains no comparable reference to the (present) act of investing.

(2) As explained above (see paragraph 2 above), it is not open to C to challenge Mr Stava's status as an "*investor*" (i.e., *ratione personae*). Furthermore, C now accepts that the Stava 2011 Objection is not an objection of this type (i.e., *ratione personae*) and characterises it instead as an objection *ratione materiae* and partly *ratione temporis* (an incorrect characterisation which itself speaks to the strained nature of C's argument).[86]

vii. Other investment treaty cases relied on by C

111. The other awards cited by C (CWC/[78]) concerned very different objections: four concerned an objection that a claimant had not acquired a protected investment before the date of breach,[87] and the fifth that the claimant did not own the relevant investment at the time of commencing proceedings.[88] The CA rightly saw the awards relied on by C as providing "*no reasoned basis for us to conclude that the objection at issue here is a matter going to substantive jurisdiction within the meaning of s.30 AA 1996*".[89] {TAB4/173}

viii. Azerbaijan v. Armenia

112. C relies on the decision of the International Court of Justice in *Azerbaijan v. Armenia*. It says that that decision supports two propositions (i) jurisdictional limitations can apply even if not stated in a compromissory clause (which it says is akin to an arbitration agreement), and (ii) the scope of the compromissory clause should be {TAB35.1/3486}

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[85] *Alcor v. Czech Republic* at [253] {**ref**}. {TAB37.3/3785}

[86] CWC/[8]. {TAB4/147}

[87] (1) *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011 (Hwang (P), Alvarez, Berman) at [536] {**ref**}, [570.1] {**ref**}; (2) *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB/06/02, Award, 17 September 2009 (Tercier (P), Lalonde, Thomas) at [114], [116]-[117] {**ref**}; (3) *Renée Rose Levy and Gremcitel S.A. v. Peru,* ICSID Case No. ARB/11/17, Award, 9 January 2015 (Kaufmann-Kohler (P), Zuleta, Vinuesa) at [85] {**ref**}; (4) *President Allende Foundation v. Chile*, PCA Case No. 2017-30, Award, 28 November 2019 (Hanotiau (P), Ruiz Fabri, Drymer) at [272]-[274] {**ref**}. {TAB37.15/4097} {TAB37.15/4111} {TAB37.7/3822} {TAB37.23/4245} {TAB37.22/4229}

[88] *B-Mex and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019 (Verhoosel (P), Born, Vinuesa) at [146] {**ref**}. {TAB37.5/3802}

[89] CA Judgment/[130]. {TAB6/278}

interpreted in line with the substantive obligations of the treaty.[90] But this decision, as the CA rightly held, offers no support to C's position.

(1) The case concerned a multilateral treaty, namely the Convention on the Elimination of All Forms of Racial Discrimination ("**CERD**"). The relevant jurisdictional clause in CERD is narrower than the Treaty: it allows certain disputes "*with respect to the interpretation or application of [CERD]*" to be submitted to the ICJ.[91]

(2) As a multilateral treaty it came into force at different times vis-à-vis different States. The issue in this case was whether the parties to the dispute (Armenia and Azerbaijan) were both bound by the substantive provisions of CERD at all, and not the time(s) at which the substantive provisions of CERD applied to particular facts and circumstances.

(3) The ICJ held that it did not have jurisdiction to consider a claim by Azerbaijan in respect of acts which occurred prior to Azerbaijan becoming a party to CERD: "*the temporal scope of the Court's jurisdiction under a compromissory clause is determined by the scope of the temporal application of the substantive provisions of a treaty between the parties concerned*."[92] However, in referring to the "*temporal scope of the application of the substantive provisions of the treaty*", the ICJ was concerned with the time period during which the parties to the dispute (Azerbaijan and Armenia) were both bound by the substantive provisions of CERD, and not the time at which those substantive provisions applied to particular facts and circumstances.[93] The issue being addressed by the ICJ concerned reciprocity. It has nothing to do with the objection before this Court.

(4) The CA therefore correctly concluded the decision in *Azerbaijan v. Armenia* was of no assistance, as it "*dealt with a very different type of dispute, where*

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[90] C's Grounds of Appeal at [17(c)] {**ref**}. {TAB18/638}

[91] See *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Azerbaijan v. Armenia)* [2024] ICJ Judgments p.1116 at [26] (quoting Article 22 of CERD) {**ref**}. {TAB35.1/3503}

[92] *Azerbaijan v. Armenia* at [45] {**ref**}. {TAB35.1/3508}

[93] *Azerbaijan v. Armenia* at [47]: "*the temporal scope of the Court's jurisdiction under Article 22 of CERD must be linked to the date on which obligations under CERD took effect between the Parties, 15 September 1996, not the date on which Armenia became bound by the Convention*" {**ref**}. {TAB35.1/3509}

there was no reciprocity at the relevant time because no obligations to Azerbaijan arose until after it became party to the Treaty".[94]

(5) To the extent that there is any analogy with the objections pursued by C, it is with C's (successful) objection that the Tribunal lacked jurisdiction over conduct which occurred prior to the entry into force of the Treaty.[95]

(2) The CA's conclusion is not inconsistent with decisions of the English Courts

113. C contends the decision of the CA can be contrasted with (i) the decision of a differently constituted CA in *Korea v. Elliott* [2025] EWCA Civ 905, and (ii) the view of Butcher J in *Tatneft v. Ukraine* [2018] EWHC 1797 (Comm). However, the decision of the CA was perfectly consistent with the approach adopted by the CA in *Korea v. Elliott* and, even if the decision of the CA can be "*contrasted*" with *obiter* statements by Butcher J in *Tatneft*, it is not inconsistent with that decision. {TAB27.13/1964} {TAB34.10/3453}

ix. Korea v. Elliott

114. C has placed considerable emphasis on the decision of the CA in *Korea v. Elliott*.[96] This reliance is misplaced.

115. C says that the CA "*drew support*" from the first instance judgment of Foxton J in *Korea v. Elliott* which was then reversed by the CA.[97] It implies that this somehow tainted the conclusion which the CA reached in respect of the Stava 2011 Objection. However, this point was addressed and rejected in *Korea v. Elliott* by the CA itself, which saw no conflict between its decision and the earlier decision of the CA in the present case.[98] Indeed, the approach of the two CA benches was strikingly similar.

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94 CA Judgment/[133]. {TAB6/279}

95 Award/[369] {**ref**}. {TAB21.10/853}

96 CWC/[22]-[30]. {TAB4/152}

97 CWC/[23]. {TAB4/153}

98 See *Korea v. Elliott* [2025] EWCA Civ 905 at [49]: "*I note that this Court in* The Czech Republic v Diag Human SE *[2025] EWCA Civ 588 has recently expressed the view at [130] that the "caution" expressed by the Judge at [28] in his judgment in this case was well-founded, but I understand that to refer to the Judge's point that caution may be needed in reading what ITA tribunals decide about jurisdiction as they may be less concerned about distinguishing between jurisdiction, standing and admissibility. I do not read it as approval of the Judge's invocation of national policy in interpreting an international treaty. Indeed, in* Diag *this Court emphasised at [125] and [128] that the question of whether there was an offer to arbitrate in a BIT was ultimately a question of interpretation of the Treaty in accordance with the principles in Article 31 of the VCLT*" {**ref**}. {TAB27.13/1980}

They both focused on the rules of treaty interpretation rather than relying on investment treaty awards.[99]

116. The decision in *Korea v. Elliott* turned on provisions contained in Chapter 11 of the free trade agreement between Korea and the United States ("**Korea-US FTA**"). Those provisions can be contrasted with the very different terms of the Treaty. {TAB27.13/1964} {TAB36.2/3724}

Korea-US FTA	The Treaty
Article 11.1 (Scope and Coverage) 1. This Chapter applies to measures adopted or maintained by a Party relating to: (a) investors of the other Party; (b) covered investments; and (c) with respect to Articles 11.8 and 11.10, all investments in the territory of the Party. 2. For greater certainty, this Chapter does not bind either Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement. 3. For purposes of this Chapter, measures adopted or maintained by a Party means measures adopted or maintained by: (a) central, regional, or local governments and authorities; and	Article 2 (Scope of Application) (1) The present Agreement shall apply to investments in the territory of one Contracting Party by investors of the other Contracting Party, if the investments have been made later than 1st January 1950 in accordance with the laws and regulations of the former Contracting Party. (2) 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.

{TAB36.2/3724} {TAB21.1/654}

[99] See *Korea v. Elliott* [2025] EWCA Civ 905 at [63] {**ref**}. {TAB27.13/1984}

(b) non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities.	
Article 11.16 (Submission of a claim to arbitration) 1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation: (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim (i) that the respondent has breached (A) an obligation under Section A, (B) an investment authorization, or (C) an investment agreement; and (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach;	Article 9 (Disputes between a Contracting Party and an Investor of the other Contracting Party)(1) For the purpose of solving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party and [without] prejudice to Article 10 of this Agreement (Disputes between Contracting Parties), consultations will take place between the parties concerned. (2) If these consultations do not result in a solution within six months, the dispute shall upon request of the investor be submitted to an arbitral tribunal. […]

{TAB36.2/3732}

{TAB21.1/657}

117. The CA held that Article 11.1 of the Korea-US FTA (i.e., the Scope and Coverage provision) imposed a limitation on the offer to arbitrate in Article 11.16.[100] This meant that the issue of whether or not there was a relevant "*measure*" was treated as a jurisdictional issue. This restriction arose explicitly from the text of the Korea-US FTA. As explained above (see paragraph 51 above), the CA did accept that Article 2 of the Treaty (Scope of Application) limited the offer to arbitrate in Article 9 of the Treaty. But the terms of Article 11.1 of the Korea-US FTA and 2(1) of the Treaty

[100] *Korea v. Elliott* [2025] EWCA Civ 905 at [61] {**ref**}. {TAB27.13/1983}

could not be more different. The CA in the present case was right not to read into Article 2(1) – or, indeed, Article 9 – a jurisdictional restriction of the type contended for by C.

118. C argues that in *Korea v. Elliott* the offer to arbitrate was co-extensive with the investment protection afforded by the Korea-US FTA. It says that the same conclusion should follow in the present case, such that the offer to arbitrate in the Treaty should be no wider than the scope of the substantive treaty protections.[101] It is wrong to suggest that one can simply transfer the approach in one treaty to another (very) differently worded treaty. To do so would be to run roughshod over the principles of treaty interpretation which all parties agree are applicable. Furthermore:

(1) It does not follow from the decision in *Korea v. Elliott* that the offer to arbitrate was co-extensive with the investment protection afforded by the Korea-US FTA. Although the existence of a relevant "*measure*" was found to be a jurisdictional requirement, demonstrating the existence of such a measure becomes a necessary but not sufficient condition for an investor to bring certain claims under the Korea-US FTA.[102] In any event, such a restriction arose explicitly from the Scope and Coverage provision in Article 11.1 of the Korea-US FTA. That provision bears no resemblance to Article 2 of the Treaty which contains no equivalent restriction. {TAB36.2/3724} {TAB21.1/654}

(2) Under the Korea-US FTA the offer to arbitrate is narrowly cast and an investor can only bring a claim in respect of the specific obligations identified in Article 11.16. However, that is not the case with respect to Article 9 of the Treaty which is broadly worded ("*disputes with respect to investments*"), and allows an investor not only to bring claims for breach of the Treaty but also based on breaches of other rules (e.g., breaches of foreign investment laws and breaches of customary international law).[103] {TAB21.1/657}

119. C relies on the following quotation of the CA in *Korea v. Elliott*: "*there is nothing surprising or unworkable about the Contracting Parties to NAFTA and [Korea-US*

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[101] CWC/[25]. {TAB4/153}

[102] Imposing such a jurisdictional restriction to the Treaty would be problematic as it is clear that the Treaty can be breached by an omission in which case there would be no relevant "*measure*". See, for example, Article 11.

[103] See footnote 45 above.

FTA] [...] having limited the right of investors to arbitrate to circumstances in which the substantive protections were engaged."[104] It is said that this "*contradicts*" what is decided by the CA in the present case.[105] There is no such contradiction. While it may not be " *surprising*" that States have limited their offers to arbitrate in certain treaties, those State parties (i.e., the State parties to NAFTA and Korea-US FTA) did so clearly by constructing detailed and specific dispute settlement mechanisms which bear no resemblance to the broad offer to arbitrate in Article 9 of the Treaty. NAFTA is structured in a very similar way to the Korea-US FTA (a point which C ignores).[106] A tribunal (or supervisory court) needs to interpret the treaty before it, and the fact that tribunals have reached different conclusions in respect of different treaties is to be expected.[107] If this were not the case, tribunals (and supervisory courts) would not be applying the treaty before them.

120. C says that jurisdiction must be based on facts and not allegations and that *Korea v. Elliott* supports this position (though it has not identified which passage of the judgment it relies on).[108] The point that C is trying to make is less than clear. The jurisdiction of the Tribunal did not depend on "*mere allegations*", as C suggests. The Tribunal determined as a matter of fact that Mr Stava had made an "*investment*" in the Czech Republic based on evidence. C then sought to challenge that decision under s.67. Following a *de novo* rehearing Foxton J reached the same conclusion as the Tribunal.[109] C's real complaint is that neither Foxton J nor the CA was prepared to read a jurisdictional restriction into the Treaty of the type contended for by C and allow it to relitigate merits issues which it lost before the Tribunal.

121. Finally, C contends that the treaty language held to raise a substantive point of jurisdiction in *Korea v. Elliott* is materially identical to that considered in other arbitral awards (*Mesa Power v. Canada*, *Gallo v. Canada*) on which C relied to

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[104] *Korea v. Elliott* [2025] EWCA Civ 905 at [53] {**ref**}. {TAB27.13/1981}

[105] CWC/[27]. {TAB4/154}

[106] See *Mesa Power Group LLC v. Canada* at [319] {**ref**}, [245] {**ref**}, [252] {**ref**} (extracting Articles 1101 and 1116 of NAFTA). {TAB37.16/4121} {TAB37.16/4119}

[107] *Nova Group Investments, B.V. v. Romania*, ICSID Case No. ARB/16/19, Award, 13 June 2024 (Kalicki (P), Clay, Reichert) at [527] {**ref**}; *AES Corporation v. Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005 (Dupuy (P), Böckstiegel, Bello Janeiro) at [23]-[26] {**ref**}. {TAB37.18/4158} {TAB37.2/3768}

[108] CWC/[29]. {TAB4/155}

[109] August Judgment/[132], [142]. {TAB13/523} {TAB13/525}

support its case, and which the CA found to be of limited assistance.[110] This submission misses the point. The very fact that these other awards contained treaty provisions such as those addressed in *Korea v. Elliott* (which bear no resemblance to the provisions contained in the Treaty) illustrates why these awards are indeed of limited assistance.

x. Tatneft v. Ukraine

{TAB34.10/3453}

122. C says that there is no proper basis for treating this case as different to *Tatneft v. Ukraine*.[111] However, both the Trial Judge and the CA were correct in concluding that it was indeed distinguishable.[112]

123. In *Tatneft* Butcher J was addressing the specific objection that the relevant investment was acquired after the dispute arose. That is clear from [82] and [87] of his judgment. The latter paragraph states: {TAB34.10/3473}

> *"More specifically, I accept that the limitation is, as indicated by the tribunal in Philip Morris, as to whether the relevant investment had been acquired before the time at which the alleged breach of the BIT occurred, and that the offer to arbitrate is only in respect of disputes where that was the case."* {**ref**} {TAB34.10/3474}

124. Butcher J ultimately concluded that the relevant investment (shares in certain companies) had been acquired prior to the relevant treaty breach and therefore his comments were *obiter*.[113]

125. The *Tatneft* objection (that a claimant never acquired a protected investment before the date of breach) is distinct from the objection here. As noted by Professor Douglas (and cited with approval in *Tatneft* at [86]):

> *"the timing of the acquisition of the investor's investment determines the commencement of the substantive protection afforded by the investment treaty and hence the temporal scope for the tribunal's adjudicative power over claims based upon an investment treaty obligation."* {**ref**} {TAB34.10/3474}

126. Furthermore, the CA agreed that *Tatneft* was distinguishable for the reasons given by Foxton J. It also explained that:

{TAB4/155} [110] See CWC/[30]; CA Judgment/[130]. {TAB6/278}

[111] CWC/[51]. {TAB4/164}

{TAB6/279} [112] CA Judgment/[133]; March Judgment/[147]. {TAB11/422}

{TAB34.10/3477} [113] *Tatneft v. Ukraine* [2018] EWHC 1797 (Comm) at [94] {**ref**}. See also CA Judgment/[103]. {TAB6/271}

> *"Mr Justice Butcher does not appear to have drawn a distinction between the question whether the Treaty conferred rights in respect of breaches occurring before a party became an investor (a question of temporal jurisdiction) and the question whether the parties had agreed to submit to arbitration a dispute about whether that was the position, which is the type of issue with which the Judge and this court are concerned."*[114]

127. Finally, C says that 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.[115] However, the CA was willing to accept that a jurisdictional limitation might arise from another provision of the Treaty when expressed in sufficiently clear terms. In particular, it recognised that Article 2 of the Treaty imposed a jurisdictional limitation such that it only applies to investors who have made a qualifying investment after 1 January 1950.[116]

G. MR STAVA HAD ALREADY SUFFERED THE LOSS FOR WHICH HE CLAIMS PRIOR TO THE ALLEGED DISPOSITION OF HIS INVESTMENT

128. Even if the Court were to determine that the Stava 2011 Objection is properly characterised as an objection going to jurisdiction, it should still uphold the order of the CA for the reason set out in paragraph 3 of Ds' Notice of Acknowledgement {**ref**}. {TAB20/650}

129. In the Consequentials Judgment, the CA determined that even if Mr Stava did divest himself of his shareholding in Diag Human SE, this did not affect the Tribunal's jurisdiction over his claim for loss which, on the Tribunal's findings, he had already suffered prior to any divestment.[117] C sought but was denied permission to appeal against the Consequentials Judgment. Ds are therefore relying on the meaning and effect of a decision by the CA, itself referring to the Tribunal's findings on the merits, which cannot be reopened.[118]

130. By way of background:

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[114] CA Judgment/[133]. {TAB6/279}

[115] CWC/[51]. {TAB4/164}

[116] CA Judgment/[126]-[127]. {TAB6/277}

[117] CA Second Judgment at [21] {**ref**}. {TAB7/353}

[118] If this matter were to be remitted to a trial judge, there are further reasons which Ds would rely on as answers to the Stava 2011 Objection.

(1) The first two treaty breaches by C (the Bojar Letter breach and interference in the main Commercial Arbitration) occurred prior to the Lawbook Transaction. In particular, the Stava 2011 Challenge cannot have affected Mr Stava's entitlement to damages for the Bojar Letter which was sent in 1992 (i.e., almost two decades prior to the Koruna Trust/Lawbook Transactions). The Tribunal found that Mr Stava was to be treated as the privy of Diag Human SE.[119]

(2) The third set of treaty breaches, namely interference in the Review Proceedings, comprised five distinct violations.[120] These were (i) the nomination of all three arbitrators and (ii) abuse of appointment rights,[121] (iii) the appointment of arbitrators manifestly lacking independence, impartiality and moral standing,[122] (iv) involvement in highly suspicious conduct that meant the Review Proceedings were riddled with abuse,[123] and (v) C using its own police force's investigation as a pretext to collect evidence that could be used to C's advantage in the Review Proceedings.[124] All of (i)-(iv) occurred before the divestment of shares into the Koruna Trust, as did much of (v). Even as to the latter, the Tribunal made no finding that any of the information wrongfully obtained by C was deployed in the arbitration, or led to or contributed to the 2014 Resolution (which was not an act of C in any event).

(3) Thus, the entire Review Proceedings were tainted by a host of serious due process violations before Mr Stava divested himself of his shares and long before the 2014 Resolution (which merely reflected the effect of C's various wrongdoings).

131. This Court does not need, and does not have the evidence before it, to go into the factual issues on the merits, but the above recounting of the facts assists in understanding the conclusions of the Tribunal and the CA. Even were the Tribunal's finding that Mr Stava had suffered loss prior to his divestment of shares into the Koruna Trust open to challenge – which, as a finding on the merits, it is not – it was

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[119] Award/[1038] {**ref**}. {TAB21.10/1054}
[120] Award/[796]ff. {**ref**}. {TAB21.10/984}
[121] Award/[797]-[801] and [802]-[806] {**ref**}.
[122] Award/[807]-[812] {**ref**}. {TAB21.10/987}
[123] Award/[813]-[825] {**ref**}.
[124] Award/[826] {**ref**}. {TAB21.10/992}

entirely justified. The CA was equally justified in reaching a conclusion in which it affirmed that finding – a conclusion that is also not open to challenge.

132. There is therefore no basis for a remittal, even were C to succeed on its Stava 2011 Objection. It goes nowhere. The Tribunal and the CA have reached unchallengeable conclusions that bar C from taking its challenge any further.[125]

H. CONCLUSION

133. Diag Human SE and Mr Stava invite the Court to dismiss the appeal. As set out above:

(1) The Stava 2011 Objection is not a jurisdictional objection which can be pursued by C pursuant to s.67 of the AA96. The CA was right to conclude that, correctly interpreted, the offer to arbitrate in Article 9 of the Treaty extends to investors who have made an investment, and there is no requirement that an investor must have continued to hold that investment. {TAB26.1/1642} {TAB21.1/657}

(2) Alternatively, even if the Stava 2011 Objection were a jurisdictional objection, the Court should uphold the Order of the CA on the basis that Mr Stava's divestment 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. This has been confirmed by the CA and is not open to challenge.

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[125] C points to comments of Henshaw J (CWC/[99]), but those were at a short adjournment hearing where the Judge did not have the full picture before him and where his focus was on risks of inefficiency. He was asked to make a case management decision, which does not and cannot affect the substance of the case. {TAB4/179}