Neutral Citation Number: [2025] EWCA Civ 588

Case No: CA-2024-000977, CA-2024-000986 & CA-2024-002663

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**KING'S BENCH DIVISION**
**COMMERCIAL COURT**
**Mr Justice Foxton**
**[2024] EWHC 503 (Comm) & [2024] EWHC 2102 (Comm)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/05/2025

**Before:**

**LORD JUSTICE MALES**
**LORD JUSTICE POPPLEWELL**
and
**LADY JUSTICE ANDREWS**

- - - - - - - - - - - - - - - - - - - - -

**Between:**

**CA-2024-000986**

| | |
|---|---|
| **THE CZECH REPUBLIC** | **Respondent /Claimant** |
| **- and -** | |
| **1) DIAG HUMAN SE**<br>**2) JOSEF STAVA** | **Appellants/ Defendants** |

**And between:**

**CA-2024-000977 and CA-2024-002663**

| | |
|---|---|
| **THE CZECH REPUBLIC** | **Appellant/ Claimant** |
| **- and -** | |
| **1) DIAG HUMAN SE**<br>**2) JOSEF STAVA** | **Respondents/ Defendants** |

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Lord Verdirame KC, Philip Riches KC, Kate Parlett, Jonathan Ketcheson, Sam Goodman & Isabelle Winstanley** (instructed by **Mishcon de Reya LLP**) for **Diag Human SE and Mr Stava**

**Graham Dunning KC, Lucas Bastin KC, Peter Webster, Richard Hoyle & Katherine Ratcliffe** (instructed by **Arnold &Porter Kaye Scholar (UK) LLP**) for the **Czech Republic**

Hearing dates: 3, 4, 5, 6 & 7 February 2025

- - - - - - - - - - - - - - - - - - - - -

# Approved Judgment

This judgment was handed down remotely at 10.30am on Wednesday 6 May 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

**LORD JUSTICE MALES, LORD JUSTICE POPPLEWELL AND LADY JUSTICE ANDREWS:**

## Introduction

1. These three appeals arise from two judgments of Mr Justice Foxton ('the Judge') in which he dealt with a large number of issues in a challenge by the Czech Republic ('CZR') under s. 67 and 68 of the Arbitration Act 1996 ('AA 1996') to an arbitration award by which Mr Josef Stava and Diag Human SE ('Diag SE') were awarded sums approximately equivalent to US$350 million plus interest against CZR. The award ('the Treaty Award') was made pursuant to a bilateral investment treaty ('the Treaty' or 'the BIT') between Switzerland and CZR which protected investments in one contracting state (here CZR) by investors of the other contracting state (here Switzerland). Mr Stava was at all material times a Swiss national and qualified as an investor under the Treaty. He founded a Czech company Conneco a.s. ('Conneco') in 1990 to which Diag SE, a European company (societas Europaea) with its seat in Liechtenstein, became the successor in 2001. Conneco (prior to 2001) and Diag SE (from 2001) owned the relevant investments. Mr Stava was the indirect majority shareholder in Conneco and sole shareholder in Diag SE, which he controlled, until events in 2011 which are at the heart of the current appeals. That rendered Diag SE a Swiss investor under the Treaty up to that time because the Treaty definition of investors included legal entities controlled by Swiss nationals.

2. In May 2011 arrangements were put in place in what has been referred to as the Lawbook Transaction. We consider this more fully below, but in summary its effect was that the shareholding in Diag SE was at the end of 2011 transferred to the trustee of the Koruna Trust, a Liechtenstein trust established by Mr Stava under which he and his daughters were, amongst others, discretionary beneficiaries. CZR contended in its s. 67 challenge that because Mr Stava no longer owned or controlled Diag SE as a result of these arrangements, both Mr Stava and Diag SE thereby ceased to be qualifying investors in the investments, and the tribunal had no jurisdiction to determine claims by either of them in respect of the conduct of CZR towards the investments thereafter.

3. In the first of the two judgments, [2024] EWHC 503 (Comm) ('the March judgment'), the Judge addressed whether a number of the s. 67 grounds advanced by CZR were barred by s. 73 AA 1996 and/or were jurisdictional in nature within the meaning of s. 30 AA 1996 so as to amount to legitimate grounds of challenge under s. 67. Amongst other things he determined that three of CZR's grounds of challenge under s. 67, which overlapped and collectively relied upon the 2011 arrangements as depriving the tribunal of jurisdiction in relation to alleged treaty breaches by CZR thereafter, were not barred by s. 73. In appeal number CA-2024-000986 ('the first appeal'), Mr Stava and Diag SE appeal against that decision with the leave of the Judge.

4. In the March judgment the Judge also decided that the ground of challenge vis à vis Mr Stava's claim from June 2011 was not jurisdictional in nature and did not fall within the scope of s. 67. In appeal number CA-2024-000977 ('the second appeal') CZR appeals against that decision with the leave of the Judge.

5. In the March judgment the Judge determined that the challenge to jurisdiction in relation to Diag SE's claim from June 2011 was jurisdictional in nature and should be determined at a subsequent hearing. There is no appeal from that aspect of his decision.

At that subsequent hearing the Judge addressed the substance of that challenge, amongst other issues, which turned upon whether Mr Stava controlled Diag SE after the relevant transactions in 2011. The Judge heard evidence from factual witnesses, including Mr Stava, and from experts on Liechtenstein law. In his second decision, [2024] EWHC 2102 (Comm) ('the August judgment'), the Judge determined that Mr Stava retained control of Diag SE at the end of 2011, so that the jurisdiction challenge vis à vis Diag SE failed on its merits. In appeal number CA-2024-002663 ('the third appeal' ) CZR appeals against that determination.

## The Bilateral Investment Treaty

6. The Treaty was signed between the Czech and Slovak Federal Republic ('Czechoslovakia') and the Swiss Federation ('Switzerland') on 5 October 1990 in two originals in German, Czech and English, which were to be treated as equally authentic but with the English text to prevail in the case of divergence. We were only referred to the English text. It came into force on 7 August 1991. On 1 January 1993 Czechoslovakia was dissolved and CZR succeeded to its rights and obligations under the Treaty.

7. The Preamble provides that:

> "The Czech and Slovak Federal Republic and the Swiss Confederation,
>
> 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.
>
> Considering the Final Act of the Conference on Security and Cooperation in Europe,
>
> Have agreed as follows:"

8. Article 2 identifies the scope of the Treaty. It provides:

> "(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."

9. Article 1 contains the relevant definitions of investor and investment in the following terms:

> "For the purpose of this Agreement:
>
> (1) The term "investor" refers with regard to either Contracting Party to
>
> (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.
>
> 2) The term "investments" shall include every kind of assets and particularly:
>
> (a) movable and immovable property as well as any other rights in rem such as servitudes, mortgages, liens, pledges;
>
> (b) shares, parts or any other kinds of participation in companies;
>
> (c) claims and rights to any performance having an economic value;
>
> (d) copyrights, industrial property rights (such as patents, utility models, industrial designs or models, trade or service marks, trade names, indications of origin), know-how and goodwill;
>
> (e) concessions under public law, including concessions to search for, extract or exploit natural resources as well as all other rights given by law, by contract or by decision of the authority in accordance with the law.
>
> …"

10. Article 1(1)(c) was the subject matter of further clarification in the Protocol, which was signed at the same time as the Treaty and as an integral part of it:

> "(1) An investor according to Article 1, paragraph (1), letter (c) may be required to submit proof of such control in order to be recognized by the Contracting Party in the territory of which the

> investment has been or is to be made as an investor of the other Contracting Party."

11. Articles 3 to 7 contain the substantive obligations of the Contracting Parties. Articles 3 to 5 are what are generally referred to as fair and equitable treatment provisions. Article 6 is an expropriation provision. Article 7 is a most favoured nation provision.

12. Article 9 provides:

> "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. Such arbitral tribunal shall be established as follows…."

13. Article 9 goes on to identify the procedure for constituting the arbitral tribunal. Article 9(2)(c) provides that the tribunal is to determine its own procedure unless otherwise agreed. It also provides that the tribunal's decisions are to be final and binding and that each Contracting Party shall ensure the recognition and enforcement of the arbitral award. Article 9(3) gives the investor the option, as an alternative to arbitration, of referring the dispute to the International Center for Settlement of Investment Disputes ('ICSID').

14. In this case, following the appointment of arbitrators, the parties and the tribunal signed terms of appointment on 20 June 2018 reflecting their agreement, amongst other things, that the arbitration would be governed by the UNCITRAL Arbitration Rules as revised in 2010 ('the UNCITRAL Rules') and that the seat of the arbitration should be London. It was common ground before us that the proper law of the arbitration agreement, by which it falls to be interpreted, is international law, including the Vienna Convention on the Law of Treaties 1969 ('the Vienna Convention'); and that the curial or supervisory law of the arbitration is the law of England and Wales by reason of its seat.

## Narrative background

15. The highly contested dispute between the parties goes back as far as the early 1990s and is procedurally complex. What follows is a summary of the facts relevant to the issues on this appeal, some of which were formerly in issue but are not now open to challenge as a result of the procedural history. We have gratefully drawn on the summary in the March judgment.

16. By the late 1980s, there was an acute shortage of certain blood plasma derivatives in Czechoslovakia, which led the Ministry of Health to begin discussions with potential foreign partners, including Diag Human AG ('Diag AG'), a Swiss company majority

owned by Mr Stava, a Czechoslovakian national. A draft framework agreement between Diag AG and the Ministry of Health was prepared, but never signed. Conneco was incorporated as a Czechoslovakian company on 15 March 1990 by Mr Stava. At that time Diag AG held a 49% shareholding in Conneco, but later that year it became a 79% shareholder and in 1993 a 100% shareholder. At all material times Mr Stava was a majority indirect shareholder in Conneco.

17. The Ministry of Health ran a tender process, in which Conneco was the only participant to submit full documentation within the required period. Its bid anticipated that it would export blood plasma to a Danish company called Novo Nordisk A/S ('Novo Nordisk') which would process the blood plasma, with the fractionated plasma being imported back into Czechoslovakia.

18. On 29 June 1990, Dr Martin Bojar was appointed as the new Minister of Health. He received a report from the committee running the tender who identified two options – contracting with Conneco if it was decided that there was an urgent need to enter into a contract to address the issue; or restarting negotiations with companies who had issued tenders outside the stipulated period. Dr Bojar appointed a second committee to evaluate those options, and that committee recommended against contracting with Conneco.

19. After the second committee had issued its report recommending a new tender process, Conneco entered into negotiations with hospitals and transfusion centres in Czechoslovakia. There is a dispute as to the extent to which those negotiations culminated in cooperation agreements with those bodies, and as to the commercial significance of those agreements. On 20 February 1991, Dr Bojar wrote a letter ordering the directors of various health facilities in Czechoslovakia to stop any negotiations with a foreign partner operating in blood plasma processing. Some, but not all, of those facilities terminated negotiations.

20. On 10 June 1991 Mr Stava acquired Swiss nationality in addition to his existing Czechoslovakian nationality. His decision to do so was unrelated to the BIT, of which he was unaware until well after the present dispute arose, and after the 2011 arrangements had been put in place.

21. The second tender was initiated, and Conneco was among the companies invited to participate. Conneco's bid under the second tender was rejected on 25 June 1991. Conneco sought to challenge that rejection, but the tender culminated in a recommendation to commence a project with Immuno Wien, with Instituto Grifols Barcelona as the second choice. On 12 August 1991, the Ministry of Health informed local hospitals that these two companies were the only foreign companies permitted to operate in the blood plasma sphere, an instruction repeated on 5 November 1991. Once again, some hospitals continued to engage with Conneco notwithstanding these letters.

22. While this was going on, Conneco obtained a certificate for the distribution of drugs and medical supplies from the Ministry of Health on 27 August 1991, and approval from the Czechoslovak Customs Office on 30 October 1991 to export blood plasma for processing by Novo Nordisk, and to import blood plasma derivatives back into Czechoslovakia.

23. Following an incident in which unlabelled frozen blood plasma was discovered at a state-owned storage facility, which Czechoslovakia alleged had been stored at Conneco's request and had originated from a co-operation agreement between Conneco and the Frýdek Místek hospital, Dr Bojar initiated a police investigation into Conneco and its associates. In addition, on 9 March 1992, Dr Bojar wrote to Novo Nordisk expressing strong reservations about Conneco's business ethics and explaining that Novo Nordisk had not been successful in the tenders on account of its connection with Conneco. This letter ("the Bojar Letter") stated:

> "Expert Committee of the Czech Ministery [*sic*] of Health have considered carefully all the projects submitted and have decided, unfortunately, in the favour of other companies than Your's [*sic*]. One of the reasons was a doubt about respectability of the Conneco a.s., the company which has had intermediate [*sic*] the cooperation. In contradiction with the decision of the Czech Ministery [*sic*] of Health and discrepantly with general ethical principles of blood donation and fractionation the Conneco a.d. is buing [*sic*] plasma in the Czech Republic and sending it for fractionation to your company (the contract being mediated possibly through Diag-Human). Respecting a good name of your company and our possible cooperation in the future we consider necessary let you know about this. We expect that You will draw appropriate conclusions from the problem mentioned above not only for the next cooperation with Conneco a.s., but also in deal with all irresponsible plasma suppliers".

24. On 18 March 1992, Novo Nordisk informed Conneco of the Bojar Letter and informed Conneco that, until further notice, all plasma cooperation agreements between them were cancelled. Following a meeting between Novo Nordisk and the Ministry of Health, Novo Nordisk later informed Diag AG that it had decided not to accept blood plasma originating from Czechoslovakia until certain issues were clarified. In the aftermath of the Bojar Letter, co-operation arrangements between Conneco and certain Czechoslovak hospitals were cancelled by mutual consent.

25. On 1 January 1993, the state of Czechoslovakia was dissolved, with the Czech Republic and the Slovak Republic coming into existence as successor states.

26. Various meetings between Conneco and the Ministry of Health took place in the aftermath of the Bojar Letter and attempts to settle the dispute continued over the following four years. During that period, on 23 November 1993, Conneco changed its name to Diag Human a.s., but we will continue to refer to the company by its original name to avoid any risk of confusion with Diag AG.

27. In March 1996, Conneco commenced proceedings against the Ministry of Health in the Czech courts. However, on 18 September 1996, Conneco and the Ministry of Health entered into an agreement to arbitrate the dispute "in respect of compensation for the loss allegedly caused in connection with [the Bojar Letter]" ('the Arbitration Agreement'). The Arbitration Agreement provided that there was to be arbitration by a panel of three arbitrators, with two party-appointed arbitrators selecting the presiding arbitrator; and that either party might submit the award to review by other arbitrators

appointed by the parties in the same manner. The resultant arbitration was referred to by the parties as "the Commercial Arbitration".

28. The resources of the Czech state, including the Czech security and police services, were deployed in an attempt to obtain information which would help the Ministry of Health to prevail in the Commercial Arbitration. Those efforts notwithstanding, on 19 March 1997 the arbitral tribunal issued an interim award ('the Interim Award') finding that Conneco had suffered loss as a direct result of the Bojar Letter, which had violated Czech competition and commercial law rules, with questions of damages being reserved for a further award. The Ministry of Health's applications to review the Interim Award and to invalidate the arbitration agreement before the Czech courts failed.

29. On 16 August 2001 Conneco merged with a Slovak company, Kolinea a.s., to form Diag SE. As we have said, Diag SE is a Liechtenstein company. At this stage Mr Stava, who by now held 100% indirect ownership of Conneco through Diag AG, became the direct 100% shareholder of Diag SE by purchasing Diag AG's shares.

30. The Commercial Arbitration was paused while further negotiations took place, and as part of those negotiations the parties jointly appointed experts to calculate Diag SE's damages claim, which they did in the sum of CZK 3.914 billion. When Diag SE sought to adduce that report in the Commercial Arbitration, the Ministry of Health challenged the attempt and threatened the arbitrators with criminal proceedings, denying that the Ministry of Health had approved the commissioning of the report. The Ministry of Health issued its own damages report, estimating Diag SE's loss to be only CZK 358.1 million.

31. On 25 June 2002, the Commercial Arbitration tribunal issued a partial award ordering an interim payment of CZK 326,608,334 ("the Partial Award"). That sum was paid on 14 January 2003.

32. In 2003 CZR initiated criminal investigations in relation to the evidence submitted in the Commercial Arbitration and in relation to Mr Stava. A Parliamentary Enquiry Commission was formed "to clarify the facts" in connection with the Commercial Arbitration. Some of the material emanating from these investigations was deployed by the Ministry of Health in the Commercial Arbitration. On 3 May 2004, Diag SE's former lawyer in the Commercial Arbitration – Mr Jirí Oršula – met the Prime Minister of CZR and handed over a written memorandum disclosing confidential information about Diag SE's position in the Commercial Arbitration, events which led to Mr Oršula being disbarred.

33. On 4 August 2008, the Commercial Arbitration tribunal rendered its final award ("the 2008 Award") ordering CZR to pay about CZK 8.3 billion in additional damages (about CZK 4.1 billion in lost profits for the period 1 July 1992 to 30 May 2000, and CZK 4.2 billion in interest to 30 June 2007). The Commercial Arbitration tribunal criticised the new Minister of Health for "unjustified" interference in their decisions "through public questioning of their professional expert opinion and an attack on their independence." They noted that "documents, contained in the file indicate quite clearly that its content was of interest to the Czech Republic Police, the Parliamentary Enquiry Commission as well as the District Court for Prague 2" and that "the arbitration tribunal has throughout the proceedings made every effort to ensure the integrity of the arbitration

file, so that the file was transferred to a safe place abroad for the time until the release of the final arbitration award, as both sides were informed."

34. The Ministry of Health initiated a review of the 2008 Award on 22 August 2008, and Diag SE initiated a review on 11 September 2008 ('the Review'). When the two party-appointed arbitrators to the Review were unable to agree on a presiding arbitrator, the Prague 6 District Court acceded to the Ministry of Health's application to appoint Mr Petr Kužel as presiding arbitrator. That appointment was maintained even after the party-appointed arbitrators had reached agreement on the appointment of another presiding arbitrator. Mr Kužel, acting alone, gave certain companies permission to intervene as "main intervenors" in the Review on the basis that they had purchased part of Diag SE's claims.

**The 2011 events in outline**

35. In 2011, when the Review process had been running for some three years and had, as it turned out, another three years or so to run, Mr Stava put in place the arrangements in relation to his shareholding in Diag SE which are central to the issues under appeal. The Judge's detailed findings are at Annex 3 of the August judgment, which we have reproduced as an annex to this judgment. For narrative purposes the following is a sufficient summary.

36. In May 2011, two connected events took place. On 25 May 2011, Kingfish Financial Ltd, acting as settlor, established a Liechtenstein discretionary trust called the Koruna Trust. Kingfish was a Turks and Caicos Islands company owned and acting at the direction of Mr Stava. The trustee was a Liechtenstein legal person, LNR Trust Reg ('the Trustee'), established by Dr Rabanser, a Liechtenstein lawyer who acted as Mr Stava's personal lawyer. On 27 May 2011, a suite of five contracts were signed relating to the sale of the shares in Diag SE to an Irish company called Lawbook Limited ('Lawbook'), which was said to be indirectly owned by "a partner in Aram International Partners LLP" ('the Lawbook Transaction'). Lawbook was said to specialise in debt recovery. The scheme of the agreements was that Lawbook purchased the shares in Diag SE from Mr Stava on terms that payment would be made in three instalments on 31 August, 31 October and 31 December 2011, with interest. Lawbook pledged all of the shares and associated entitlements in Diag SE to the Trustee as security for performance of its obligations. Mr Stava assigned to the Trustee all of his rights under the sale arrangement. If the price was not paid by 31 December 2011, the purchase would be cancelled, and the shares would be transferred to the Trustee. There was a letter of instruction by which Lawbook, as the purchaser of the shares in Diag SE, instructed Mr Stava, as the seller, to transfer the bearer share certificates for Diag SE to the Trustee as trustee of the Koruna Trust. In fact the Trustee permitted Mr Stava to retain the bearer share certificates.

37. As to the purpose of the Lawbook Transaction, the Judge concluded that it was never intended that Lawbook would pay for the shares. He accepted Mr Stava's evidence that the Lawbook Transaction was entered into because in early 2011, the Czech Minister of Finance, with the knowledge of the Czech Prime Minister, suggested that if Mr Stava distanced himself from Diag SE, it would facilitate the settlement of their longstanding dispute. In effect, it was intended to create the illusion that he had severed his connection with Diag SE to facilitate a settlement following indications from high

levels within the Czech Government that this would be helpful to any attempt to resolve the dispute.

38. At midnight on 31 December 2011, no payment having been made, the shares became settled into the Koruna Trust. Meanwhile on 12 October 2011, the Koruna Trust and the Trustee's trusteeship had been formally registered in Liechtenstein.

39. Unlike the purchase of the shares under the Lawbook Transaction, there was no dispute that the Koruna Trust created a valid trust which was intended to and did take effect in accordance with its terms and the applicable principles of Liechtenstein law. The Judge concluded that Mr Stava's purpose in establishing the trust and settling the Diag SE shares into it was "succession planning" in the sense of benefitting his family, and that asset protection may also have been a motive.

40. The terms of the Koruna Trust were set out in the Trust Deed, which was subject to an express choice of Liechtenstein law and the jurisdiction of the Liechtenstein courts. The Koruna Trust was declared to be irrevocable. The Trust Deed identifies Mr Stava as the Original Protector, and he also falls within the definition of "Settlor"; the class of discretionary beneficiaries includes Mr Stava's three daughters, all of whom hold Swiss nationality, as well as Mr Stava, amongst others.

**The narrative continued**

41. Returning to the dispute between the parties, the Review culminated in a resolution dated 23rd July 2014 ('the 2014 Resolution') declaring that the arbitral proceedings were discontinued. Mr Stava and Diag SE allege that CZR corruptly interfered in the Review process. Among the allegations made, and upheld in the Treaty Award, were the following:

    (1) Mr Kužel and the Ministry of Health's party-appointed arbitrator had excluded Diag SE's appointed arbitrator from key deliberations, leading to the latter's resignation;

    (2) the Ministry of Health applied to the Czech courts to appoint an arbitrator of its choosing as Diag SE's replacement party-appointed arbitrator, which appointment was approved by the Czech court, with the result that all three arbitrators in the review process were appointed by the Ministry of Health;

    (3) those arbitrators manifestly lacked the independence, impartiality and moral standing to deal with the dispute;

    (4) the Review tribunal shared advance information on its deliberations with CZR;

    (5) the Ministry of Health sought to influence two of the members of the Review panel to procure a favourable outcome by a combination of threats and bribes;

    (6) CZR used a criminal investigation into an opinion, provided by a Czech lawyer to Diag SE advising that the 2008 Award was enforceable, to obtain material to support CZR's case.

42. Diag SE sought to enforce the 2008 Award in a number of different countries without success, largely due to the courts in those jurisdictions holding that the 2008 Award was not enforceable as a result of the ongoing Review and/or the 2014 Resolution.

43. By a notice of dispute of 13 April 2017 Diag SE and Mr Stava identified a Treaty claim against CZR and sought consultations pursuant to Article 9 of the Treaty. On 22 December 2017, they commenced arbitration proceedings against CZR under the Treaty ('the Treaty arbitration proceedings'), which on 20 June 2018 the parties agreed would be governed by the UNCITRAL Rules and be seated in London.

44. The course of the Treaty arbitration proceedings and content of many of the relevant documents are set out in considerable detail in the Annex to the March Judgment. For convenience we have reproduced that annex as an annex to this judgment. In summary:

    i) Mr Stava's and Diag SE's claim on the merits was first set out in a witness statement of Mr Stava of 19 October 2018 and the Claimants' Memorial dated 21 October 2018. See March Judgment Annex [7]-[13] for further detail.

    ii) CZR responded with a Request for Bifurcation dated 7 December 2018 in which it identified four preliminary objections and sought to have them dealt with separately and in advance of consideration of the merits of the claim. These were identified as "intended preliminary objections" with a view to showing that they were sufficiently arguable to merit an order for bifurcation. See March Judgment Annex [14] for further detail.

    iii) Following written objections and an oral hearing, on 25 January 2019 the tribunal issued a ruling dismissing the application for bifurcation.

    iv) CZR first addressed the merits of the claim in its 232 page Counter-Memorial served on 30 May 2019, with accompanying documents and evidence. In Section III B it identified four jurisdictional objections to the claim. See March Judgment Annex [17]-[30] for further detail.

    v) The parties then exchanged documentary requests in Redfern schedule format, on which the tribunal ruled on 23 July 2019: March Judgment Annex [36].

    vi) The Claimants served their Reply on 9 December 2019: March Judgment Annex [37]-[47]. The Czech Republic's Rejoinder was served on 14 April 2020: March Judgment Annex [48]-[56]. The Claimants were permitted a Rejoinder on Jurisdiction served on 15 May 2020: March Judgment Annex [57]-[58].

    vii) There was a 5 day hearing in July 2020, held remotely, at which Mr Stava gave evidence and was cross-examined: March Judgment Annex [59]-[64]. After the hearing the tribunal formulated a number of questions for the parties to address in post-hearing briefs, which concluded on 18 November 2020: March Judgment Annex [65]-[74].

45. The Treaty Award was issued on 18 May 2022. It identified the following as qualifying investments within the definition in Article 1(2) of the Treaty: Conneco's contracts with Czech hospitals and transfusion centres and with Novo Nordisk ([390]); Mr Stava's shares in Conneco ([391]); Conneco's know how and goodwill ([392]); and the Arbitration Agreement, entitling Mr Stava and Diag SE to fair unbiased and efficient proceedings to protect their investments [393].

46. It dealt with jurisdictional objections in Section VI and identified five such objections. The only one of potential relevance to the appeal is Objection No 5 that "Claimants cannot be deemed investors of the other Contracting Party". Under Objection No 5 the tribunal summarised CZR's case as including the objection that Mr Stava had sold Diag SE in June 2011, noting also references to the trust and complaints that the Claimants had failed to disclose details of the Liechtenstein-seated trust structure underlying Mr Stava's claim of ownership and control of Diag SE trust shares ([257]). In reciting Mr Stava's and Diag SE's response to this objection the tribunal said at [310] that "Claimants take exception to Respondent's "new objection" (to which they do not raise timeliness objections), which is premised on Mr. Stava having relinquished control over Diag Human SE". A footnote to the expression "new objection" cross-referred to [64] of the Rejoinder on Jurisdiction which identified the objection as being that neither of the Claimants could bring a claim in respect of conduct after June 2011. Before us Lord Verdirame KC sought to argue that the tribunal's reference to there being no timeliness objection from the Claimants was in reference only to the jurisdiction objection of whether Mr Stava and Diag SE were investors under the Treaty, and did not extend to the Stava June 2011 objection which was concerned with standing in relation to his claim; but the footnote reference makes clear that the tribunal had both in mind. The tribunal rejected the jurisdictional objection, holding that following the Lawbook Transaction Mr Stava continued to control the Koruna trust, to hold the right to vote the Diag SE shares and collect dividends, and that he continued to control Diag SE directly and indirectly such that Diag SE remained an investor within the definition in Article 1(1)(c) of the Treaty ([397]-[412]).

47. As to the merits of the claims, the tribunal found that the following breaches of the Treaty had been established:

i) the sending of the Bojar Letter was a breach of the fair and equitable treatment obligation in Article 4(2) ([684]);

ii) CZR abused its sovereign powers to interfere in the Commercial Arbitration and thereby breached Article 4(2) ([752]);

iii) the "entire review proceedings and the 2014 Resolution" were in breach of the fair and equitable treatment obligation in Article 4(2) ([754], [796]);

iv) the allegations of breach were otherwise dismissed either on jurisdictional grounds or on their merits or because it was not necessary to consider the claim for reasons of "judicial economy" given other findings ([849], [865], [885]-[886], [915]);

v) the 2008 Award had effectively been cancelled as a matter of Czech law by the 2014 Resolution ([795]) but at [831] it held:

> "To conclude, the Tribunal has found that Respondent breached the FET standard in Article 4(2) of the BIT through the following conduct: (i) by issuing the Bojar Letter in bad faith; (ii) by abusing its sovereign powers in order to interfere with the Commercial Arbitration; and (iii) by manifestly failing to comply with the principle of due process during the review proceedings. In particular, as a result of the latter violation, the

> Tribunal considers that the 2014 Resolution is not entitled to recognition under international law. By way of necessary implication, from the point of view of international law, the 2008 Award has not been cancelled."

48. As to damages, the following summary is sufficient for the purpose of this appeal but is without prejudice to any issue properly arising on the remission of one aspect of the quantum issue ordered by the Judge in the March judgment:

    i) the Treaty breach in relation to the Bojar Letter caused damage in the amount of the 2008 Award ([1026]-[1037], [1059]);

    ii) The Treaty breach in relation to the Commercial Arbitration caused no loss, it having been unsuccessful in preventing the 2008 Award ([1027]);

    iii) as to the Treaty breach in relation to the Review and 2014 Resolution, it tainted the whole of the Review proceedings including the 2014 Resolution, such that the 2008 Award was entitled to recognition in international law and the damages there identified would compensate for the loss caused by this breach of the Treaty ([1028]-[1030]).

## The First Appeal

49. This turns on the application of the AA 1996, and the UNCITRAL Rules, not any principles of international law. The challenges were brought before the High Court under s.67 AA 1996 as part of the curial law of the Treaty arbitration agreement.

*AA 1996*

50. Section 67(1) permits challenges on the grounds that the tribunal lacked "substantive jurisdiction". What is covered by this expression is explained in s. 30 which provides that a tribunal may, unless otherwise agreed, rule on its own substantive jurisdiction "that is, as to, (a) whether there is a valid agreement to arbitrate, (b) whether the tribunal is properly constituted and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement." Section 67(1) identifies that a party may lose the right to object on grounds that the tribunal lacked substantive jurisdiction by reason of s. 73. Section 73(1) provides:

> "Loss of right to object.
>
> (1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection—
>
> (a) that the tribunal lacks substantive jurisdiction,
>
> (b) that the proceedings have been improperly conducted,
>
> (c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or

> (d) that there has been any other irregularity affecting the tribunal or the proceedings,
>
> he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection."

51. Section 31 provides in material part:

> "Objection to substantive jurisdiction of tribunal.
>
> (1) An objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction.
>
> A party is not precluded from raising such an objection by the fact that he has appointed or participated in the appointment of an arbitrator.
>
> (2) Any objection during the course of the arbitral proceedings that the arbitral tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised.
>
> (3) The arbitral tribunal may admit an objection later than the time specified in subsection (1) or (2) if it considers the delay justified.
>
> (4) Where an objection is duly taken to the tribunal's substantive jurisdiction and the tribunal has power to rule on its own jurisdiction, it may—
>
> (a) rule on the matter in an award as to jurisdiction, or
>
> (b) deal with the objection in its award on the merits.
>
> If the parties agree which of these courses the tribunal should take, the tribunal shall proceed accordingly.

52. Sections 31, 67 and 73 are amongst the mandatory provisions which section 4(1) provides "have effect notwithstanding any agreement to the contrary".

53. They are also within Part 1 of the Act to which section 1 applies:

> "General principles.
>
> The provisions of this Part are founded on the following principles, and shall be construed accordingly—

> (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
>
> (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
>
> (c) in matters governed by this Part the court should not intervene except as provided by this Part."

54. The February 1996 Report on the Bill by the Departmental Advisory Committee under the chairmanship of Lord Justice Saville ('the DAC Report') explains these principles at [18]-[22]. The first includes procedural efficiency and fairness. The second is described in the DAC Report as a principle of party autonomy. The third is a principle in favour of arbitral finality by reference to limited court intervention in awards. All three are relevant to the issue in the first appeal. The first and third are at play in s. 73's sanction that a party may lose a right to object if it is not taken timeously, as the DAC Report explains at [297]:

> "297. Recalcitrant parties or those who have had an award made against them often seek to delay proceedings or to avoid honouring the award by raising points on jurisdiction, etc. which they have been saving up for this purpose or which they could and should have discovered and raised at an earlier stage. Article 4 of the Model Law contains some provisions designed to combat this sort of behaviour (which does the efficiency of arbitration as a form of dispute resolution no good) and we have attempted to address the same point in this Clause…."

*The UNCITRAL Rules*

55. The UNCITRAL Rules provide:

> "Pleas as to the jurisdiction of the arbitral tribunal Article 23
>
> 1. …
>
> 2. A plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defence or, with respect to a counterclaim or a claim for the purpose of a set-off, in the reply to the counterclaim or to the claim for the purpose of a set-off. A party is not precluded from raising such a plea by the fact that it has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.
>
> …

> Waiver of right to object Article 32
>
> A failure by any party to object promptly to any non-compliance with these Rules or with any requirement of the arbitration agreement shall be deemed to be a waiver of the right of such party to make such an objection, unless such party can show that, under the circumstances, its failure to object was justified."

*The disputed jurisdictional objections*

56. The Judge identified no fewer than eleven jurisdictional objections which CZR wished to raise. The first appeal is concerned with his decision in relation to three of these, which he held were not barred by s. 73. He summarised these three at [63 (vii)-(ix)] of his March Judgment in the following terms:

> "vii) The allegation that Mr Stava did not hold the investments held by the tribunal to exist when the arbitration was commenced because he had transferred his interest to the Koruna Trust ("the Koruna Trust Objection").
>
> viii) The allegation that Mr Stava did not hold the investments held by the tribunal to exist when the arbitration was commenced because he had sold his interest under the Lawbook Transaction ("the Lawbook Transaction Objection").
>
> ix) The allegation that Diag SE was not controlled by Mr Stava, or not controlled by him from June 2011 ("the No Control Objection")."

57. We will refer to these in this part of the judgment as CZR's jurisdictional objections. They are not to be confused with the objection by Mr Stava and Diag SE, that CZR is barred from raising them by s.73 on the grounds that they were not raised at the time required by s. 31 AA 1996 and Article 23 of the UNCITRAL Rules, to which we will refer as the timeliness objection. It is the Judge's decision on the timeliness objection which is the subject matter of this first appeal.

*The March judgment*

58. At [69]-[70] the Judge addressed the principles applicable to determining whether an objection is the same objection as one which has been taken timeously or is a new objection. Although there was some debate before us about these principles, we do not need to address the issue. The Judge concluded that CZR's jurisdictional objections were not advanced in the Counter-Memorial and were first advanced in the Rejoinder, and decided the s. 73 issue in CZR's favour on that basis. In its Respondent's Notice CZR sought to argue that the objections had been taken timeously in the Counter-Memorial. We did not find it necessary to call on CZR in the first appeal and accordingly we did not hear argument from CZR on that point. We therefore proceed on the assumption that the Judge was right in holding that CZR's jurisdictional objections were first taken in the Rejoinder. This was some 11 months after CZR took "the first step in the proceedings to contest the merits" (in its Counter-Memorial). Mr Stava and Diag SE had an opportunity to address those jurisdictional objections in their

Rejoinder on Jurisdiction served a month later, at the hearing which took place some three months later, and in post-hearing briefs. They did so, but in each case without making any timeliness objection, as the tribunal observed at [310].

59. At [80] to [86] the Judge addressed what he described as a longstanding controversy as to whether ss. 31 and 73, and Article 23 of the UNCITRAL Rules, require an express invocation or application to extend time, or whether it is sufficient for the tribunal to address the late jurisdictional objection on the merits in an award, without stating the objection that the point was taken out of time. He referred to three first instance decisions in which the issue had been considered: *Gulf Import & Export Co v Bunge SA* [2007] EWHC 2667 (Comm), a decision of Mr Justice Flaux (‘*Gulf’*); *The Republic of Serbia v ImageSat International NV* [2009] EWHC 2853 (Comm), a decision of Mr Justice Beatson (‘*Republic of Serbia’*); and *Stockman Interhold SA v Arricano Real Estate Plc* [2017] EWHC 2909 (Comm), a decision of Mr Christopher Hancock QC (‘*Stockman*’). The Judge said he had found it difficult to extract any clear principles from these decisions.

60. At [85] the Judge said that, approached as a matter of principle, there was some force in the argument that it was “quite something” to assume that a tribunal has extended time simply because it has addressed the jurisdictional objection on its merits. However at [86] he identified four “strong pragmatic considerations which favour the conclusion that, if the point is raised before the arbitral tribunal, and determined on its merits without reference to the timing of the objection, the court should proceed on the basis that time has been extended by the tribunal, or it has concluded that no extension is necessary because the point had been sufficiently taken at an earlier stage.” The pragmatic considerations he identified were:

> “i) As noted in *Bunge* and *Republic of Serbia*, if the respondent to such a challenge takes the point that it was made out of time for the first time before the court, it will be too late for the challenging party to seek an extension of time from the arbitral tribunal.
>
> ii) The 1996 Act does not provide for a right to challenge the determination of the arbitral tribunal on a jurisdictional point on the basis that it was taken out of time unless it can be brought within ss.67 or 68. Section 1(c) of the 1996 Act tells against the suggestion that, without invoking s.68, a respondent to a s.67 challenge in respect of a jurisdictional challenge considered and determined on its merits can, in effect, submit to the court that the arbitral tribunal should not have entertained the objection. In considering the difficulties which might arise, it is helpful to consider the position where the arbitral tribunal upholds a jurisdictional challenge said to have been taken late. If the other party wishes to challenge that determination not on the basis that it was wrong on its merits, but that the point was taken too late, it must bring itself within s.68.
>
> iii) Where the respondent to the challenge is required to take the timing objection before the tribunal, the tribunal is able to consider not simply whether to grant an extension, but whether

> one is required (there being scope for dispute as to whether a challenge is a new challenge or a permissible development of one which has already been made). The tribunal will not be able to do so if the timing objection is taken for the first time in court. The policy of the 1996 Act, as reflected in s.30, is better given effect by a rule which requires a party wishing to take the timing point to do so before the arbitral tribunal.
>
> iv) A rule which requires the respondent to take the timing objection, and thereby crystallise the issue for the tribunal, reflects the essentially collaborative nature of the arbitral process, in which parties are expected to take positive steps to support the "proper conduct" of the arbitration (s.40 of the 1996 Act), and to raise any irregularities promptly during the arbitration (s.73(1)(b)-(d))."

61. Applying those principles, the Judge concluded that CZR's jurisdictional challenges had been brought within the time permitted by the tribunal ([120], [122]).

*The rival submissions in outline*

62. There were three main steps in the arguments advanced on behalf of Mr Stava and Diag SE by Lord Verdirame. First it was submitted that, as the Judge held, the disputed jurisdictional objections had not been raised timeously as required by s. 31(1) and article 23 of the UNCITRAL Rules. This point was developed by Mr Sam Goodman. Secondly it was argued that the only part of s. 73 which could potentially be invoked by CZR was that time had been allowed by "any provision of this Part", namely by an extension of time under s. 31(3). Thirdly it was argued that s. 31(3) is not fulfilled in a case like the present where there has been no application to the tribunal to extend time and the tribunal has not expressly exercised its discretion to extend time. Section 31 is mandatory, and a tribunal cannot be deemed to consider a delay justified, which is the only ground for exercising the discretion to extend time provided for in s. 31(3), if it has not determined that there has been a delay and considered the reasons for it. There is no room for an assumption that the tribunal has implicitly done so simply by dealing with the objection on its merits. The Judge was wrong to treat his pragmatic considerations, which lacked force, as capable of trumping principle. Moreover there was no question of subverting s. 68 AA 1996; the argument did not involve criticising the tribunal for misconducting itself in addressing the jurisdictional objections on their merits; rather it was simply a case of CZR being required to seek the necessary extension of time and to ask the tribunal to exercise its discretion, in the absence of which s. 73 precluded the jurisdictional objections being raised in a s. 67 challenge.

63. In its skeleton argument, CZR took issue with each of Lord Verdirame's main three steps. As to the first, apart from its argument that the jurisdictional objections had been taken timeously in the Counter-Memorial, which we assume, without deciding, is not made out, it argued that the timeliness objection was itself precluded by s. 73 and/or Article 32 of the UNCITRAL Rules and/or waiver at common law, on the grounds that no timeliness objection had been taken before the Treaty tribunal and the jurisdictional objections had been addressed by Mr Stava and Diag SE on their merits. As to the second step, CZR relied on the jurisdictional objections having been made "within such time as is allowed by … the tribunal" under s. 73 because the tribunal had allowed them

to be raised in the absence of any timeliness objection and dealt with them on their merits; accordingly CZR had no need to rely on s.31(3). In the alternative, and as to the third step, CZR supported the principle as expressed by the Judge in [86] and argued that the Judge was right to treat the tribunal as having extended time under s. 31(3) if any extension under that subsection was necessary.

*Analysis and conclusions*

64. We start with the three first instance authorities which were relied on before the Judge and before us.

*The authorities*

65. In *Gulf*, Bunge appealed to the FOSFA Board of Appeal against a refusal of the first-tier tribunal to exercise its discretion to allow a stale claim to continue. Submissions were exchanged, but on the day of the oral hearing Gulf argued for the first time that the Board of Appeal had no power to permit a claim to continue, that power being confined to the first-tier tribunal. The Board of Appeal disagreed, and extended time for the pursuit of the stale claim. Mr Justice Flaux held that the respondent's renewed complaint was a s.68 challenge (to which ss. 31 and 73 are not applicable). But he also rejected, *obiter*, Bunge's argument that Gulf could not renew its challenge because it had been raised out of time before the Board of Appeal. At [47] he said:

> "…I consider that Mr Males is right in his submission that, in circumstances where the Board of Appeal allowed the objection to the exercise of discretion by it to be fully argued on the merits and decided the point, albeit against Gulf, it would be bizarre if Bunge could successfully argue before the Court that the objection was too late by reference to either section 31 or section 73(1). In effect, Gulf would be worse off than if Bunge or the Board of Appeal had protested about the point raised late and the Board had then ruled that the objection could still be argued. It seems to me that the Board has allowed the point to be argued and if it would otherwise have been too late, it is not precluded by section 31 or section 73(1), either because section 31(3) comes into play or because the objection has been raised 'within such time as is allowed by … the tribunal' within the meaning of the opening words of section 73(1)".

66. It is to be noted that Mr Justice Flaux identified two separate routes to this conclusion. One was that s. 31(3) was "in play" i.e. the tribunal was to be treated as having granted an extension. The other was that no such extension was necessary because the objection was raised within the time "allowed by the tribunal" and so came within s. 73, irrespective of s. 31. These alternatives were each identified but not explored in any detail.

67. *The Republic of Serbia* involved an ICC arbitration in which Serbia's objection to the jurisdiction of the arbitral tribunal was not taken in the Answer to the Request for the Arbitration, which was the "first step" for s.31 purposes. The Terms of Reference recorded that neither party was aware of "any ground for challenging the jurisdiction of the tribunal" at that point. The jurisdictional objection was taken for the first time in

the Statement of Defence, and ImageSat asked the tribunal to determine whether the point was open to Serbia but not by reference to the time when it was taken: [55]. Directions were then given for the issue to be determined as a preliminary issue, which is what happened. Mr Justice Beatson rejected ImageSat's s.31/s.73 objection:

> "109. ...However, at the arbitration, although the issue of delay was in issue in general terms, ImageSat did not rely on section 31 as a ground for contending that the jurisdictional objection Serbia had raised in its Defence was too late. ImageSat did not argue before the arbitrator that Serbia was out of time and could not raise the jurisdictional objection because it had not done so in its Answer. There are *obiter* statements by Flaux J in [*Gulf*] indicating that, if no objection was taken to the jurisdictional point being argued before the arbitral tribunal, and the tribunal has dealt with it, it is too late to say in response to an application under section 67 that the jurisdictional point cannot be raised. Mr Owen submitted this could not be so. He argued that since section 31 is mandatory, the only basis for stating that the jurisdictional objection can be relied upon, is if the arbitrator considered that the delay was justified (see section 31(3)) and that there cannot be a deemed extension of time.
>
> 110. It appears that the preliminary issue before the arbitrator, who had full submissions and skeleton arguments, was conducted on the assumption that the issue as to delay by Serbia in raising the point concerned the effect of inter-party correspondence and the Terms of Reference and not because of its failure to do so in its Answer. Serbia would, in these circumstances, not have known that it should make an application under section 31((3) in respect of the Answer. Not surprisingly it did not do so. It cannot now do so. The point could have been taken by ImageSat at the arbitration. ImageSat took other points on delay but not this one. Serbia cannot now make an application under section 31(3). I share Flaux J's view that there are difficulties in saying that an application pursuant to section 67 is barred because the jurisdictional objection was not raised in the Answer where the point could have been, but was not, raised in the arbitration, and the arbitrator has dealt with it."

68. This was part of the *ratio*, not *obiter*, and was an endorsement and application of Mr Justice Flaux's *obiter* conclusion in *Gulf,* with its alternative s. 73 and s. 31(3) bases, without any additional reasoning in relation to those sections.

69. In *Stockman*, an issue arose as to whether a further award made by an LCIA tribunal in favour of Arricano following remission from the court fell within the scope of that remission, and in particular, whether remission of an award granting specific performance which it had not been possible to execute extended to permitting a claim to be brought for damages in lieu. No objection had been taken by Stockman when such a claim was first intimated, nor did Stockman make an application for an extension of time within which to make the objection. When the point was raised by Stockman, the

argument that it was raised too late and was barred by s.31 and s. 73 was taken, which the arbitrator rejected ([119(3)(a)]). Mr Hancock QC held:

> "150. I do not think that I need to express any concluded view on whether or not the comments of Flaux J [in *Gulf*] set out above are correct, since in my judgment the issue must always depend on the facts of the individual case. On the facts of the current case, I have concluded that there was no implicit extension of time. I have reached this conclusion for the following reasons:
>
> (1) As I have noted, in my judgment the objection to jurisdiction was not made forthwith.
>
> (2) It was thus for Stockman to make an application to the arbitrator for an extension of time. Only the arbitrator had a discretion to extend time, and this would have been a matter of discretion, applying the principles established under s.73 and/or s.31(3).
>
> (3) Because such an application was not made, the arbitrator did not have to consider these principles.
>
> (4) In circumstances in which the arbitrator did not have to address his mind to the question of whether or not to extend time, because no such application was made, I do not think it is safe to assume that he would have done so, particularly since the consequence of so doing would have been that his decisions on jurisdiction would become challengeable in a way that they would not be absent such an extension.
>
> 151. Accordingly, I hold that Stockman also waived its right to object to the jurisdiction of the arbitrator…."

70. We would observe that Mr Hancock saw no tension between his decision and the reasoning of Mr Justice Flaux in *Gulf,* but treated the issue before him as fact specific as to whether the tribunal in that case could be treated as having implicitly extended time under s. 31 (in its Seventh Award) where a s.31/s.73 timeliness objection *was* taken and rejected. It is not clear from the court report on what grounds it was rejected by the tribunal, which will have been apparent to the deputy judge in that case from [196] of the Seventh Award (see [147(3)] of the judgment). If it was, as seems likely, that the objection was not late, it is easy to see that such a decision cannot support an implied extension on the premise that it was late (as the judge concluded it was). The decision addresses only the question of whether there was an implicit extension under s. 31(3) by reason of the tribunal having addressed the merits on the basis that the objection was in time. The decision does not touch upon the position where no timeliness objection is taken before the tribunal, as in the current case, and in *Gulf,* which Mr Hancock was content to treat as rightly decided on its facts in accordance with the reasoning of Mr Justice Flaux. Nor did he have to engage with Mr Justice Flaux's alternative basis for his decision in *Gulf,* that the objection was made "within the time allowed by the tribunal", by addressing it on its merits, such that it came within

s. 73 without any need for a s. 31(3) extension: Stockman's argument was limited to there having been an implied s. 31(3) extension: see [147(5)]).

71. We agree with the Judge that these cases do not contain clear reasoning which disposes of the issue we have to decide. Nevertheless, the two alternative bases for the decision in *Gulf* provide a useful framework in which to address the arguments.

72. We have concluded that the argument in support of the appeal fails for each of three reasons, which we will state and then develop, namely:

    i) the timeliness objection was never made to the tribunal during the arbitration, and s. 73 therefore precludes it being made later before the court;

    ii) CZR's jurisdictional objections were made "within such time as [was] allowed by … the tribunal" and so within the time permitted by s. 73, irrespective of any question whether s. 31(3) was fulfilled;

    iii) in any event the tribunal did "admit" the objections within the meaning of s. 31(3).

*Section 73 bars the timeliness objection*

73. The first step in the argument on behalf of Mr Stava and Diag SE is the contention that CZR's jurisdictional objections were not taken within the time required by s. 31(1) and Article 23. In each case, that timeliness objection is an objection which itself falls with the scope of s. 73(1)(c). The objection based on s. 31(1) is an objection "that there has been a failure to comply with … any provision of this Part". The objection based on Article 23 is an objection "that there has been a failure to comply with the arbitration agreement". That timeliness objection was never made to the tribunal during the arbitration, and s. 73 therefore precludes it being made later before the court. That is a complete answer to the objection and sufficient to dismiss the appeal. We do not need to consider the alternative arguments based on waiver under Article 32 or at common law.

*The jurisdictional objections were made within "the time allowed by the tribunal" under s. 73*

74. What happened in this case was that Mr Stava and Diag SE did not object to the jurisdiction objections being raised (in the Rejoinder) but addressed them on their merits and thereby effectively invited the tribunal to decide them; they did so in their Rejoinder on Jurisdiction, in a witness statement from Mr Stava, in his evidence at the hearing and in their post-hearing submissions; the tribunal noted that there was no timeliness objection from Mr Stava and Diag SE; and the tribunal went on to determine the objections on their merits in accordance with the apparent agreement of the parties that it should do so. In those circumstances as a matter of ordinary language the tribunal allowed the jurisdiction objections to be taken at the time they were taken. They were within "such time as is allowed by … the tribunal". The word "allowed" is a passive verb in the passive voice, which simply connotes what the tribunal permits. The tribunal permitted CZR to make the objections within the time in which they were in fact made. This involves the second of the two alternative bases which were identified by Mr Justice Flaux in *Gulf* and does not depend upon s. 31(1).

75. Lord Verdirame's answer is that in relation to objections to substantive jurisdiction the only applicable part of s. 73 is that the objection must be made "within such time as is allowed by any provision of this Part", namely s. 31. The other three points of time in s. 73 ("forthwith"; "within such time as is allowed by the arbitration agreement"; and "within such time as is allowed by the tribunal") are not alternatives which apply to substantive jurisdiction objections. Only in this way is s. 31 given effect, which is mandatory in its language (s. 31(1) "… must …") and by operation of section 4, which provides that it is to have effect notwithstanding any agreement to the contrary. Section 31(3), he argues, provides the only source of a tribunal's power to admit late jurisdictional objections.

76. This is a cogent argument but one we are unable to accept for a number of reasons. It is not an approach which is required in order to give effect to the mandatory nature of s. 31(1) because s. 73 is also a mandatory provision and the two sections must be read together. Contrary to Lord Verdirame's submissions, s.73 deals not only with loss of the right to raise objections before the court but also loss of the right to raise objections before the tribunal itself if not made within one of the four points of time identified in the opening words. If there is a failure to do so, the party "may not raise that objection later before the tribunal or the court." Both s. 31 and s. 73 are therefore concerned with when the right to object before a tribunal is lost. Importantly, section 73(1) contains the proviso that the loss of the right to object does not apply if the objecting party did not know and could not with reasonable diligence have discovered the grounds of the objection. This applies to all the objections identified in (a) to (d), including objections to substantive jurisdiction. No such qualification is to be found in s. 31(1). So although s. 31(1) is in apparently mandatory terms that a party "must" raise its substantive jurisdictional objection in or before its "first step", that is not so if it does not then know, and could not with reasonable diligence then know, the grounds of such objection. Section 31(1) is in this respect qualified by s. 73 and does not contain a complete code as to when substantive jurisdiction objections must be taken. If it be suggested that the no knowledge situation is catered for by s. 31(3), the suggestion is met by the fact that s. 31(3) does not reproduce the criterion in the terms of the s. 73 no knowledge proviso; and that the ability to ameliorate the effects of s. 31(1) through s. 31(3) does not prevent the "must" in s. 31(1) being qualified by s. 73: otherwise it would require a party to perform an obligation which it is unable to perform.

77. This is how the case law has treated s. 31 and s. 73, namely as provisions which must be read together such that a party who does not raise an objection within the time specified in s. 31 is not precluded from relying on the point if it establishes that it did not know and could not with reasonable diligence have discovered the grounds for the objection until some time later. So the approach was to consider only the question of knowledge within s. 73 in *Rustal Trading SA v Gill & Duffus SA* [2000] 1 Lloyd's Rep 14, per Mr Justice Moore-Bick at pp.19-20; *Vee Networks Ltd v Econet Wireless International Ltd* [2004] EWHC 2909 (Comm) [2005] 1 All ER (Comm) 577, per Mr Justice Colman at [66]; and *Exportadora de Sal SA de CV v Corretaje Maritimo Sud-Americano Inc* [2018] EWHC 224 (Comm) [2018] 1 Lloyd's Rep 399, per Mr Justice Andrew Baker at [47].

78. What this illustrates is that s. 31 is not the sole source of how and when jurisdictional objections are to be made. It is qualified by s. 73, which can in some circumstances provide the answer. There is no reason in the structure of the sections, therefore, why

"time allowed by the tribunal" in s. 73 should not encompass circumstances in which it is allowed outside s. 31.

79. That it may do so is the natural reading of the language of s. 73 in expressing the four points of time as alternatives by the words "either … or … or … or". The most natural reading of s. 73 is that the objection may be taken if within the time allowed by the tribunal or the time allowed by any provision of Part 1, either being sufficient. When addressing s. 31 Lord Verdirame invoked the passage in the DAC Report at [395] that "We have attempted to produce a draft which can be read, understood and applied by everyone, not just lawyers learned in this branch of our law. Thus our aim has been to make the text "user-friendly" and the rules it contains clear and readily comprehensible, so that arbitration is available to all who wish to use it." When applied to s. 73, this works against his argument.

80. We do not wish to be misunderstood as deciding that in all circumstances, and for all objections, each of the four points of time in s. 73 is an alternative, the fulfilment of any one of which is sufficient. We do not need to go that far. We are merely saying that in some circumstances "time allowed by the tribunal" and "time allowed by any provision of this Part" can be alternatives in relation to substantive jurisdictional objections, the fulfilment of either of which is sufficient; and that the circumstances of this case provide an example of where they are such alternatives. Compare *A v B* [2017] EWHC 3417 (Comm) [2018] Bus LR 778 at [44] where Mr Justice Phillips expressed the view, *obiter*, that time allowed by the arbitration agreement and time allowed by s. 31 were alternatives where the arbitration agreement provided for jurisdiction objections to be made before the "first step"; and [67(ii)] of the March judgment where the Judge opined, *en passant*, that a challenge brought within the [longer] time permitted by an arbitration agreement is not out of time simply because it was not brought before the "first step" required by s. 31(1). We do not need to express a view on the correctness of these *obiter* observations.

81. Lord Verdirame advanced an alternative argument that if "time allowed by the tribunal" was capable of applying to a substantive jurisdiction objection under (a), it was qualified so as to mean time allowed by the tribunal under s. 31(3). But the language of s. 73 contains no such qualification and seeking to read such a qualification depends on the false premise that s. 31 alone determines when jurisdictional objections may be taken.

82. That this is the correct approach is supported by consideration of the practical consequences of Mr Stava's and Diag SE's approach. This is not a question of pragmatism trumping principle, but rather of interpreting the provisions of s. 31 and s. 73 in accordance with the statutory purposes as required by s. 1 AA 1996. In particular:

    i) If a party thinks its jurisdictional objection has been timely made, and the other party does not suggest otherwise, it would be a waste of time and money for that party to have to apply for an extension in every such case as a prophylactic measure in order to guard against a timeliness argument which the other party might subsequently raise. That is contrary to the principle of fair efficiency reflected in s. 1(a). Indeed, if the other party is not contending that the jurisdiction objection is late, how can the objecting party persuade the tribunal that the delay is justified so as to get a prophylactic extension under s. 31(1) when no one is identifying any period of delay? As the Judge adverted to at

[86(i)], if there is no timeliness objection, the other party is deprived of an opportunity to get the tribunal to extend time, which is obviously unfair. As both Mr Justice Flaux and Mr Justice Beatson observed, this puts it in a worse position than if the other party had raised the timeliness objection, which is the antithesis of the purpose of s. 73.

ii) It is intrinsic to the thrust of s. 1 and s. 73 that arbitral tribunals can treat the parties as agreeing to their deciding a point when one party invites them to do so and the other party does not object, but rather addresses the merits of the point and in effect joins in the request for the tribunal to decide it; and that each party can treat the other party as so agreeing in such circumstances. The effect of Mr Stava's and Diag SE's argument is that a party must take points against itself which the other side is not taking. This is not only commercially unrealistic and anathema to the adversarial nature of the process; it is contrary to the consensual nature of the process, and to the principles of efficiency, finality, and party autonomy, which are expressed to be the purposes of the Act in s. 1. The unreality of this argument was further illustrated by Lord Verdirame contending that both s. 33 AA 1996 and Article 17 of the Rules imposed an obligation on the tribunal to hear Mr Stava and Diag SE and invite them to express their views in respect of any extension of time, of which they were unfairly deprived. The idea that fairness or procedural efficiency requires a tribunal to hear a party who is not making a timeliness objection on whether there should be an extension of time seems to us self-evidently wrong. In this connection Lord Verdirame also sought to derive assistance from an analogy with court proceedings in which a party is not obliged to point out its opponent's mistakes: *Barton v Wright Hassall LLP* [2018] UKSC 12 and *Woodward v Phoenix Healthcare Distribution Ltd* [2019] EWCA Civ 985. But the analogy is a false one. Arbitration is a consensual and collaborative process; and there is no equivalent in court proceedings to the mandatory effect of s. 73(1)(b)-(d) in imposing a bar to raising objections; nor to the waiver provided for in Article 32 of the UNCITRAL Rules. Moreover those cases were concerned with service of process; but in other aspects of civil litigation the court does treat as wholly inappropriate a party seeking to take advantage of its opponent's mistakes: see *Denton v TH White Ltd* [2014] 1 WLR 3926 at [41].

iii) There is also force in the points made by the Judge at [86(ii), (iii) and (iv)].

83. This approach is reinforced by the purpose of s. 73, as explained in the DAC Report at [297]. It is aimed at preventing parties from later relying on objections which have not been raised at a time when they can conveniently be dealt with by the tribunal, because that does not promote the s. 1 purpose of fair and efficient process, nor the principle of finality and minimum intervention. But where, as here, jurisdiction objections are raised without a timeliness objection and dealt with by the tribunal at a convenient point in the process, that fulfils the purpose of s. 73. We asked Lord Verdirame which of the purposes of s. 73 were served by his argument. His response was that requiring the objecting party to apply for an extension if it needed one prevented it from "trying its luck". However the objecting party may believe that no extension is necessary (bearing in mind that any timeliness issue may turn not only on whether an objection was raised timeously but whether it is to be treated as the same objection which is pursued later or a new one); and even where it has doubts about that, it is entitled to assume that the

other side does not regard one as necessary if the latter takes no timeliness objection. In neither case is the objecting party fairly described as "trying its luck" in not applying for an extension.

*The tribunal admitted the objections under s. 31(3)*

84. Alternatively, if it is necessary for CZR to bring itself within s. 31(3), it does so in this case because the tribunal "admitted" the objections. Although the parties have used the language of extending time to describe the content of s. 31(3), which is in practice its effect, and we have at times adopted it ourselves to reflect the terms of the argument, that is not the language of the subsection. All that is required is that the tribunal admits the objection at a later time than specified in s. 31(1). The tribunal did so in this case.

85. It is no accident that the word used is "admit" in its passive sense of what the tribunal permits, rather than requiring some positive declaration of an extension. The first draft of the UNCITRAL Rules had the following wording in article 18 (2): "Where a delay in raising a plea of incompetence is justified under the circumstances, the arbitrators may declare the plea admissible". The provision was deleted by the Conference: see the 1974 Report of the Secretary General on the preliminary draft set of UNCITRAL Arbitration Rules UN Doc A/CN.9/97. The first UNCITRAL Arbitration Rules, the 1976 Rules, contained no equivalent in Article 21(3), the predecessor to the current article 23(2), which merely provided that "A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter claim". However, Article 16 of the UNCITRAL Model Law adopted by the UN in 1985 included the provision that "the arbitral tribunal may … admit the later plea if it considers the delay justified". This was the language adopted in s. 31 of the AA 1996, which the DAC Report explains at [140] was based on Article 16 of the Model Law and which then appears in Article 23(2) of the 2010 UNCITRAL Rules. The contrast between "admitting" the jurisdictional objection if a delay is justified and "declaring" it to be admissible if a delay is justified reinforces the passive nature of what is sufficient for s. 31(3).

86. It is no answer to say, as Lord Verdirame argues, that the tribunal did not apply its mind to the statutory criterion of whether the delay was justified.

    i) The failure to do so would have to be characterised as an objection that the proceedings had been improperly conducted, or that there was a failure to comply with a provision of Part 1 (namely s. 31(3)) or that there was some other irregularity affecting the tribunal or the proceedings, so that the objection that the tribunal had not addressed the question whether any delay was justified is an objection engaging s. 73(1)(b) and/or (c) and/or (d). Section 73 prevents that objection being taken in court when it was not taken during the arbitration proceedings. Moreover if, as the Judge was inclined to think, and we are inclined to agree, it is in substance a complaint of breach by the tribunal of its obligations, it can only be challenged by a s. 68 application and there is none.

    ii) If on the other hand the tribunal is not to be criticised for not considering whether any delay was justified, as Lord Verdirame argued, then if it has admitted the objection without acting irregularly or improperly, there can be no complaint that there was no consideration of whether any delay was justified. A failure to

do so does not detract from the fact that the tribunal has taken the action required by s. 31(3) by permitting the objection to be advanced.

iii) We would in any event question whether Mr Stava and Diag SE can establish that in this case the tribunal did not consider that the delay was justified. What it did was to note that there was no timeliness objection. That is consistent with the arbitrators having said to themselves: this seems to be late because it was not raised in the Counter-Memorial; but there is no complaint from Mr Stava and Diag SE that it has only been raised in the Rejoinder; and it has been addressed on its merits, so whatever the reasons for the lateness we can assume that the delay is justified, especially as we are not privy to all the communications between the parties and all their circumstances; if the delay were not justified we are confident that Mr Stava and Diag SE would be taking a timeliness point because this is a dispute in which every point is taken on both sides; we are therefore satisfied that the delay is justified on the basis that Mr Stava and Diag SE treat it as justified; all we need say when addressing it is that there is no timeliness objection, because there is no need to get into a discussion about whether the objection is late in the first place. That would involve *expressly* addressing the reasons for admitting the objection identified in s. 31(3); or in the language used by the parties, expressly exercising the discretion.

iv) If the tribunal did no more than jump straight from noting the lack of timeliness objection to a decision to address (i.e. "admit") the jurisdiction objection, it was implicitly reaching the same conclusion: if any extension of time were needed, it is justified by the lack of objection.

87. That s. 31(3) was fulfilled, if it needed to be, is illustrated by a consideration of s. 31(4) which provides that the tribunal may rule on its own jurisdiction where an objection "is duly taken to the tribunal's substantive jurisdiction". In this case the tribunal did rule on its jurisdiction in the relevant respects in the Treaty Award; and it is not said by Mr Stava or Diag SE that it committed any misconduct or procedural irregularity in doing so. It must therefore have treated the objections as "duly" taken, i.e. as made in accordance with s. 31.

*The Judge's principle*

88. The Judge reached the same conclusion by identifying and applying a principle that "if the point is raised before the arbitral tribunal, and determined on its merits without reference to the timing of the objection, the court should proceed on the basis that time has been extended by the tribunal, or it has concluded that no extension is necessary because the point had been sufficiently taken at an earlier stage." However, we would prefer not to express any such principle in those terms, for a number of reasons. First, the solution need not be found in s. 31(3) but from the words in s. 73 "time allowed by the tribunal". Secondly, the Judge's formulation treats s. 31(3) as requiring a positive act of extending time, whereas its terms require no more than the passive requirement that the tribunal admit the objection, that is to say permit it to be taken. Thirdly, the principle seems to operate by way of deeming or implied conduct, whereas all that is needed for s. 31(3) is a focus on the actual conduct of the tribunal in admitting (or not) the objection. Last, the alternative within the formulated principle, that the tribunal is deemed to have determined that the objection is not out of time, does not resolve the problem where the court is for s. 67 jurisdictional purposes required to examine for

itself whether that is so and may conclude that it is out of time (where s. 73 provides no impediment to it doing so).

*Conclusion on the first appeal*

89. For all these reasons the first appeal is dismissed.

## The second appeal

*The issue*

90. The issue arising on the second appeal is whether, if as CZR contends, Mr Stava disposed of his interest in the qualifying investments in June 2011, the tribunal lacked *substantive* jurisdiction to consider claims by him relating to breaches of the BIT after such disposal. The Judge characterised this as "**the Stava June 2011 Objection**." [123]. He found that this objection was limited to breaches post-dating June 2011 [121(i)]. He correctly identified at [145] that the effect of this objection is that even if Mr Stava is Swiss and made the investments which the tribunal found he made, all of which were made long before June 2011 (none of which is now open to challenge) the tribunal would have no jurisdiction to determine the dispute about whether Mr Stava retained those investments after June 2011.

91. At [146] to [147] the Judge considered the provisions of Article 9 of the BIT (set out at [12] above) and rejected the argument that the Stava June 2011 Objection was a jurisdictional objection falling within s.30 (and therefore s.67) AA 1996. He held that there was nothing in the offer to arbitrate which limited it to breaches which occur at the date when the investor still owned the investments they made. The question whether Mr Stava had disposed of his investments was, rather, a matter of substance which would have a bearing on Mr Stava's status (standing) to complain about such breaches, and possibly also on the question of loss.

92. The parties agree that if we were to find that the Judge was wrong in his characterisation, the matter would have to be remitted to the High Court for determination of the s.67 challenge.

93. On behalf of CZR, Mr Lucas Bastin KC contended that there were two sources that supported his client's position that this was an objection to substantive jurisdiction (or, as it is commonly referred to in investor-State arbitrations, jurisdiction *ratione materiae*). First and foremost, the terms of the Treaty itself, which he submitted as a matter of proper interpretation supported CZR's contention; secondly, a body of previous decisions in investor-State arbitrations, which he submitted would assist in elucidating the relevant principles.

94. It is accepted by both parties that the Treaty falls to be interpreted in accordance with international law, and thus in accordance with the rules set out in Article 31 (and, where applicable Article 32) of the Vienna Convention. Article 31 provides:

> "(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

> (2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> (3) There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> (4) A special meaning shall be given to a term if it is established that the parties so intended."

95. Mr Bastin submitted that the preamble assisted the court in establishing the object, purpose and context of the Treaty, and also formed context in which its terms were to be interpreted. The third preamble identified as an object or purpose of this BIT that it is:

> "intending to create and maintain favourable conditions for investments by investors of one Contracting party in the territory of the other Contracting Party."

Therefore the Treaty was there to protect investments by investors, not just any asset held by someone in the relevant jurisdiction.

96. This was repeated in the language of Article 2(1) of the BIT which provides that:

> "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."

The fact that the Treaty can only apply to investments by investors of the other Contracting Party is underlined by Art 2(2) which provides that:

> "The present Agreement shall not affect the rights and obligations of the Contracting Parties with respect to investments that are not within the scope of the Agreement."

97. An arbitral tribunal constituted under Article 9 only has jurisdiction within the defined scope of application of the Treaty. In this case, Article 2 sets the jurisdictional limits under the Treaty, and one of those is that there must be an investment by an investor. Thus in order for the arbitral tribunal to have substantive jurisdiction, there must be an arbitration agreement with a qualifying investor in relation to a qualifying investment, which engages not merely the question whether there is an "investor" as defined in Article 1(1) and an "investment" as defined in Article 1(2) but also whether there is the necessary connection or "link" between them required by Article 2(1).

98. Mr Bastin submitted that the requirement that there should be an investment by an investor is fundamental and permeates the rest of the Treaty; for example Article 3 requires each Contracting Party to promote "investments by investors of the other Contracting party"; Article 4 (1) requires each Contracting Party to protect within its territory "investments made … by investors of the other Contracting Party"; and Article 4(2) provides that "each Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the investors of the other Contracting Party". Similar language is found in Article 6 which affords protection against "dispossession" of "investments of investors".

99. Article 9 confers jurisdiction in respect of "disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party." Mr Bastin argued that in order to fall within the scope of the offer to arbitrate made in Article 9, there must be an investment by that investor, because of Article 2. Once a person who qualified as an investor who had made an investment in an asset which constituted an investment under the Treaty divests themselves of that asset, the asset ceases to be an "investment by an investor" and disputes concerning the later treatment of that asset are not "disputes with respect to investments between [CZR] and an investor" for the purposes of Article 9. Thus the offer to arbitrate is only for the period during which the assets are held by the investor.

100. If an issue arises about whether that state of affairs exists, Mr Bastin submitted that that is also a matter of substantive jurisdiction under s.30(1)(a), even though it would be necessary to examine the facts in order to reach a conclusion on the issue. Although an examination of the facts is quintessentially a matter for the arbitral tribunal, and the need to do so might be regarded as an indication that the question is one of admissibility rather than jurisdiction, Mr Bastin said that BIT arbitrations frequently deal with questions of jurisdiction, standing, admissibility, and the merits at the same hearing. The BIT does not spell out what the connection between the investor and the investment has to be (e.g. ownership, control, or something else) to come within Article 2(1). Issues about what that connection must be, as well as whether it is fulfilled at the date of the breach, are issues which go to jurisdiction because they define whether the investment is a qualifying investment under the Treaty (i.e. whether it is an investment by an investor falling within Article 2(1).) Article 2, read as a whole, is a clear textual jurisdictional limitation.

101. Mr Bastin also raised an alternative objection which he argued should also be characterised as jurisdictional, namely, that irrespective of whether a claimant is an

investor in an investment at the time of the alleged breaches, they must continue to hold the investments as at the date of commencement of the arbitration (if, as in the present case, that is the date on which the offer to arbitrate is accepted) in order to qualify as an "investor" to whom the offer is addressed. The parties were in dispute as to whether it was open to CZR to raise this alternative case (which was referred to in oral argument as "variant 2").

102. Mr Bastin referred to a number of investor-State Awards in other cases which he contended supported CZR's analysis, many of which were not referred to before the Judge at the substantive hearing (though some were referred to when permission to appeal was sought). He placed particular reliance on the awards in *Phoenix v Czech Republic*, ICSID Case No. ARB/06/5, Award 15 April 2009 ("*Phoenix"), Vöcklinghaus v Czech Republic,* UNCITRAL Final Award, 19 September 2011 ("*Vöcklinghaus"),* and *Alcor Holdings Ltd v Czech Republic* PCA Case No. 2018-45 ("*Alcor")*. Whilst he accepted that none of the cases he referred to was precisely on all fours with the present, Mr Bastin contended that they are indicative of a general approach by international arbitrators of treating this type of challenge as a matter of substantive jurisdiction. He said they were all examples of situations where the challenge concerned the existence and scope of the consent to arbitrate.

103. Mr Bastin also relied on the decision of Mr Justice Butcher in *PAO Tatneft v Ukraine* [2018] EWHC 1797 ("*Tatneft*"). One of the issues in that case was whether an objection that Tatneft had acquired the asset after the breach of the treaty had occurred was jurisdictional. Mr Justice Butcher found in that case that the offer to arbitrate was only in respect of disputes where the relevant investment had been acquired at the time when the alleged breach of the treaty occurred, and that this was a jurisdictional objection [87] – though these findings were *obiter*, because in the event, he found on the facts that Tatneft was an investor at the time of the breach [88] to [94].

104. Mr Justice Butcher relied upon a line of decisions beginning with *Levy v Republic of Peru* ICSID case no ARB/11/17 from which he quoted at [84]:

> "146. … the national or company must already have made its investment when the alleged breach occurs, for the tribunal to have jurisdiction over a breach of that Treaty's substantive standards affecting that investment.
>
> 147. This conclusion follows from the principle of non-retroactivity of treaties, which entails that the substantive protections of the BIT apply to the state conduct that occurred after these protections became applicable to the eligible investment. Because the BIT is at the same time the instrument that creates the substantive obligation forming the basis of the claim before the tribunal and the instrument that confers jurisdiction upon the tribunal, a claimant bringing a claim based on a Treaty obligation must have owned or controlled the investment when that obligation was allegedly breached."

Mr Bastin submitted that if the predating point was to be characterised as jurisdictional, then so too should the post-dating point, which he described as the other side of the same coin.

105. The Judge distinguished *Tatneft* at [147]. He observed that it was easy to see why the "forceful and well-established presumption that treaties do not have retrospective effect", the interpretative canon, and the provision stipulating when the Treaty comes into force combined in that case to provide a sufficient basis for reading a limitation of that kind into the offer to arbitrate. In response to that, Mr Bastin submitted that the statement of principle at [147] of *Levy v Peru* was not limited solely to the principle of non-retroactivity in the first sentence but also made clear, in the second sentence (which the Judge did not address) that the nature of a BIT is that it creates obligations and confers jurisdiction. He argued that this demonstrates that the point about conduct pre-dating the investment is a jurisdictional one; it is not a matter of implying terms into the arbitration clause or relying on the principle of non-retroactivity of treaties, but rather, a matter of delineating the scope of the consent to arbitrate and the jurisdiction that it confers on the tribunal.

106. In further support of that submission, Mr Bastin relied on the decision of the International Court of Justice in *Azerbaijan v Armenia* (12 November 2024) which ruled on a series of preliminary objections to the jurisdiction of the court to determine complaints by Azerbaijan of alleged violations of the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"). There was a dispute about whether the court had jurisdiction to determine complaints about acts occurring in a period when Armenia was a State party to CERD but Azerbaijan was not.

107. There was no express language in the compromissory clause in CERD (Art 22) defining the temporal scope of the court's jurisdiction. The court stated:

> " 44. …The Court observes, however, that the question before it is not whether Armenia was bound by the obligations under CERD during the relevant interval. Rather, the question is whether Article 22, under which Azerbaijan has given its consent to the Court's jurisdiction, provides a jurisdictional basis for the Court to entertain Azerbaijan's claims in respect of alleged acts that took place before Azerbaijan became party to the Convention.
>
> 45. The Court considers that, subject to any reservation or express indication to the contrary, the temporal scope of the Court's jurisdiction under a compromissory clause is determined by the temporal application of the substantive provisions of a treaty between the parties concerned."

Mr Bastin contended that although this objection had been pleaded on the basis that the point was either jurisdictional or a matter of admissibility, in finding that Article 22 of CERD contained a temporal limitation on its jurisdiction, the court was indicating that it considered it was properly characterised as a matter of jurisdiction. Secondly, he submitted that the absence of an express temporal limitation in the arbitration clause was no barrier to a limitation being inferred as a matter of proper interpretation of the Treaty. Thirdly, because Armenia had no substantive obligations to Azerbaijan under CERD in the relevant period, the compromissory clause did not cover disputes between those two States in respect of that period. By analogy, once an investment is disposed of, there is no applicable substantive obligation to which the arbitration clause in the BIT can apply.

108. On behalf of Mr Stava, Lord Verdirame submitted that the Judge was right to find that this was not an objection to substantive jurisdiction. As the Judge identified at [133], the court is faced with a binary decision as to whether a challenge brought falls within s.30(1) AA 1996 or not. It was important to bear that in mind when considering the international arbitration decisions, and to approach them with some caution. None of them addressed that question.

109. Where there is no express limitation in the offer to arbitrate, there is likely to be a greater challenge in persuading the court that the offer to arbitrate is limited, as the Judge recognised. In the present case, one could not derive such a limitation from the language of Article 2 of the Treaty, or from the Treaty definitions of "investor" and "investment" which contain no temporal limitations. Article 1(2) defines "investments" in a broad and inclusive way, by contrast with other treaties that contain qualifications, sometimes even temporal qualifications, on what is to be regarded as an "investment" in respect of which the obligations of the State arise. The express temporal limitation in Article 2(1) does not assist CZR, and in fact assists Mr Stava, because all that it requires is that the investment has been made later than 1 January 1950. That indicates that if the parties had wished to include further temporal limitations they would have done so expressly. Every investment made by a qualifying investor after that date, which satisfies the definition in Article 1(2) (together with any inherent element that the term "investment" may be found to possess) is a protected investment, and any dispute with respect to such an investment is one that can potentially be submitted to arbitration under Article 9. Article 2(1) does not contain the type of qualification limitation that CZR would need to demonstrate in order to establish that it gives rise to the restriction on Article 9 for which it contends.

110. Lord Verdirame also relied on Article 6, which makes it evident that the parties had expressly in mind expropriation or forced sale which, by their very nature, mean that the investor will have parted with the investment by the time the dispute arises. He submitted that Mr Bastin's contention that cases of expropriation or forced sale could be catered for by a good faith interpretation of the Treaty was not in truth a matter of good faith interpretation. Good faith interpretation must be distinguished from the broader principle of good faith. Good faith interpretation must lead to some objective meaning. It cannot be used to add terms to the Treaty, nor can it change the text in a way which itself could be open to the criticism that it is not a good faith interpretation.

111. Lord Verdirame also pointed out that Article 5(1)(d) provides that the contracting party in whose territory investments have been made by investors shall grant those investors the free transfer of "the proceeds, including possible capital appreciation, arising from the sale or the partial liquidation" of investments. This, he submitted, makes it clear that certain treaty rights continue after sale, not just forced sale, and that must mean that the investor would be able to submit a dispute in relation to matters falling under Article 5(1)(d) – such as a refusal to transfer the proceeds of sale of an investment to a third party - to arbitration under Article 9. In response to that point, Mr Bastin contended that Article 5 was only concerned with changes in the form of an investment. It did not indicate that if the investor sold the investment and kept the proceeds there would be jurisdiction thereafter. It is unnecessary to resolve disputes about the scope of Article 5 for the purpose of determining this appeal, but that does not appear to be a complete answer to Lord Verdirame's argument about Article 5(1)(d).

112. Lord Verdirame submitted that there was no justification for the argument that the general language in the preamble supported CZR's contention that the protections of the Treaty applied, or the offer was made, only for so long as the investments continued to be held by a qualifying investor. The maintenance of favourable conditions for investments, for example, does not necessitate any particular temporal limitation on the offer to arbitrate. Whilst Lord Verdirame accepted the principle that the starting position is that a sovereign State is not presumed to have consented to foreign or international jurisdiction, he contended that this did not change the terms of Article 9. It begs the question of what it is that the State has agreed to submit to the jurisdiction of the arbitral tribunal: that depends on the interpretation of the compromissory clause in the Treaty.

113. The jurisdictional provision of the Treaty in this case is Article 9, and, as the Judge observed, this does not require that an investor should hold the investment at the time of the breach. Paragraph 1 identifies the class of disputes in respect of which the offer to consult is extended. Paragraph 2 contains the offer to arbitrate "the dispute" identified in paragraph 1, i.e. a dispute with respect to investments between a contracting State and an investor of the other contracting State. There must be a degree of specificity about the dispute that is being identified by the time the dispute goes to arbitration. The offer is a broad one, and so long as there is a qualifying investor, a qualifying investment made after 1 January 1950, and a dispute with respect to that investment, jurisdiction is established. A dispute in relation to whether a qualifying investor no longer has the necessary link with a qualifying investment is a dispute with respect to that investment.

114. Lord Verdirame submitted that the interpretation for which Mr Bastin contended could not be established just by reading Article 2 and Article 9 together as Mr Bastin submitted; it would involve reading language into Article 9 which does not exist. Moreover the language that would need to be read into Article 9 in order to limit the offer to arbitrate would be different depending on whether CZR's primary objection or variant 2 is being relied upon. For the former, the provision would have to be interpreted as meaning:

> "For the purpose of solving disputes 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 at a time when the investor holds the investment ..."

Whereas for variant 2, the provision would have to be interpreted as meaning:

> For the purpose of solving disputes between a Contracting Party and an investor of the other Contracting Party with respect to investments still held by the investor at the time of the submission of the dispute to arbitration."

115. Lord Verdirame submitted that variant 2 was not an argument open to CZR. Self-evidently an objection taken on the basis that Mr Stava had ceased to be an "investor" to whom the offer to arbitrate was made, because he had not retained his investment as at the date of commencement of the arbitration, would not only affect claims for breaches post-June 2011. If that objection was within the purview of paragraph 4 of the Amended Particulars of Claim, which he disputed, it did not survive the challenge under

s.73 AA 1996, and in any event it was not a point falling within the scope of the single ground of appeal for which permission to appeal was granted.

116. So far as *Tatneft* was concerned, Lord Verdirame submitted that Mr Justice Butcher was only addressing the specific objection that the relevant investment was acquired after the dispute arose. The key was that the issue related to the type of "dispute" that could be submitted to arbitration under the treaty in that case. An investor could not acquire an investment that was either protected under another treaty or not protected at all, and then, by virtue of that acquisition, submit a dispute concerning that investment which arose at a time when he was not an investor, to arbitration under the treaty that applied to him. The Judge was right in his analysis at [147]. Whilst Mr Justice Butcher focused his analysis on the term "dispute", the Judge had in mind the fact that (as in the *Azerbaijan* case) the Treaty was not in force as between the investor's state of nationality and the other state party at the time when that dispute arose. The principle against retroactivity had a part to play in both judges' differently nuanced analyses in *Tatneft* that led them both to the conclusion that the objection in that case was jurisdictional. On a proper analysis there was no tension between *Tatneft* and the Judge's decision in this case, as the situations they addressed were markedly different. They were not two sides of the same coin as Mr Bastin suggested.

117. As to the investor-State awards relied on by CZR, Lord Verdirame made four broad points. First, none of them involved a tribunal in an arbitration seated in England, applying a similar provision to the one in this Treaty, where the question of characterisation arose, and where the tribunal turned its mind to how to resolve that question in the light of s.30 AA 1996. Even an award that fulfilled all those criteria would only have been of limited assistance, however distinguished the members of the tribunal might be. This is because of the second point, which is that, as the Judge pointed out, the investment treaty approach cannot be determinative of these issues because the question whether a dispute falls within the ambit of s.30(1) is ultimately a question for the court. Thirdly, if and insofar as any of the awards draw a distinction between temporal jurisdiction, standing, and substantive jurisdiction, which few do, that distinction is not based on an articulation of clear principles that could assist an English court in the task that it has to undertake. Fourthly, and allied to that point, the distinction between something which goes to substantive jurisdiction and something which goes to admissibility or standing does not generally matter to such a tribunal, unless it is seeking to deal with problems that might arise in the future when the award comes to be reviewed or enforced by a court. Therefore, when an international tribunal refers to something being a matter of "jurisdiction", that expression can embrace any or all of these concepts and will not necessarily relate to jurisdiction *ratione materiae*.

118. Lord Verdirame also made the point that in the awards relied on by CZR the language of the treaties, and in particular the dispute resolution provisions, differed from that of the BIT in the present case. However similar some of the clauses may appear, they were not identical. As to the awards on which particular reliance was placed, he submitted that neither *Phoenix* nor *Vöcklinghaus* assisted because there was no issue as to whether the tribunal had substantive jurisdiction to decide whether or not it had jurisdiction to accept claims made after divestment. In *Phoenix* there was no dispute as to the date of the divestment and no claim by the investor in respect of the period thereafter. In *Vöcklinghaus*, whilst there were statements in the award that on their face appeared to support CZR's contention that the issue as to whether a claim could be made after sale

of the investments was one of jurisdiction, the tribunal did in fact consider claims in respect of events that occurred after the date of the sale, and there was no jurisdictional finding in the dispositif section of the award.

119. In *Alcor* the objection related to whether Alcor was an investor at the time when the arbitration was commenced, since it had disposed of its investments some two years previously. In the relevant treaty the term "investor" was defined as "the Government of a Contracting State or any of its natural or juridical persons who invest in the territory of the other Contracting State." The language used there was in the present tense, and the tribunal held that the offer to arbitrate was not capable of being accepted by a person who had made an investment at some point in the past. However, the tribunal went on to acknowledge at [274] that there are cases in which an investor who has ceased to own the investment before the commencement of arbitration proceedings retains the capacity to accept the offer of arbitration, and that the question whether that is so will be necessarily fact-specific [275].

120. As to *Azerbaijan v Armenia* the objection was that the dispute was about something that occurred before the complainant state became a party to the Treaty. It was a temporal objection which was of a very different nature from the objection taken in the present case and could not assist in the characterisation exercise. Lord Verdirame pointed out that the characterisation of the objection as jurisdictional was not unanimous. Judge Tomka, a former president of the court, thought that the issue should have been characterised as one of admissibility, and Judge Cleveland agreed with him. She said that questions of jurisdiction essentially turn on the interpretation and application of a treaty's compromissory clause, whereas admissibility concerns the exercise of the Court's jurisdiction where that jurisdiction is already established. Lord Verdirame argued that Judge Cleveland's categorisation was to be preferred and that it clearly supported the contention that substantive jurisdiction depended on the interpretation of Article 9 of the BIT, which was how the Judge had approached the matter.

121. Lord Verdirame submitted that if international law characterisation of disputes as to standing was at all relevant to the exercise that the court had to carry out, objections as to standing are routinely characterised in international law as going to admissibility rather than substantive jurisdiction.

122. Finally, Lord Verdirame submitted that CZR itself had characterised the Stava June 2011 Objection as non-jurisdictional in its submissions to the Tribunal. He argued that the way in which a respondent to an arbitration puts its own objection is relevant to the question whether the objection has been made for the purposes of s.73(1) AA 1996, and thus must also be relevant to the question of whether or not the objection goes to substantive jurisdiction. We are not persuaded that this argument materially advanced Mr Stava's case.

*Discussion*

123. We consider that the Judge was right in his characterisation of the Stava June 2011 Objection. It is not a jurisdictional issue falling within s.30. We also consider that it is not open to CZR to raise the second variant of the objection.

124. The conventional analysis of arbitration clauses in treaties of this kind was set out by Lord Justice Laurence Collins in *City of London v Sancheti* [2008] EWCA Civ 1283 at [3]:

> "Typically under a BIT the investor is given direct standing to pursue his own claim against the state of the investment in respect of any "investment dispute". The arbitration provision in the BIT can amount to a standing offer to investors to arbitrate, and acceptance of this standing offer to arbitrate by an investor gives rise to a binding arbitration agreement between the investor on the one hand and the host state on the other."

125. As both variants of the objection would fall within s.30(1)(c), if they fall within s.30 at all, the court must determine (i) to whom the offer to arbitrate is addressed and (ii) the disputes to which the offer applies, which, as the Judge identified at [142], is ultimately a question of interpretation of the Treaty.

126. 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.

127. As to the disputes to which the offer applies, they are disputes between a Contracting party and a qualifying investor, i.e. a person who made a qualifying investment after 1 January 1950, "with respect to investments". The 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). All that it requires is that the subject matter of the dispute is "investments".

128. This interpretation is the natural interpretation of the language of Article 9 in accordance with the principles in Article 31 Vienna Convention, and neither the preamble nor Article 2 of the Treaty gives rise to any constraints upon it as CZR contends. There is no need to resort to either the requirement under Article 31(1) of the Vienna Convention to use good faith in the interpretation of the Treaty or to the requirement in Article 26 that the Treaty be performed in good faith in order for Article 9 to embrace a claim brought under Article 6 (or Art 5(d)).

129. If the investor parts with the investment, that will give rise to an issue as to standing/admissibility in respect of claims arising thereafter, which is properly characterised as a matter within the jurisdiction *ratione materiae* of the arbitral tribunal and outside the scope of s.30(1). Therefore a dispute as to whether the tribunal was entitled to consider a claim brought by Mr Stava for breaches occurring after June 2011 is not to be characterised as going to the tribunal's substantive jurisdiction.

130. We reject CZR's contention that the Judge's approach, which we endorse, is inconsistent with the approach adopted by international arbitral tribunals. The Judge's cautionary words at [132] to [133] of the judgment below, and in *Republic of Korea* v *Elliott Associates LP* [2024] EWHC 2037 (Comm) at [28] to [30], are well-founded. We 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. In *Phoenix* the issue which the tribunal decided was one of the scope of the treaty obligations, not whether it had jurisdiction to determine questions about the scope of the treaty obligations. It was not addressing "jurisdiction" in the sense used in s.30 AA 1996. The same is true of *Vöcklinghaus*, and indeed of all the remaining arbitration awards cited by CZR.

131. The objection under consideration in *Alcor*, which the tribunal in that case characterised as jurisdictional, was similar to variant 2 of the objection articulated by Mr Bastin, because the focus in that award was on the time at which the offer to arbitrate was accepted by the commencement of the arbitral proceedings. However, it is quite clear from [256] and [257] of the award 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" if he had parted with his investment over two years before the commencement of the arbitration.

132. The tribunal in that case obviously considered that it had jurisdiction to decide the dispute in relation to those matters, despite the fact that it characterised the objection as one pertaining to "jurisdiction" rather than the merits of the underlying claim. The tribunal was not addressing the issue with which we are concerned, and it is unnecessary to express a view on whether we would have come to the same conclusions. It is interesting to note, however, that at [263] the tribunal observed that:

> "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 the 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".

133. The case of *Azerbaijan v Armenia* dealt with a very different type of dispute, where there was no reciprocity at the relevant time because no obligations to Azerbaijan arose until after it became party to the Treaty. We consider it to be of no assistance on the issues with which we are concerned. As for *Tatneft*, it is distinguishable for the reasons given by the Judge. Moreover, in that case 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.

134. Turning to the question whether variant 2 is open to CZR, we have no doubt that it is not, irrespective of whether it was pleaded, as Mr Bastin contended, in paragraph 4 of the Amended Particulars of Claim. It is unnecessary to lengthen this judgment further by considering the detailed arguments about how that paragraph is to be interpreted or about how the pleaded arguments were narrowed when the Judge made his ruling about which of CZR's pleaded objections survived the s.73 challenge. Suffice it to say that at

[118] the Judge described the issues pleaded in CZR's Rejoinder, and identified two objections to "standing", and one objection to jurisdiction based on the Lawbook transaction [118(iii)], which:

> "in practical terms means that Mr Stava cannot assert any claim herein in respect of events that occurred *after June 2011*" and "*for the period after June 2011*, there is no basis on which the Tribunal could deem Diag Human SE to be a Swiss "investor"."
>
> (Emphasis added by the Judge).

135. At [122] (iv) and (v) the Judge recorded that the scope of the Koruna Trust and No Control objections (as defined in [63 (viii) and (ix)] which survived the s.73 challenge was not advanced on any wider basis than the Lawbook transaction – they relate to Mr Stava so far as claims from June 2011 are concerned, and to Diag SE's status as an investor. He then defined those two surviving objections at [123] in these terms:

> "(i) I will refer to the objection relating to Mr Stava's inability to claim in respect of conduct after June 2011 as **the Stava June 2011 Objection**
>
> (ii) I will refer to the objection relating to Diag SE's ability to claim if it was not Swiss after June 2011 as the **Diag SE June 2011 Objection."**

Consequently there was no objection to Mr Stava's status as an investor which survived the s.73 challenge, even if it existed previously, and the only objection to Diag SE's status as an investor was the one which is the subject of the third appeal.

136. The Stava June 2011 Objection cannot be widened into an objection to the position of Mr Stava *at the date of commencement of the arbitration*, and permission to appeal was not granted to CZR in terms which would enable it to raise this issue. The Appellant's Notice states that:

> "The Appellant wishes to appeal paragraph 1 of the order of Mr Justice Foxton dated 11 April 2024 insofar as it concerns the conclusion set out at paragraphs 145 to 147 of the judgment of Mr Justice Foxton dated 8 March 2024 that the objection that the Tribunal had no jurisdiction to consider a claim by Mr Stava in respect of conduct after June 2011 was not an objection to jurisdiction".

That mirrors the way in which the Stava June 2011 Objection was described in the judgment itself.

137. The relevant Ground of Appeal, Ground 1, which is the ground on which the Judge granted CZR permission to appeal, is couched in similar terms:

> "The learned Judge erred when he concluded that the objection that the Tribunal had no jurisdiction to consider a claim by Mr Stava in respect of conduct after June 2011 ("the June 2011 objection") was not an objection to jurisdiction. In particular the Court should have held that Article 9 of the Treaty does not contain an offer to a putative investor

> to arbitrate a dispute or claims in respect of conduct by the State taking place after that person no longer holds the relevant investment"

It then goes on to identify CZR's contention that the court should have held that Article 9 of the Treaty contains a limitation to the effect that claims for conduct at a time when the investor no longer held the investment should be excluded.

138. The argument was likewise presented in these terms to the Judge in CZR's skeleton argument for the permission hearing, which repeated the point about Article 9 and then stated that "various investment tribunals have held that they lacked jurisdiction to consider claims over conduct post-dating a transfer of the alleged investment." The skeleton argument goes on to state that this approach is *consistent* with the approach of BIT tribunals to *other questions of temporal jurisdiction* (our emphasis) and submits that "such tribunals regularly read a temporal limitation into provisions equivalent to Article 9, to the effect that the investment must be owned or controlled by the claimant on the date arbitral proceedings are commenced. This demonstrates that tribunals do read offers to arbitrate as being subject to implied limitation."

139. Variant 2 was thereby presented as something different from the Stava June 2011 Objection, and characterised as an illustration that, on CZR's case, it is possible to read certain categories of jurisdictional limitation into the arbitration provisions in a Treaty. It was not being run as a separate argument or raised as an alternative case.

140. We do not accept Mr Bastin's submission that the reference in the third sentence of the Ground of Appeal to an offer to a "putative investor" is a reference to variant 2. The expression "putative investor" was being used in the sense of someone who is assumed for these purposes to be an investor, i.e. a hypothetical investor. It comes nowhere near raising an argument that Mr Stava was not an investor capable of accepting the offer to arbitrate at the time when the proceedings commenced, because he had divested himself of his investments in June 2011. It is also impossible to read the third sentence disjunctively as dealing with two separate situations, namely, an offer to arbitrate a dispute and an offer to arbitrate claims in respect of conduct taking place after that person no longer holds the relevant investment, as Mr Bastin contended.

141. The Judge's observations recorded at [17] of the transcript of the hearing on consequential matters on 25 October 2024 do not support CZR's claim to be entitled to run this argument and in any event they can have no bearing on the scope of the ground for which permission was given months earlier.

*Conclusion on the second appeal*

142. For all these reasons, the second appeal is dismissed.

## The third appeal

*The issue*

143. The issue arising on the third appeal is whether, as a result of the placing of the shares in Diag SE in the Koruna Trust in 2011, Diag SE ceased to be controlled by Mr Stava, with the consequence that it no longer fell within the definition of "investor" in Article 1(1) of the BIT. Accordingly this appeal concerns the claim by Diag SE.

144. Article 1(1) of the BIT defined "investor" in the following terms:

> "(1) The term "investor" refers with regard to either Contracting Party to
>
> (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."

145. As a Liechtenstein company, Diag SE did not fall within paragraphs (a) or (b). It could only qualify as an investor if it fell within paragraph (c). Therefore it would qualify so long as it was directly or indirectly controlled by Mr Stava, a Swiss national, but not otherwise. (Diag SE sought to argue that Mr Stava's position could be considered collectively with that of his daughters, who were also Swiss, but no such case was run at the trial and it is too late to do so on appeal: it is in any event difficult to see what this would add). It is common ground that Mr Stava did control Diag SE until the transfer of the company's shares to the Koruna Trust in 2011, but CZR contends that he ceased to control the company within the meaning of Article 1(1)(c) as a result of that transfer. The Judge described this as "the Qualifying Investor objection".

146. The first issue on this appeal is whether control in Article 1(1)(c) requires control of a legal entity to arise from legal rights, or to derive to some extent from a proprietary interest in the legal entity concerned (which the Judge referred to as "*de jure* control"), or whether some form of practical control ("*de facto* control") would suffice. The Judge held that, if *de jure* control was required, the result of the transfer of the shares was that Mr Stava did not have control of Diag SE. In particular, he had no proprietary or other legal interest in the shares of Diag SE, which thenceforth were held by the trustee, a Liechtenstein entity, in a discretionary trust. Diag SE does not challenge that conclusion. However, the Judge went on to hold that in some circumstances *de facto* control would suffice and that Mr Stava did have sufficient *de facto* control of Diag SE for the company to qualify as an investor for the purpose of Article 1(1)(c).

147. CZR challenges these conclusions. Mr Graham Dunning KC for CZR submitted that Article 1(1)(c) requires *de jure* control. Alternatively, on the assumption that some form of *de facto* control is sufficient, Mr Dunning submitted that the facts found by the Judge did not satisfy Article 1(1)(c), in summary because the whole purpose of transferring the shares into a discretionary trust was that Mr Stava should have no proprietary interest in, or legal rights of control over, the shares and hence the company; Mr Stava held none of the economic attributes of ownership; and such factual control as he

exercised was not in his own right, but as an agent of the trustee, required to act in the interest of the trust.

148. It is common ground that this "Qualifying Investor objection" is an objection to the substantive jurisdiction of the arbitral tribunal within the meaning of s.30 AA. Accordingly, if the objection is well-founded, it is common ground that the award in favour of Diag SE was made without substantive jurisdiction and must be set aside. However, it is important to note the basis on which the objection comes to this court, as a result of the procedural history and the terms in which the Judge gave permission to appeal. The Judge held that the scope of the objection open to CZR was limited to the effect of events occurring between the transfer of the shares in Diag SE into the Koruna Trust in June 2011 and the end of the pledge arrangements put in place as an element of the Lawbook Transaction at the end of 2011. In the result, although formally the issue is whether Diag SE qualified as an investor when the arbitration was commenced in 2017, it is common ground that in this court this issue must be decided by reference to the position as it stood at the end of 2011, on the basis of the factual findings made by the Judge.

*The Judge's findings*

149. The Judge's detailed findings are set out in Annex 3 of the August judgment and have been summarised above. Based on those findings, the Judge stated his conclusions as follows:

> "170. I have set out my findings of fact, which include, for this purpose, my findings of Liechtenstein law, in Annex 3. My conclusions are as follows:
>
> i) Mr Stava made an investment in Diag SE and through Diag SE in the Czech Republic, for the reasons set out in my reasoning on the 'No Investment' challenge.
>
> ii) No investment was made by the Koruna Trust or the Trustee.
>
> iii) The Lawbook Transaction was not a genuine transaction but an attempt to create apparent distance between Mr Stava and Diag SE following indications from high levels within the Czech Government that this would be helpful to any attempt to resolve the dispute by negotiation.
>
> iv) Mr Stava's legal decision-making powers as chairman of Diag SE, holder of the bearer shares in Diag SE and as Protector of the Koruna Trust:
>
> a) were not, in the first two instances, held in his own right; and
>
> b) in each case, were not exercisable solely by reference to his own interests, but only in what Mr

Stava believed to be the best interest of Diag SE / the Koruna Trust (as appropriate).

That was also true of the Trustee's powers.

v) There was no realistic possibility of a conflict of interest between Mr Stava's own interests and those of the Koruna Trust in relation to the conduct of Diag SE's only business, its attempt to enforce the Commercial Arbitration Award. In relation to that matter, the Trustee was entitled to and did leave the enforcement efforts to Mr Stava (who also funded them).

vi) There was no realistic possibility of the Trustee or any other member of the Class of Beneficiaries disagreeing with or seeking to challenge any decision taken by Mr Stava in the conduct of Diag SE's business.

vii) The Trustee of the Koruna Trust had the legal right to sell the shares in Diag SE, where the Trustee formed the good faith view that such a sale was in the business interests of the Koruna Trust and was a prudent business judgement, but it is virtually inconceivable that it would have followed such a course if Mr Stava opposed it. Had the Trustee been intent on pursuing such a sale in defiance of Mr Stava's wishes, I am satisfied that Mr Stava's daughters would have supported him in removing the Trustee in the exercise of his powers as Protector and/or appointing himself as Trustee together with a Liechtenstein-domiciled trustee, and that Mr Stava would have been able to act so as to prevent a sale which he opposed consistent with his duties as Protector.

viii) Mr Stava had a legal power to prevent the Trustee adding or removing members of the Class of Beneficiaries, to be exercised in what he believed to be the best interests of the Koruna Trust.

ix) As the Settlor and a member of the Class of Beneficiaries, Mr Stava would have had significant influence over any decisions by the Trustee to add or exclude members of the Class of Beneficiaries or to make a distribution. However, he had no legal right to require the Trustee to act in certain way, and the Trustee would not have automatically followed Mr Stava's wishes but would have had regard to all relevant circumstances.

> x) In the circumstances prevailing in January 2012, Mr Stava's three daughters would have supported his wishes as to the eligibility of Beneficiaries or the distribution of assets from the Koruna Trust (albeit they were under no legal obligation to do so), and in those circumstances it is virtually certain that the Trustee would have formed the perfectly proper professional judgement that it should act in the manner supported by the Stava family. Had the Trustee refused to do so, there is a high likelihood that Mr Stava's daughters would have supported him if he had decided to remove the Trustee and/or appoint himself as trustee together with a Liechtenstein-domiciled trustee (although they were under no legal obligation to provide such support).
>
> xi) It is not fanciful to suppose that there could be circumstances in which there would be a disagreement within the Class of Beneficiaries as to how assets should be distributed from the Koruna Trust. In that eventuality, it is not possible to determine how the Trustee would have acted or whether the Trustee could have been removed. It would all depend on the circumstances.
>
> 171. The effect of these factual findings is that if Article 1(1)(c) of the BIT requires control of a legal entity to arise from legal rights, or to derive to some extent from a proprietary interest in that legal entity (which I shall refer to by the shorthand '*de jure* control'), then Mr Stava did not have it. If, however, *de facto* control might in some circumstances be sufficient, then further analysis is required."

150. The Judge's reasons for concluding that *de jure* control was not required, set out at [213] to [215] of the August judgment, can be summarised as follows:

(1) The ordinary meaning of the word "control" embraces control in fact as well as control through the exercise of legal rights.

(2) That conclusion is supported by the majority of the investment treaty arbitration jurisprudence to which the Judge was referred.

(3) It also gives priority to substance over form, reflecting the "realities of control of the investor and the economic sense of the investment", and promotes the object of the BIT as recorded in its Preamble.

(4) Article 1(1) itself evinces a preference for substance over form in paragraph (b), with its requirement of "real economic activity".

(5) The preference for substance over form has also influenced investment treaty arbitration tribunals.

(6) It would be artificial to confine the question of control to control through the exercise of legal rights, because control will often arise through a combination of the particular facts and the availability of legal rights; once it is accepted that there is some scope to have regard to matters going beyond the exercise of legal rights, it becomes impossible to hold the line that control in Article 1(1)(c) means only control through the exercise of legal rights.

151. As this summary demonstrates, a major strand in the Judge's reasoning was that *de jure* control was a matter of form, while *de facto* control was a matter of substance.

*The principles of interpretation*

152. Whether *de jure* control by a national of a Contracting Party is required in order to satisfy Article 1(1)(c) is an issue of interpretation of the BIT. As the BIT is a treaty between two states, this issue must be determined by reference to principles of public international law. The applicable principles of interpretation are those set out in Article 31 of the Vienna Convention (see [94] above).

153. Neither party suggested that there was any agreement or instrument relating to the BIT made between Switzerland and Czechoslovakia in connection with the conclusion of the treaty, other than the BIT itself; or that there was any relevant subsequent agreement or practice; or that the parties to the BIT intended that "control" should have any special meaning. Further, although Article 32 permits recourse in some cases to "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion", it was not suggested that there are any such supplementary means which are relevant here.

154. Accordingly Article 1(1)(c) of the BIT must be interpreted (1) in good faith (2) in accordance with its ordinary meaning (3) in its context, which includes the terms of the BIT as a whole and (4) in the light of the object and purpose of the BIT. However, although we have for ease of exposition broken down the various elements of the interpretation exercise, reflecting some of the submissions made to us, it is important to say that interpretation is "a single combined operation", as the Supreme Court explained in *JTI Polska Sp Z.o.o. v Jakubowski* [2023] UKSC 19, [2024] AC 621:

> "26. Article 31 focuses on seeking to ascertain the ordinary meaning of the relevant terms of the treaty having regard to their context and the object and purpose of the treaty. This is to be done by reference to the text of the treaty and to the material set out in article 31.2 to 31.4, such as its preamble, as a 'single combined operation'.
>
> 27. As Lord Kerr of Tonaghmore explained in *Moohan v Lord Advocate* [2014] UKSC 67; [2015] AC 901, para 64:
>
> > "It would be wrong to read article 31 as reflecting something like the so-called 'golden rule' of statutory interpretation where one starts with the ordinary meaning of the words and then moves to other considerations only if the ordinary meaning would give rise to absurdity. That is not international law. The International Law Commission made clear in its

> commentary to the draft treaty, at p 219, that, in accordance with the established international law which these provisions of [the Vienna Convention] codified, such a sequential mode of interpretation was not contemplated: 'The commission, by heading the article 'General rule of interpretation' in the singular and by underlining the connection between paras 1 and 2 and again between para 3 and the two previous paragraphs, intended to indicate that the application of the means of interpretation in the article would be a single combined operation'."

*Interpretation of Article 1(1)(c)*

*The function of the definition of "investor"*

155. It is convenient to begin by considering the function of the definition of "investor" in Article 1(1) and the place of paragraph (c) in the scheme of the Article.

156. The function of the definition is to identify those who are entitled to benefit from the protection provided by the BIT, for example to be treated fairly and equitably (Article 4), to benefit from the free transfer of returns on investments and the proceeds of any sale (Article 5), and to hold their investments free of expropriation or nationalisation unless effective and adequate compensation is paid (Article 6). Those rights are enforceable by arbitration pursuant to Article 9, so the definition also identifies the persons to whom the offer of arbitration contained in that Article is made.

157. All this suggests that an investor should be someone to whom returns from making the investment will flow, typically as a result of their ownership of the investment. If the profitability of the investment is impeded by unfair and inequitable treatment by the host state, it is to be expected that the person entitled to make a claim for compensation would be a person who would have been entitled to receive those profits – typically, in the case of a company, the owner of the shares. Similarly, if the assets comprising the investment are expropriated without compensation, it is to be expected that a claim in arbitration will be brought by the owner of the assets in question. Thus, although Article 1(1) does not refer to ownership in terms, that concept is inherent in the function of the definition of "investor". If neither the entity making the investment nor its beneficial owners are Swiss or Czechoslovak, it is difficult to see why the Contracting States should have wished to confer on them the benefits of the BIT. The fact that the management or administration of the entity is carried out by Swiss or Czechoslovak nationals should make no difference.

158. As the BIT is a treaty between Switzerland and Czechoslovakia, later divided into the Czech and Slovak Republics, for the promotion and reciprocal protection of investments by nationals of one party in the territory of the other, it would obviously be expected that those intended to benefit from the treaty would be natural or legal persons of the Contracting States. If natural or legal persons of third states were to benefit from the protection of the BIT, that would not accord with the principle of reciprocity on which the BIT is founded. The first two paragraphs of Article 1(1), dealing with natural persons and legal entities respectively, give effect to this reciprocity.

159. Paragraph (c), however, goes further. It extends the protection of the BIT to any legal entity established under the law of any country in the world, with the proviso that the entity must be directly or indirectly controlled by a natural person who, or legal entity which, if they were the investor, would qualify under paragraph (a) or (b). That being so, the interpretation of paragraph (c) should not be approached with any predisposition to conclude that a legal entity of a third state should qualify as an investor for the purpose of the BIT – or, in other words, to give an extended meaning to the concept of control. Rather, the paragraph should be seen as an exception to the principle of reciprocity. After all, if a prospective investor of a third state does not qualify under paragraph (c), a solution is readily available, as the investment can be made by a legal entity which does qualify under paragraph (b).

*Good faith*

160. Although both parties emphasised, and we accept, that a treaty must be interpreted in good faith, which has an autonomous international law meaning, we do not consider that this principle materially advances the resolution of the present issue.

*The ordinary meaning of control in Article 1(1)*

161. We can readily accept that the word "control" or "controlled", considered in isolation, is capable of referring to *de jure* or *de facto* control. However, to consider the meaning of "controlled" in isolation would be the wrong approach. When the word is considered in its place in Article 1(1), there are several indications in the Article itself that paragraph (c) is concerned with legal control. Thus paragraph (a), identifying the natural persons who are entitled to the benefit of the protection afforded by the BIT, refers to those who are nationals of a Contracting Party "in accordance with its laws". Nationality is inherently a legal concept and those who qualify under paragraph (a) do so because they have a legal right as a national of a Contracting Party. There was some suggestion that persons holding dual nationality would not necessarily qualify under paragraph (a), but that seems obviously wrong. A person who is a national of Switzerland or the Czech Republic in accordance with Swiss or Czech law qualifies under paragraph (a) regardless of whether they are also a national of another state.

162. Similarly, paragraph (b) refers to "legal entities … which are constituted or otherwise duly organized under the law" of a Contracting Party. Although the net is spread widely and non-exhaustively over the kinds of entities which may benefit from the BIT ("including companies, corporations, business associations and other organizations"), the limiting factor is that such entities must be of a "legal" nature (i.e. with legal personality) and recognised as such by the law of the Contracting Party in which they have their "seat", which is also a legal concept. It is true that there may need to be a factual enquiry whether the legal entity has "real economic activities" in the territory of that Contracting Party, but that is a provision which limits rather than expands the protection provided by the BIT by ensuring that legal entities which have no such real activity do not benefit from it.

163. It is therefore to be expected that paragraph (c) would also be concerned with legal rights. That paragraph extends the definition of "investor" to "legal entities established under the law of any country" which are "directly or indirectly controlled" by those falling within paragraphs (a) or (b). This gives some indication, in our judgment, that

the control to which the paragraph refers is control which exists by virtue of a legal right under the law applicable to the legal entity in question.

*The Protocol*

164. While this indication would not be conclusive if the terms of Article 1 stood alone, the position does become clear in the light of the clarification of Article 1 provided by the Protocol, which forms an integral part of the BIT. It provides:

> "Protocol
>
> On signing the Agreement between the Czech and Slovak Federal Republic and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments, the undersigned plenipotentiaries have, in relation to Article 1, agreed on the following clarification, which shall be regarded as an integral part of the said Agreement.
>
> (1) an investor according to Article 1, paragraph (1), letter © [*sic*.] may be required to submit proof of such control in order to be recognized by the Contracting Party in the territory of which the investment has been or is to be made as an investor of the other Contracting Party. …"

165. The BIT does not spell out the circumstances in which proof of control may be required or the legal consequences of being "recognised" as an investor. It is fairly obvious, however, that the purpose of this provision is to provide a procedure to give comfort to an existing or potential investor that they do or will benefit from the protection provided by the BIT. Three conclusions follow.

166. First, if recognition as an investor is to serve any purpose, it must mean that the host state cannot renege on the recognition which is given, at any rate unless the position changes materially. The recognition is therefore meaningful if the proof of control to be provided is concerned with the legal structure by which the third country entity is controlled by a person who would qualify as an investor under paragraph (a) or (b). Such a legal structure will be fixed and, unless the investor chooses to change it, the investor can rely on the recognition which has been given throughout the life of the investment. That suggests that what is contemplated is proof of *de jure* control. Conversely, if control depends upon a factual enquiry, the recognition will be of little or no value as the facts amounting to *de facto* control are always susceptible to change over the life of the investment and the parties will not know how they stand.

167. Second, if the provision is to be workable, it must contemplate a relatively straightforward administrative procedure by which "proof of such control" is submitted and the host state either confirms or declines to confirm the investor's status. It does not contemplate the kind of proof which might be provided in an arbitration, with extensive disclosure and witness statements. The procedure will be viable, at least in typical cases, if what is required is proof of *de jure* control. Although proof of *de jure* control may be complex in some cases, depending on the structure adopted, in general the investor will provide that proof by producing relatively few documents, such as share certificates or an entry in a public register (and an investor can hardly complain

that, the more complex the structure, the less likely it is that recognition will be given). The procedure will not be viable if an investor can satisfy the requirement by having only *de facto* control which is not readily verifiable. The parties to the BIT cannot have contemplated that the procedure could apply in circumstances such as those of the present case (a Liechtenstein company owned by a Liechtenstein trust, but with some kind of unspecified evidence that in practice, but not in law, the Liechtenstein trust would act in accordance with the wishes of a Swiss national or that the Swiss national would in practice be able to control the destination of the returns on the investment).

168. Third, the Protocol contemplates that proof of control and thus recognition as an investor may be sought before any investment has been made. That is probably the most obvious circumstance in which this procedure would be invoked: a legal entity not organised under the law of the other Contracting Party is contemplating a potential investment and wants to know whether, as it is currently structured, it will benefit from the protection of the BIT. At that stage, the putative investor may not even have been incorporated and there may be no "facts" in existence which can be provided to prove *de facto* control. But it will be relatively straightforward to explain the proposed legal structure of the putative investor, traced back to a Swiss national or a Swiss legal entity, and to obtain a decision about recognition which can be used as the basis for an investment decision. The effective operation of the Protocol will therefore benefit both parties: the prospective investor will have the comfort that its status as an investor is recognised, while the host state will know that if it is able to afford recognition to a prospective investor, the investment in question is more likely to be made; conversely, if the host state declines to afford recognition, or if the enquiry required in order to do so is too convoluted, the investment may not be made.

169. Thus the Protocol is likely to be of practical value if the control referred to in Article 1(1)(c) is *de jure* control. It is likely to be unworkable if what is referred to is *de facto* control.

170. The Judge considered that the text of the BIT "offers relatively little guidance as to what the concept of 'control' involves" and regarded the reference to "proof" in the Protocol as neutral, saying that "*de facto* as well as *de jure* control can be 'proved'." No doubt *de facto* control can be proved after the event, although not necessarily in advance, in an arbitration or in court proceedings lasting several days and with the benefit of factual evidence. But that is not what the Protocol contemplates. For the reasons we have given, we consider that the text of the BIT points strongly towards an interpretation of control in Article 1(1)(c) which requires *de jure* control which can in most cases be readily proved by a straightforward administrative procedure.

*The object and purpose of the BIT*

171. That interpretation accords also with the object and purpose of the BIT, which is stated in the Preamble. This reads as follows:

"Preamble

> The Czech and Slovak Federal Republic and the Swiss Confederation,

> Desiring to intensify economic cooperation to the mutual benefit of both States,
>
> Intending to create and maintain favourable conditions for 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.
>
> Considering the Final Act of the Conference on Security and Cooperation in Europe,
>
> Have agreed as follows: …"

172. The procedure envisaged by the Protocol is also important here. Investments are more likely to be made, thereby intensifying economic cooperation and fostering the economic prosperity of both states, if it is known in advance that a prospective investor will qualify under Article 1(1). Uncertainty and unpredictability are inimical to investment decisions. A predictable and clear test of control provides certainty for the investor and the host state alike. That would be an important consideration even without the Protocol, but the availability of a special contractual procedure to obtain recognition as an investor, even if the way in which it is to work is not spelled out, is particularly significant. It promotes certainty and predictability and thereby furthers the achievement of the object and purpose of the BIT.

*The importance of certainty and predictability*

173. The Judge appeared to acknowledge at [186] that a test of *de facto* control was "sufficiently vague as to be unmanageable", citing the award in *Aguas del Tunari SA v Republic of Bolivia*, ICSID Case No ARB/02/3 (21 October 2005). He described this as "a forensically powerful point against a requirement of factual control". In the *Aguas del Tunari* case the definition of "investor" was in materially the same terms as the definition in the Switzerland/Czechoslovakia BIT with which we are concerned, although there was no equivalent of the Protocol. The issue was slightly different, being whether "control" required only the legal potential to control the investor (the claimant's case) or whether there had in addition to be the actual exercise of such control (the respondent's case). The tribunal concluded that the ordinary meaning of "control" or "controlled" would encompass both the actual exercise of powers or direction over the company and the rights arising from the ownership of shares, but (applying Article 31 of the Vienna Convention) that the object and purpose of the BIT, to stimulate the flow of capital and technology, and the context in which the phrase "controlled directly or indirectly" was used, pointed towards control being a quality of the ownership interest in the company. That was because the function of the definition of "investor" was to define the scope of persons and entities to be regarded as the beneficiaries of the substantive rights of the BIT and also those to whom the offer of arbitration in the BIT was directed. If control was divorced from ownership, that would enable a company to make a claim under the BIT when the beneficiaries of that claim, i.e. the owners of the company, need not be nationals of a Contracting Party to the BIT.

174. The tribunal identified three reasons for accepting the claimant's case:

> "245. First, Claimant's view that 'control' is a quality that accompanies ownership finds support generally in the law. An entity that owns 100% of the shares of another entity necessarily possesses the power to control the second entity. The first entity may decline to exercise its control, but that is its choice. …
>
> 246. Second, Respondent's argument that 'control' can be satisfied by only a certain level of actual control has not been defined by the Respondent with sufficient particularity. Rather, the concept is sufficiently vague as to be unmanageable. … The difficulty in articulating a test in the Tribunal's view reflects not only the fact the Respondent did not provide such a test, but also the possibility that it is not practicable to do so and that, as discussed in the next paragraph, the resultant uncertainty would directly frustrate the object and purpose of the BIT.
>
> 247. Third, the uncertainty inherent in Respondent's call for a test based on an uncertain level of actual control would not be consistent with the object and purpose of the BIT. The BIT is intended to stimulate investment by the provision of an agreement on how investments will be treated, that treatment including the possibility of arbitration before ICSID. If an investor cannot ascertain whether their ownership of a locally incorporated vehicle for the investment will qualify for protection, then the effort of the BIT to stimulate investment will be frustrated."

175. We find this reasoning compelling. It is given added force when applied to the Switzerland/Czechoslovakia BIT in the present case which does contain the Protocol. In our judgment the Judge was right to regard a test of *de facto* control as vague and unmanageable. Whether a person has *de facto* control of a legal entity may depend upon a variety of ephemeral and temporary considerations, including such matters as the force of their personality, their relationship with the legal owners and shifting social or economic circumstances. Indeed, whether a person has *de facto* control of a legal entity all depends on what is meant by *de facto* control. Once it is recognised that the function of the definition of "investor" is to identify those who are entitled to the protection afforded by the BIT and to whom the offer to arbitrate is made, it is apparent that, as the *Aguas del Tunari* tribunal said, control is a quality which accompanies the ownership interest in the company, and that ownership is a legal rather than a *de facto* concept.

176. In *The International Law of Investment Claims* (2009) Professor Zachary Douglas discussed the concept of control in the context of a clause very similar to Article 1(1) (but again with no equivalent of the Protocol) in terms which drew upon the *Aguas del Tunari* award. He said:

> "556. The question is then how to define 'control' for the purposes of satisfying the requisite nexus between the claimant and the investment. In giving effect to the ordinary meaning of

> the word 'control' or the implicit requirement that mirrors it, reference must be had to general principles of property law and company law. An assertion that the meaning of control in the investment treaty context is *sui generis* and thus can be tailored by a tribunal to meet the exigencies is of a particular case must be treated with scepticism. The majority of investment treaties say nothing about the indices of control and international law in general does not purport to regulate the relationship between an individual or legal entity and its assets. Moreover, such an approach undermines the role of the investment treaty as an instrument for the encouragement of investment because the critical issue of whether the investment of the putative investor is covered by the treaty will be incapable of resolution at the investment planning stage. …
>
> 558. This discussion of the relationship between an individual or legal entity (the claimant) and its investment (property or assets) reveals that the question of control is a question of law. It would be meaningless for a claimant to assert that it is the *de facto* owner of the land that constitutes its investment or has some other form of *de facto* control in respect thereof. Either the claimant has a power to control the property that is recognised by the *lex situs* or it does not."

177. The Judge cited this passage but was unimpressed, saying at [203] that Professor Douglas's approach had not been followed in many of the investment treaty awards to which he had been referred and that his views were controversial. That may be so, but we find the analysis convincing and have not been referred to anything in the investment treaty jurisprudence which calls it into question. The Judge said also at [215(ii)] that Professor Douglas was addressing a different issue. We do not agree with this. It seems to us that Professor Douglas was addressing the same issue as that with which we are concerned, albeit by reference to a similar clause which did not have the clarification provided by the Protocol.

178. The Judge did acknowledge (at [213], referring back to [186]) that "limiting Article 1(1)(c) to control exercised through legal rights would offer a simpler solution". However, he did not follow through the logic of what he had said at [186] and [213] in his interpretation of the Article. In this respect, he was in our judgment in error.

179. Dr Kate Parlett, who dealt with the meaning of "control" in Article 1(1)(c) on behalf of Diag SE was unable to explain how the Protocol procedure could operate in a case where the investment had yet to be made if the control referred to was *de facto* control. She submitted instead that there was no evidence that this procedure had ever been invoked in practice, and that the legal consequences of recognition were not spelled out in the Protocol. That may be so, but the submission misses the point. The point is that the Protocol procedure is provided for in the BIT and must therefore have been intended to be available; that the parties plainly contemplated that recognition as an investor would be of practical value to a prospective investor and would thereby promote the object and purpose of the BIT; that (even if not achievable in every case) this is more likely to be achieved if control means *de jure* control, but not if it means *de facto*

control; and that the Protocol therefore sheds important light on what the parties to the BIT meant by control.

180. Dr Parlett was constrained to submit that there was no basis on which to say that it was an object and purpose of the BIT to provide certainty and predictability. We reject that submission without hesitation. Certainty and predictability are precisely what the Protocol is intended to provide, and that object is best achieved by interpreting control as meaning *de jure* control.

181. This is illustrated by the example which Dr Parlett gave in support of a submission that *de facto* control would not have been difficult to prove. She submitted that if Mr Stava had been asked to provide proof of control of Diag SE, he could either have arranged for the shares to be transferred to himself personally (as in fact he did in May 2024) or could have appointed himself or a company under his control as trustee of the trust. Leaving to one side the point that Liechtenstein law required that there should be at least one Liechtenstein trustee, for Mr Stava to have answered a request for proof of control by showing that he was the owner of the shares, or by appointing a company under his control as trustee, would have been proof of *de jure* rather than *de facto* control. A Czech official considering whether to recognise Diag SE as an investor could be expected to afford such recognition when shown that Mr Stava, a Swiss national, was the owner of the shares. But he could hardly be expected to do so merely on Mr Stava's assertion that he was in a position to procure the transfer of the shares to himself if he wanted to do so.

*Form over substance?*

182. As we have pointed out, an important theme of the Judge's reasoning was that to interpret "control" as referring to *de jure* control would give priority to form over substance. We do not accept this. A search for the "substance" of control which disregards the legal rights involved is inherently uncertain, as we have already explained. But in any event, there is in our judgment nothing formal about having ownership of, or the legal right to control, an asset.

183. That proposition can usefully be tested by reference to the facts of the present case. Mr Stava's evidence was clear and consistent that the transfer of the shares in Diag SE to the Koruna Trust was carried out for the purposes of succession planning (so that in the event of his death, the shares would not form part of his estate and therefore would not be subject to the mandatory inheritance laws of Liechtenstein) and asset protection (so that the shares would be protected from claims by his alleged creditors). It was essential for the achievement of these purposes that Mr Stava did not have any ownership interest in, or control over, the shares. The fact that the shares were transferred into a discretionary trust in which the potential beneficiaries, who included Mr Stava, had no legal rights of ownership or control, was not a matter of form. It was a matter of substance and was critical. The trust was valid and effective under Liechtenstein law to achieve these purposes, but only because of the transfer of legal rights.

184. The Judge was concerned that, if "control" refers to *de jure* control, a change in the nationality of a professional service provider, such as a trustee, would mean that an entity which hitherto fell within Article 1(1)(c) no longer qualified as an "investor". He said at [216(vii)] that this was an "improbable consequence" and regarded this example as supporting his view of "substance over form". We respectfully disagree. A change

in the nationality of a trustee will be a matter of considerable importance for a trust, requiring careful legal advice (cf *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108, where the appointment of United Kingdom residents to replace non-resident trustees had major tax consequences). It cannot be brushed aside as a matter of mere form.

*The investment treaty jurisprudence*

185. As we have noted, one pillar of the Judge's reasoning was that the majority of the investment treaty jurisprudence to which he was referred acknowledged that *de facto* control could be sufficient in some circumstances to satisfy a requirement such as that contained in Article 1(1)(c). The Judge conducted an extensive review of that jurisprudence between [177] and [211]. However, we do not propose to repeat that exercise, which is neither necessary nor helpful. This is for several reasons.

186. First, there is no rule of precedent in public international law and the awards cited are only as valuable as the cogency of their reasoning. Second, while the Judge may well be right that the majority of the awards cited do not insist that control should exist by virtue of a legal right, there is a minority view (we have already referred to the *Aguas del Tunari* award and the writing of Professor Douglas), so it cannot be said (and it was not suggested) that there is a settled consensus on the point in international law. Third, none of the cases to which we were referred contained any equivalent of the Protocol, which is (as already explained) an important distinguishing feature of the present case. Fourth, in some of the awards the definition of "investor" referred, not to control *simpliciter*, but to "effective control", a concept which is clearly capable of permitting factual enquiry but which in any event is different from control *simpliciter*: the word "effective" must be intended to add something. Fifth, in some cases the treaty in question will contain a definition of what is meant by "control", but such a case cannot assist in the present case where there is no such definition. For example, Dr Parlett relied on Article 1(6) of the Energy Charter Treaty, to which both Switzerland and CZR are parties, which provides that "control of an Investment means control in fact, determined after an examination of the actual circumstances in each situation …". She submitted that some arbitral tribunals have relied on such a provision to determine the meaning of "control" in a treaty which contains no such definition. We do not find this a helpful approach, not least as each party was able to point to treaties which contained definitions said to support its case. Reference to such treaties shows only that there is no uniform understanding in public international law of what is meant by "control" in investment treaties. It is therefore necessary to interpret each treaty in accordance with the principles set out in Article 31 (and, where relevant, Article 32) of the Vienna Convention.

187. In these circumstances we invited Dr Parlett to identify what she regarded as her best case for a statement of the relevant principles. Initially she selected the award in *Von Pezold v Republic of Zimbabwe* (ICSID Case No. ARB/10/15) dated 28 July 2015, but on further reflection preferred the award in *B-Mex LLC v United Mexican States* (ICSID Case No. ARB(AF)/16/3) dated 19 July 2019. We therefore propose to examine both those cases.

188. In *Von Pezold* the relevant provision of the Switzerland/Zimbabwe BIT was broadly equivalent to Article 1(1)(c), but it referred to legal entities which were "effectively" controlled by natural persons or legal entities of the other Contracting Party. As we have explained, that is a material distinction. One group of claimants was known as

"the Border Claimants". They claimed to have been effectively controlled by Elisabeth von Pezold, a Swiss national, as a result of her factual and legal control of the companies. The evidence was that although Elisabeth held some shares, members of her family would vote their shares in accordance with her wishes. The claimants' case was that "the term 'effective control', although not defined in the Swiss BIT, means 'real control', as opposed to the mere appearances of control; it encompasses direct and indirect control, so long as it is effective", and that this evidence demonstrated effective control. The arbitral tribunal accepted this case, dismissing Zimbabwe's assertion "that only theoretical control has been made out". So far as we can see, and with respect, the award contains no analysis of principle. It was a decision on the facts and was concerned with a clause somewhat different from that with which we are concerned.

189. In the *B-Mex* case the relevant provision of the BIT provided that an investor might submit a claim to arbitration on behalf of an enterprise of another party that the investor owned or controlled directly or indirectly. The claimants submitted a claim on behalf of Mexican companies and the issue was whether they owned or controlled those companies directly or indirectly. The arbitral tribunal held that "control" could mean both the legal capacity to control and *de facto* control, so that the test would be satisfied if the claimants were able to exercise *de facto* control even without owning a number of shares sufficient to confer the legal capacity to control the companies. It regarded this as being the ordinary meaning of the term "control", while acknowledging (as ultimately Dr Parlett also acknowledged) that proof of *de facto* control "will typically, and logically, present a greater evidentiary challenge". In the event, however, the tribunal found that the claimants did have the legal capacity to control the Mexican companies, so that the question of *de facto* control did not need to be addressed further.

190. Although the Judge did not find Professor Douglas's writing helpful, he did rely on Professor Schreuer's *Commentary on the ICSID Convention*, 3rd Edition (2022), stating that "control is a flexible concept, which can only be determined case by case in the light of the particular facts" and that "While it can be grounded on formal, legal control through ownership, it can also derive from other factors such as operational management and expertise". Professor Schreuer continued:

> "330. Overall, the case law on these various provisions dealing with the concept of control demonstrates that arbitral tribunals have shown a high degree of flexibility. In order to determine control, they have, in addition to formal ownership, looked at criteria such as powers of management and operation of the investment, as well as expertise. What matters to establish control are not formal parameters, like the existence or amount of ownership, but the actual ability to direct the action of the controlled investment."

191. This may be an accurate summary of what some arbitral tribunals, perhaps the majority, have in fact done. But this approach is problematic, at any rate if it were to be applied to Article 1(1)(c) in the present case. To treat operational and management powers, let alone such matters as expertise, as indicia of control for the purpose of the definition of investor takes no account of the function of such a definition in a BIT. For example, a CEO may have "the actual ability to direct the action" of a company, but be remunerated by a salary which gives him no stake in the company's assets. Or the company's business may consist of exploiting an invention made by an employee in its research

department, also remunerated by a salary. It would be surprising if the mere fact that a company's CEO (let alone the employee in the research department) was Swiss enabled the company, which otherwise had no Swiss connection, to benefit from the protection of the BIT.

192. More generally, the higher the degree of flexibility applied by arbitral tribunals, the harder it will be to predict which entities will qualify as investors and which will not, thereby frustrating the object and purpose of a typical BIT, which is to encourage investment. Dr Parlett accepted that, in the CEO example, the company concerned might not qualify as a Swiss investor, because an assessment "in the round" would be required, weighing all the relevant factors in the case. As she put it, "it's the package really rather than one factor in isolation". That is inevitably so if there is indeed a broad test of *de facto* control, but this only serves to emphasise the vague and unmanageable nature of such a test.

*Conclusion*

193. For these reasons we would hold, drawing together the various elements which need to be considered under Article 31 of the Vienna Convention in a "single combined operation", that to qualify as an investor under Article 1(1)(c), a third country legal entity must be controlled *de jure* either by a Swiss national or by a legal entity which, if it were the investor, would qualify under paragraph (b).

194. Mr Dunning's primary case was that, in the case of a company, *de jure* control will be established by ownership of a majority of the shares. However, he was prepared in the alternative to say that "relative control", for example control by the single largest shareholder, would be sufficient in some circumstances if combined with other factors, even if that shareholder did not hold more than 50% of the shares. Strictly, it is unnecessary to decide between the primary and the alternative case. As Mr Stava did not have *de jure* control of Diag SE in either sense, he was unable to satisfy either requirement. We acknowledge, however, that much of our reasoning, in particular the importance of certainty and predictability and the application of the Protocol, favours the primary case.

195. Accordingly this appeal must be allowed and the award in favour of Diag SE must be set aside. We go on, however, to consider the second ground of appeal, which is whether, on the assumption that *de facto* control may in some circumstances be sufficient to satisfy Article 1(1)(c), the control which Mr Stava in fact exercised was sufficient to do so.

*Did Mr Stava have de facto control of Diag SE?*

196. If, as the Judge concluded but contrary to what we have decided, *de facto* control may in some circumstances be sufficient to satisfy Article 1(1)(c), it is necessary to consider what those circumstances are and whether they existed at the end of 2011 in the present case. Once again, it is necessary to bear in mind the function of the definition of "investor", which is to identify who is entitled to the protection of the BIT, which suggests that the "control" referred to in Article 1(1)(c) is control of the economic interest in the entity in question, as distinct from control over the conduct of the entity's business.

197. This distinction was conveniently explained in the *Gramercy Funds Management LLC v Republic of Peru* award dated 6 December 2022:

> "631. How does an investor exercise control over an enterprise or corporation, be it in the home State or in the host state?
>
> 632. Corporations are organized at two levels – that of the owners and that of the administrators (e.g. in a joint stock corporation, the general shareholders meeting and the board of directors). Each level constitutes a separate organ but cross-participation is frequently permitted (e.g. in joint-stock companies shareholders may act as members of the board of directors).
>
> 633. Owners (be they known as partners, shareholders or members) are those who contribute the funds required for the corporation's development, stand to benefit or suffer from the entity's activities, and receive the remaining funds upon the corporation's liquidation.
>
> 634. The administrative organ (be it a sole manager, a general partner or a board) manages the affairs of the corporation and designates its officers; administrators and officers are both the corporation's servants, authorized by the owners or the founding documents to adopt decisions on the corporation's behalf and in his interest. Administrators and officers normally receive remuneration for their services (which may or not be linked to the company's profits) and may or may not be subject to dismissal by the owners; what separates owners and administrators/officers is the business risk; that ultimate risk is always borne by the owners.
>
> 635. Control of the corporation can only be exercised at the level of its owners – not at that of its administrators or officers. The owners, and not the administrators or officers, have an ownership interest in the company, and the owners are those who suffer the loss. The Treaty grants protection to assets owned or directly or indirectly controlled by an investor, reinforcing the conclusion must be exercised at ownership level."

198. In considering the issue of *de facto* control, therefore, we are concerned with *de facto* control of the economic interest in Diag SE rather than control of the business activities of the company.

199. The Judge's reasons for concluding that Mr Stava had *de facto* control of Diag SE of a kind which satisfied Article 1(1)(c) were as follows:

> "216. In this case, I am satisfied that Mr Stava had *de facto* control of Diag SE of a kind which satisfied Article 1(1)(c):

i) Mr Stava was materially (and indeed determinatively) influential in the conduct of Diag SE's business from the date it was settled into the Koruna Trust until the end of 2011 (which is the chronological limit of this review). Mr Stava, and only Mr Stava, had the relevant knowledge in relation to Diag SE's claims.

ii) The Trustee was necessarily and properly dependent on Mr Stava to conduct Diag SE's business and was not in a position to direct him in this regard.

iii) In the conduct of Diag SE's business, it was undoubtedly Mr Stava who was 'in charge' and the 'driving force' behind Diag SE's pursuit of its claims.

iv) It was Mr Stava, not the Trustee nor the Koruna Trust, who was the source of any value in Diag SE, both in terms of establishing its business and funding its attempts to enforce the Commercial Arbitration Awards from May 2011. The success or failure of Diag SE in its business in the period under review would have inured to the benefit or detriment of Mr Stava or members of his family who, because of Mr Stava's choice when settling the Koruna Trust, were members of the Class of Beneficiaries. In these significant respects, Mr Stava had the economic attributes of 'ownership' as discussed in the case law, and the national character of the capital at risk through Diag SE was essentially Swiss.

v) The Trustee committed no assets to Diag SE, ran no risk in relation to its business and was not exposed to any loss. It was renumerated in the form of professional fees which on the evidence were paid by Mr Stava. In short, its role was essentially 'managerial', and in no meaningful sense could it be said that the national character of the capital at risk through Diag SE was that of the Trustee's state of incorporation, Liechtenstein.

vi) The effect of the matters in (i) to (v) above is as follows:

    a. While Mr Stava held the legal rights of control on behalf of others (see Annex 3, [61(iv)]), there was no realistic possibility of any conflict of interest between Mr Stava's interests and those of the Koruna Trust in the conduct of Diag SE's business (see Annex 3, [61(v)-(vii)]).

b. Mr Stava had, therefore, the same scope for decision-making in fact in relation to the conduct of Diag SE's business after June 2011, as he had when he was the owner of Diag SE.

c. It was Mr Stava, rather than the Trustee, who for practical purposes held the economic attributes of 'ownership' for the reason set out in (iv) and (v).

d. For these reasons, the position of Mr Stava in this case cannot be equated with that of a conventional director or manager of a company or an agent acting on behalf of a principal where I accept *de facto* control for Article 1(1)(c) purposes would be difficult to establish. The closest analogue to a conventional company director in this case is not Mr Stava. It is the Trustee.

vii) The identification of the Trustee as the controller of Diag SE for Article 1(1)(c) purposes would appear to have the improbable consequence that a change in the nationality of a professional service provider would change the nationality of Diag SE and its investment treaty options (with the potential to enhance investment treaty protection or to forfeit it, even though the economic substratum of the investment was unchanged).

viii) Recognising that this was an unattractive and improbable outcome, Mr Dunning KC suggested that it was not necessarily the case that a legal entity would have an Article 1(1)(c) controller. That represented something of a departure from the overall trend of the Czech Republic's submissions that it was the Trustee who had Article 1(1)(c) control of Diag SE. It also entails that consideration of who holds the legal right of control is not determinative for Article 1(1)(c) purposes. However, if that concession has to be made, then it provides strong support for the view that Article 1(1)(c) requires consideration of the realities of factual control."

200. The Judge's findings proceed on the basis that the trust structure which Mr Stava established was valid and effective under Liechtenstein law. Neither the Judge nor Mr Philip Riches KC (who dealt with this aspect of the appeal on behalf of Diag SE) suggested that Mr Stava exercised any kind of control over Diag SE outside of or irrespective of this structure, or that the trust arrangements were other than genuine.

201. It can be seen from the Judge's summary of his findings, and from the more detailed findings in Annex 3, that such control as Mr Stava exercised over Diag SE derived from his formal position as chairman of the company, holder of the bearer shares and

protector of the Koruna Trust, together with the fact that, in practice, the trustee was likely to act (entirely properly) in accordance with his wishes. The Judge's view at [216(vi)(c)] was that this meant that it was Mr Stava "who for practical purposes held the economic attributes of 'ownership'".

202. We would accept that these findings mean that in practice Mr Stava exercised complete control over the company in the conduct of its business which, during the relevant period, was confined to the pursuit of its claim against CZR in the Review of the 2008 Award. That claim was its only asset. However, in everything he did as chairman of the company and holder of its bearer shares, Mr Stava acted as agent of the trustee and was obliged to act, not in his own interest, but in the best interest of the Koruna Trust. Likewise, although his role as protector of the trust did not involve him acting as an agent, he was required to exercise his powers as protector in what he believed to be the best interest of the trust. As the Judge put it in his summary of conclusions in Annex 3:

> "61. My conclusions are as follows: …
>
> (iv) Mr Stava's legal decision-making powers as chairman of Diag SE, holder of the bearer shares in Diag SE and as Protector of the Koruna Trust:
>
> a) were not, in the first two instances, held in his own right; and
>
> b) in each case, were not exercisable solely by reference to his own interests, but only in what Mr Stava believed to be the best interest of Diag SE / the Koruna Trust (as appropriate).
>
> That was also true of the Trustee's powers."

203. Thus the control which he exercised as an agent of the trust must in law be regarded as control by the trust and not by the agent, Mr Stava. As already discussed, it was essential that this should be so if the purposes of establishing the trust, succession planning and asset protection, were to be achieved. (Mr Riches sought to argue at one point that the transfer of shares into the Koruna Trust should be disregarded because it was all part of the Lawbook Transaction which was instigated by CZR, but it is clear that the transfer of shares into the trust was done voluntarily by Mr Stava for his own purposes).

204. For this purpose it makes no difference that the interest of the principal and the agent were in practice aligned, with no conflict between them. Nor does the fact that Mr Stava had always been and remained the driving force behind Diag SE and the pursuit of its claim. Previously he had conducted the business of the company and the pursuit of its claim in his own right. Henceforth he did so as agent for the trustee. It is true that Diag SE was dependent on Mr Stava for the funding of the claim which was its only business, but that is another matter. A Swiss bank or Swiss litigation funder on which a claimant was in practice dependent for the funding needed in order to pursue a claim would not be regarded as falling within the definition of an investor.

205. Mr Stava's role as protector is in a slightly different category. He had the power to appoint new trustees and to remove existing trustees, although for this purpose he needed the prior written consent of at least two other members of the class of potential

beneficiaries (i.e. of two of his three daughters). As the Judge found that such consent could have been obtained, Mr Stava was in a position to reconstitute the trust with himself and a Liechtenstein company under his control as the trustees, provided always that he considered this to be in the best interest of the trust, and to make distributions to himself as one of the beneficiaries. Indeed, regardless of his position as protector, if Mr Stava had simply requested the trustee to transfer the shares to him as a beneficiary, it may be (but the Judge does not go this far) that the trustee would have complied, albeit after satisfying itself that this was in the interest of the trust. But even this would have required an independent decision by the trustee that this was in the best interest of the trust.

206. It can fairly be said, therefore, that in practice Mr Stava was in a position to acquire control of Diag SE if he wished to do so. But that is different from actually having control of the company. At the relevant time, the end of 2011, Mr Stava had not exercised his power to acquire control of Diag SE and had no intention of doing so. On the contrary, it was important to him that he was not regarded as having such control.

207. In these circumstances we respectfully disagree with the Judge's view that Mr Stava held the "economic attributes of ownership". Any value in Diag SE was held by the trustee for the benefit of the class of potential beneficiaries as a whole, but none of those potential beneficiaries (including Mr Stava) had any interest in the assets of the trust.

208. In those circumstances we conclude that even if there are some circumstances in which *de facto* control would suffice, Mr Stava did not have *de facto* control of Diag SE in a sense necessary to qualify as an investor under Article 1(1)(c).

**Disposal**

209. For the reasons set out above:

(1) the first appeal is dismissed;

(2) the second appeal is dismissed; and

(3) the third appeal is allowed.

# MARCH JUDGMENT ANNEX
# THE COURSE OF THE ARBITRATION

## The Pre-Disclosure Phase

1. The Claimants served a Request for Arbitration on 22 December 2017. This set out the Claimants' account of the underlying events and then addressed a number of issues.

2. A section entitled "The Dispute falls within the scope of the BIT" (at [74]-[88]) addressed the following issues:

   i. Mr Stava's status as a qualifying investor as "a national of Switzerland" and Diag SE's status as a qualifying investor because it was controlled by Mr Stava, a Swiss national: i.e. the question of *ratione personae*.

   ii. The investments said to have been made, which were said to include the shares in Diag SE; a framework agreement with the Czech Republic; co-operation agreements with at least 20 hospitals and 14 transfusion centres which were equipped with necessary technology, equipment and paraphernalia including "walk-in freezers, packaging materials for transportation, freezer trucks, special centrifuges and related information technology"; training of staff, and it was said that the Claimants "accumulated goodwill, acquired rights in rem and purchased further movable and immovable assets" including a building in Prague, vehicles and accommodation … and machinery, equipment and paraphernalia", and; "the Arbitration Agreement and the [2008] Award". The Claimants relied on findings in the 2008 Award to support these assertions. This set out the Claimants' case on *ratione materiae*.

3. A section entitled "the Dispute falls within the temporal scope of the BIT" (at [90]-[92]) alleged that the Investment Treaty entered into force on 7 August 1991 and applied to the claim (addressing the issue of *ratione temporis*).

4. A section entitled "the Respondent's conduct violated the BIT" ([92]-[109]) which pleaded that the conduct set out above:

   i. breached Article 4(1) by impairing the Claimants' investments through multiple unreasonable or discriminatory measures;

   ii. breached Article 4(2) by failing to afford the Claimants and their investments fair and equitable treatment;

   iii. afforded the Claimants and their investments less favourable treatment than that granted to investors from other states in breach of the "not less favourable" obligation in Article 4(2) including because the Czech Republic had "persistently refused to abide by its obligations under the Final Award";

   iv. breached Article 4(2) by failing to guarantee covered investments full protection and security;

v. breached Article 6(1) by expropriating the Claimants' assets without compensation, including failing to pay the 2008 Award and undermining "the Claimants' rights to the Respondent's performance of its obligations under the Final Award through unlawful means"; and

vi. breached Article 11 by failing to observe its commitments under a framework agreement, the Arbitration Agreement and the 2008 Award.

5. There was a section headed "An indication of the amount involved" ([110]-[115]) which stated that "the compensation sought pursuant to this RFA includes the amount due under the [2008] Award" but "extended beyond the amount determined in the [2008] Award", on the basis that "the Respondent's abusive conduct toward the Claimants and the commercial arbitration tribunal during the commercial arbitration proceedings persuaded the tribunal to opt for the lowest quantum of damages that the tribunal-appointed experts put forward in its submissions to the tribunal."

6. By its first procedural order of 21 June 2018, the tribunal made an order for service by the Claimants of a "Memorial/Statement of Claim with witness statements (experts and fact statements)". There was then an opportunity for the Czech Republic to request a bifurcation between preliminary objections (i.e. jurisdictional and admissibility objections) and merits issues, with different timetables depending on whether or not such a request was made. On the same date, the tribunal directed the Czech Republic that:

"In the eventuality that it decides to submit a Request for Bifurcation it should include a brief summary of its case on the merits and describe its jurisdictional objections in sufficient detail so as to permit the Tribunal to rule upon its application".

7. On 21 October 2018, the Claimants served their Memorial and accompanying evidence. The Memorial was a 190-page document embracing narrative, legal argument and evidentiary references. This included a 103 page "Statement of Facts" which then formed the basis for shorter submissions on the legal issues. Those submissions referred back to that section, sometimes in compendious terms, and sometimes by cross-references to specific paragraphs.

8. Focussing on the issues of relevance to jurisdiction:

i. It was said that Mr Stava held Swiss nationality since 10 June 1991 and had "always controlled, managed and been the majority shareholder in all Diag Human entities" ([23]), being the controller and manager of Diag AG. It was said that Diag AG had always held a majority stake in Conneco, owning 79% of its shares from 1990, and 100% from 1993, and that Mr Stava became the sole shareholder of Diag AG in early 2001, and acquired all of the shares in Diag SE from 6 April 2001. It was said that he had "full control" over decisions relating to Diag SE ([25]-[26]).

ii. It was alleged that the Claimants had shared knowledge and know-how with the Czech healthcare sector, that a large number of hospitals and transfusion centres entered into co-operation agreement with the Claimants, that pursuant to those agreements the Claimants provided training, equipment and paraphernalia; invested in an office building; developed storage for blood derivatives including a walk-in

freezer; established employee accommodations; acquired six vehicles; one deep freezer truck; goods and equipment kept in stock; a consignment warehouse and purchased equipment and derivatives ([48]-[52]). Reference was also made to the Arbitration Agreement ([158]), and the various awards in the Commercial Arbitration, albeit these were not clearly described as investments in this section ([173], [197], [238]).

9. Section III of the Memorial was headed "The Tribunal has jurisdiction over the dispute under the BIT":

   i. The issue of *ratione personae* was addressed by a submission that Mr Stava was Swiss and Diag SE controlled by Mr Stava, and that Conneco had previously been controlled by Mr Stava through a controlling interest in Diag AG which had a controlling interest in Conneco. This section traced through the corporate chain relied upon in some detail ([292]-[297]).

   ii. The issue of *ratione materiae* was addressed more briefly ([298]-[300]), the submissions beginning with the statement "Based on the facts in Section II above", but it did specifically refer to the office building, vehicles, machinery, equipment and other paraphernalia; shares in Conneco; the rights from the 2008 Award; rights to performance from the Co-operation Agreement; rights before the Czech courts; "know-how and goodwill"; and rights deriving from regulatory approvals. The Arbitration Agreement was not referred to as an investment (but, elsewhere, as a "commitment" which the Czech Republic had failed to honour in breach of Article 11 of the Investment Treaty: [315]). It did not refer to a co-operation agreement between the Claimants and Novo Nordisk.

   iii. The issue of *ratione temporis* was addressed by assertions that the breaches alleged all occurred after the Investment Treaty had entered into force, and that the investments relied upon were made after 1 January 1950 ([301]-[303]).

10. The allegations of breach included:

    i. An alleged breach of Article 11 for failure to comply with the Arbitration Agreement and the 2008 Award ([308]-[319]).

    ii. An alleged breach of the fair and equitable treatment obligation in Article 4(2), the matters alleged to constitute such a breach including the sending of the Bojar Letter and by failing to comply with the Arbitration Agreement and the 2008 Award, in which context it was submitted that "the right to arbitration in a contract constituted an asset" ([340]-[342]). The breaches alleged include that the Czech Republic had "even tried to subvert [the 2008] Award by interfering inappropriately with the [2008] Award" ([356]), which allegation was linked to "the Respondent's refusal to comply with its payment obligations." It was alleged that the Czech Republic had "violated Article 4(2) … by its interference with the review proceeding of the Final Award" (heading to [357]).

11. Section V addressed loss and damage. In an approach which court and arbitration practitioners will find equally familiar (and, I suspect, equally unenlightening), this

advanced a compendious damages claim for all the pleaded breaches. The claim, totalling USD 2.483 billion, had the following principal elements:

i. The amount of the 2008 Award and post-award interest to 27 July 2014 when it should have been paid and damages for loss of use of that amount to the date of payment said to total USD 687.651m at the date of the Memorial ([428]). This was described as compensation for "Respondent's violations of the BIT with regard to the Final Award" ([404]) and as being the compensation necessary "to wipe out all consequences of its violations in relation to the Final Award" (heading to [419]). It was not limited to the Article 11 breach, but involved an allegation that "but for" the compendious breaches, the 2008 Award would have been paid.

ii. A discounted cashflow claim for the loss of the Claimants' business of USD 1.502 billion ([477]).

iii. Loss of reputation ([508]).

iv. Moral damages ([508]).

12. The Memorial was accompanied by an expert report from Matthew Shopp. This divided the amount claims into three heads of loss:

i. "Arbitration Award Losses" of USD 623,664,000.

ii. "Czech Republic Business Enterprises Losses" of USD 1,502,634.

iii. "Reputation losses" of $980,969,000.

The claim for moral damages was not addressed.

13. Neither the Memorial nor the report addressed the interrelationship between the different heads of loss.

14. On 7 December 2018, the Czech Republic issued its Request for Bifurcation (**"RFB"**). It is one of the ironies of this case that the Czech Republic is now more attracted by the terms of that document than by its Counter-Memorial when it comes to identifying which jurisdictional objections were taken in the Investment Treaty arbitration. This makes it important to be clear as to what the function of this document was:

i. The RFB noted that the tribunal's direction at [6] above and stated (at footnote 2):

"Such discussion is not intended to be a complete or definitive list of relevant facts or legal argument, which will be fully developed and supported in Czech Republic's principal pleadings (e.g.in the Memorial on Jurisdiction and, if required, the Counter-Memorial on the Merits)".

ii. There was some development of the "intended preliminary objections" with a view to showing that they were sufficiently arguable to merit an order for bifurcation (this being a criterion to be applied when considering whether to make an order for

bifurcation identified in *Glamis Gold Ltd v United States* UNCITRAL Procedural Order No 2 (Revised) 31 May 2005). In this context, the Czech Republic submitted (at [73]):

"It would … be appropriate to afford the Czech Republic an opportunity to submit further argument and evidence in support of their objections by means of a Memorial on Jurisdiction. Importantly, the ultimate burden of establishing jurisdiction rests with Claimants, and Claimants are not entitled to any favourable presumptions on factual matters relevant to jurisdiction."

iii. So far as *ratione temporis* is concerned ([47]-[51]) the RFB asserted:

a) Mr Stava had only acquired Swiss nationality in June 1991; the Investment Treaty only came into force in August 1991; and Diag SE did not exist before August 2006. However, the dispute had crystallised before the Investment Treaty entered into force and the "alleged investments" were made before Mr Stava acquired Swiss nationality.
b) The Czech Republic did not come into existence until January 1993 and could not be liable for breaches of the Investment Treaty before that date.

iv. So far as *ratione personae* is concerned, it was alleged that Mr Stava did not acquire Swiss nationality until June 1991 and the alleged investments were made before that date ([52]).

v. In addition, an "admissibility" preliminary objection was canvassed ([60]-[68]):

a) It was noted that "the issue of whether or not the Claimants are entitled to bring claims as injured parties requires a separate analysis from the question of whether the requirements for jurisdiction under the BIT have been met." It was reiterated that the question of standing "is distinct from the question of whether each Claimant meets the BIT definition of 'investor'".
b) This was said to require the Claimants to prove that they had suffered personal loss by establishing that they held a stakeholding interest in the alleged investment and had "not sold or transferred their claims" (with a footnote reference stating "as noted above, on 2 March 2011 Diag Human a.s. assigned 30% of its claim against the State to its lawyer").
c) There was no contemporaneous evidence proving that between 1990 and 1992, Mr Stava controlled Diag Human AG which in turn allegedly owned and controlled Diag Human a.s", with a footnote reference to a 1998 report stating Mr Stava owned 66% of the capital of Diag AG (footnote 117).
d) There was "scant evidence" as to Mr Stava's interest in the various companies at the time of breach or the time the RFA was filed, with the result that there was not "sufficient evidence of Mr Stava's standing (and therefore the standing of Diag Human SE which is predicated on Mr Stava's nationality)", which "requires a thorough examination before the Tribunal turns to the merits phase."
e) There was no evidence Mr Stava was a beneficiary of the Koruna Trust which held bearer shares in Diag SE, and a general lack of evidence as to the trust arrangements.

vi. So far as objections *ratione materiae* are considered, the RFB stated:

a) The 2008 Award and the arbitration proceedings were not investments because they were not "based on an underlying foreign investment in the Czech Republic" ([10]).
b) There was no "Framework Agreement" between the Claimants and the Czech Republic ([11]).
c) The Co-operation Agreements were "merely barter trade contracts", "had been prohibited by the Ministry of Health at the time they were executed" and were terminated in 1992, and there were only a few of them for a limited quantity of products ([11]).
d) There had been no attempt to "itemize the property that allegedly formed the basis of their investment" which, even if it existed, was not targeted by any of the alleged measures, and which only formed "pre-investment activities" ([52]).
e) The matters relied on were "either unsubstantiated, irrelevant or illegitimate" ([53]).

vii. There was also reference to an alleged fact that on 2 March 2001, Conneco had assigned "30% of its claim" against the Czech Republic to its lawyer, a Mr Jiri Oršula, including by way of a footnote reference (footnote 116) to the text (at [62]) the statements "Claimants must demonstrate that they have not sold or transferred their claims".

15. The Claimants filed their answer to the RFB on 31 December 2018. The following points in this document should be noted:

i. First, the recognition of a dispute between the parties as to whether the nationality requirement had to be satisfied when the investments were made, or only when the breaches took place ([71]).

ii. Second, the opportunity was taken to add additional evidential material in response to the Czech Republic's "standing" objection ([95] and following).

iii. Third, it was alleged that the assignment to which the Czech Republic had referred was of a claim "that arose exclusively from the Interim Award issued in the Commercial Arbitration in 1997" ([111]), as well as referring to the fact that the "validity and enforceability" of the alleged assignment "was highly disputed by the tribunal in the Commercial Arbitration." It was said that if the Investment Treaty claim had been assigned, "which is not admitted", this would "at best" go to damages and not standing ([111]).

16. Following an oral hearing on 14 January 2019, on 25 January 2019, the tribunal issued a ruling dismissing the application for bifurcation. They noted that they did not have "a full record as regards all jurisdictional objections raised" and concluded that the issues raised on *ratione temporis* and absence of qualifying investment were "inextricably intertwined with the merits". In relation to that last question, the tribunal observed that "the examination … requires the tribunal to determine …. whether the cooperation agreements concluded by Conneco were legal under Czech law". They observed that the "standing" objection was inextricably linked to the "no investment" objection. Finally, it was not "procedurally efficient" to determine the objection based on whether the Czech Republic had successor liability.

17. On 30 May 2019, some four months after the application for bifurcation was rejected, the Czech Republic served its Counter-Memorial and accompanying documents and evidence. The Counter-Memorial was 232 pages. Before venturing into the detail of that document, it is important to record what it said about the RFB. There was no general incorporation of the RFB or the points taken in it. Rather:

    i. There was a cross-reference to the factual section of the RFB dealing with restructurings from 1993 onwards in a footnote to text addressing a 2001 transfer of shares in Conneco from Diag AG to Mr Stava ([54]).

    ii. There was a footnote reference to a paragraph in the RFB noting that the Claimants now admitted the Framework Agreement was never signed (footnote 128).

    iii. The submission that the Czech Republic could not be liable for conduct pre-dating the coming into effect of the Investment Treaty was repeated, with a textual cross-reference to the same point in the RFB ([195]).

    iv. There was a footnote cross-reference to the "no standing" section of the RFB when making legal submissions as to what was required (footnote 459).

    v. It was noted that in the RFB, "the Czech Republic challenged Claimants to explain what investment (if any) had existed in 1996 (or afterwards)" ([364]).

    vi. There was a reference to a paragraph in the background section of the RFB dealing with whether costs could be recovered for unsuccessful enforcement proceedings ([476]).

18. As with the Memorial it was responding to, the Counter-Memorial began with a summary of the case, including the sentence (at [4]):

    "The claims fail the jurisdictional hurdle because Claimants' claims relate to a dispute that arose long before the BIT's entry into force, and there was never any 'investment' owned by either Claimant that was ever covered by the protections of the BIT. Further still, Claimant Diag Human SE is not a Swiss company, and its standing in this arbitration is entirely derivative of that of co-Claimant (who himself was a Czechoslovak national and became a Swiss national only mid-way through the critical 1990-1992 timeframe during which the key measures challenged by the Claimants occurred)."

19. It was said that in the period after 1990-1992, the Claimants had no blood plasma business, but were simply pursuing legal claims in relation to the events of 1990-1992 ([5]). It was also noted that the Claimants' relationship with Novo Nordisk was already under severe strain by the date of the alleged breach, and there was no credible evidence Novo Nordisk had a long-term commitment to working with the Claimants, the relationship being terminated at the end of 1992 ([9]). The Co-operation Agreements were described as "barter contracts" ([13]).

20. There was then a lengthy "Statement of Facts":

i. This contended that the Claimants' relationship with Novo Nordisk was "limited in nature", and that there was "no successful co-operation in relation to Czechoslovakia" ([59]-[60]).

ii. It alleged the relationship was "fraying" by 1991 and that it ended in September 1992 because Diag SE did not pay amounts due to Novo Nordisk ([61]).

iii. It alleged that in 1991, Novo Nordisk was not "firmly committed" to working with the Claimants ([87]).

iv. It included a section entitled "Conneco's Unauthorized Activities in the Blood Plasma Sector" (heading to [95]) which referred to fact that hospitals had disregarded the Minister of Health in signing Co-operation Agreements; that the Claimants' permits "appeared to have little to do with blood plasma"; and that they were "insufficient to authorize Conneco to acquire blood plasma … particularly in the light of the express prohibition of such activity by the Ministry of Health."

v. It included a statement that "Diag Human a.s. later merged with another entity to become Claimant … whose capital apparently consists entirely of bearer shares. Mr Stava's ownership interest in these bearer shares is difficult to discern, as it is obscured by a web of opaque trust structures. Claimants' submission on bifurcation brought little clarity", with criticism of the Claimants' evidence ([54]).

21. "Flesh" was put on the "bones" of the Jurisdictional objections in Section III. That section began with a generalised statement of the position before descending into detail. The generalised statement summarised the *ratione temporis* arguments, and then stated ([193]):

"Finally, Claimants never had an 'investment' that would qualify as such under the BIT. In any event, even if it could be said that the Claimants had some sort of investment, the claims that are being advanced bear no relation to such investment – rather, the claims are about an impossible project, a mere pipe dream by Mr Stava: a blood fractionation monopoly (i) that Czechoslovak authorities never offered; (ii) that Conneco in any event was ill-suited to obtain from a technical capabilities standpoint; and (iii) that Conneco clearly understood by June 1991 that it would not obtain".

22. This was followed by a section addressing "Applicable Legal Principles and Relevant Chronology" (heading to [195]) which asserted the general principle "nor can a claimant claim for an interference by the State with an investment or right … that it no longer possesses on the date of the alleged violation" with a footnote reference both to supporting authority and stating "[t]he ownership interest in Diag Human SE remains obscure; Claimants have not provided actual evidence of the extent of Mr Stava's beneficial ownership, if any, of Diag Human SE's assets (which are held in a discretionary trust in the form of bearer shares."

23. Turning to the development of the argument, the following *ratione temporis* objections were taken:

i. The Investment Treaty did not apply to events occurring before it came into force ([195]).

ii. The Czech Republic could not be liable for events before it adopted the Investment Treaty ([199]).

iii. The dispute arose before the Investment Treaty came into force ([212]).

24. The Czech Republic's fourth submission blended *rationae temporis* and *materiae* objections, contending that "Claimant had no protected investment at any time (i) during which the BIT was in force, and (ii) at which the Czech Republic was bound by the BIT" ([226]). One difficulty with this formulation, as matters have turned out, is that it was principally concerned to establish that no investment was in existence by January 1993, the date when and from when it was said the Czech Republic's obligations under the Investment Treaty first arose. To establish that proposition:

i. A section entitled "Chronology of Events Relevant to Jurisdiction" (heading to [206]) made a number of points:

a) At the time of the 1990 Selection Procure, Conneco did not have permits which were "blood plasma-specific or directly related to the blood plasma activities."
b) The Co-operation Agreements were "inappropriate backdoor efforts … to circumvent the bidding process."

ii. The Co-operation Agreements "failed to assist Claimants in establishing jurisdiction, as all of them were signed in direct contravention of the Ministry's February 1991 direction …" and they had "all terminated by mutual consent by November 1992", with the result that "to the extent that Mr Stava ever had a plasma 'business' in the Czechoslovakia (*quod non*), that business had already ceased exist before the Czech Republic came into existence as a sovereign state in January 1993".

iii. The submission section said that Conneco's attempts to establish a blood plasma business had failed by late 1992, and the Co-operation Agreements had all been terminated in 1992. There was a reference in this context to the small level of plasma exports for processing by Novo Nordisk, but no reference to the Novo Nordisk relationship ([221]).

iv. It was submitted that the Claimants' relationship with Novo Nordisk had ended by January 1993 when the Czech Republic was formed ([268]).

v. A submission was made that the Claimants' claims were insufficiently connected with "the interests (if any) that they had in Czechoslovakia" ([264]), because the claims were "predicated on the notion that they had a legally-protected right to a permanent monopoly of the Czech plasma processing market" when they "never had a blood plasma *processing* business at all" (emphasis in original).

vi. "Even if" Mr Stava did indeed, among other things, acquire a freezer truck, build a refrigeration facility, obtain office space, and undertake other preparatory steps (as Claimant assert that he did although none of that is documented on the record), these activities would not be sufficient to constitute an investment that would be entitled to the BIT's protection" because they were "merely pre-investment activities" ([266]).

vii. It was submitted that Mr Stava's ownership of shares (which was not disputed) was not sufficient because Conneco had no assets or rights that "relate to the disputed measures" ([267]).

viii. No reference was made to the Arbitration Agreement.

25. No *ratione personae* objection as such appeared in Section III. However, the jurisdictional chronology made the point that Mr Stava "apparently also acquired Swiss nationality" in June 1991 ([217]), but the principal point taken was that he did not have an interest in a "permanent monopoly of blood plasma processing services in the Czech Republic" ([201]). This may well have been because the date of entry into force of the Investment Treaty post-dated June 1991.

26. It is not necessary to summarise Section IV, dealing with the Claimants' breach case, beyond noting the following:

i. It was accepted that the Claimants were alleging that there had been interference in the 2014 Review of the 2008 Award which amounted to a breach of the Article 4(2) "fair and equitable treatment" obligation ([383]).

ii. It was noted that this was being done to attack the 2014 Resolution because otherwise the Claimants' "claims for non-payment of the 2008 Award would founder on the basis that the 2014 Resolution had invalidated the 2008 Award" and that the Claimants were seeking to "discredit … the Review process" (ibid).

iii. It was observed "Claimants' argument appears to be that, but for the Czech Republic's supposedly unlawful acts, the Review Tribunal would not have invalidated the 2008 Award" ([403]).

iv. No counter-factual case ("even if there had been no unlawful acts, the 2008 Award would still have been invalidated") was advanced.

27. Section V addressed "Quantum". This did make the "double counting" point: "given that the 2008 Award purported to compensate Claimants for the very same harm that is at issue in [the damage to business enterprise case], Claimants in effect are seeking double compensation" ([406(c)]). When summarising the valuation of the Czech Republic's expert, the Counter-Memorial states ([407]):

"Even this assessment is accurate on the assumption – disputed by the Czech Republic – that the co-operation agreements were lawful and could be performed."

28. The Czech Republic noted that the Interim Award of the Commercial Arbitration "related to the same alleged harm as that which is at issue in this arbitration" ([421]). The Counter-Memorial also criticised the Claimants' damages calculation on the following basis ([437]):

"Mr Shopp's analysis assumes that the Claimants owned 100% of Conneco. However, the record shows that Mr Stava did not own 100% of the Swiss entity, Diag Human AG (but rather held only 67% of its shares), and that Diag Human AG in turn held 80% of the shares in Conneco as of July 1992".

Footnote 943 stated:

"As neither Conneco nor Diag Human SE are Swiss entities, they can only recover insofar as they are owned by the Swiss claimant, i.e. Mr Stava. Any damages owed to Diag Human SE, therefore, cannot be greater than any damages owed to Mr Stava".

29. In Section II ([133]), when recounting the history of the Commercial Arbitration, reference had been made to "a strange episode in April 2003" when "Mr Jiri Oršula – a lawyer who had represented Conneco during the proceedings that culminated in the 1997 and 2002 Awards – attempted to join the proceedings as a party" (emphasis in original), continuing:

"Mr Oršula argued that he should be allowed to participate as a party because Conneco had assigned him a 30% interest in all claims arising out of the liability finding of the 1997 Award. This request generated multiple rounds of briefing, but the tribunal eventually rejected the request without considering the validity or scope of the assignment."

30. No argument was advanced in Section V as to any alleged impact of this event on quantum.

31. The Counter-Memorial was accompanied by an expert report from Mr Carlos Lapuerta. He observed that "the 2008 Award purports to compensate the Claimants for the same harm that is at issue in this arbitration". Mr Lapuerta's report included a section on "Claimants' shareholding" and its relevance to his assessment of loss as at July 1992. A diagram showed that Mr Stava owned 66.7% of Diag AG at that date, and Diag AG 80% of Conneco. He then stated:

"Had I measured any damages associated with Diag Human AG, I would have allocated 66.7% of the total to Mr Stava. However, the point is moot, given that the Claimants have not been able to establish that the Disputed Conduct harmed Diag Human AG, and have not provided sufficient evidence to estimate the fair market value of Diag Human AG."

32. He also stated:

"In 2001 CONNECO had assigned 30% of any potential award to Mr Oršula. As Mr Oršula is not a named party to this arbitration, I would reduce any damages to Claimant Diag Human SE by 30%."
This was a reference to Head of Damages 3, because Mr Laputa did not address loss said to flow from the interference in the 2014 Review and the non-payment of the 2008 Award.

33. The results of these paragraphs were reflected in a table which, when addressing the Claimants' claims for loss of the value of business and reputational harm:

i. reduced Diag SE's claim by 30% (to reflect the alleged assignment with nothing for the shareholding, Mr Lapuerta expressing agreement that "any damages borne by Conneco would be 100% attributable" to Diag SE, less the 30% assignment); and

ii. reduced Mr Stava's claim by 33% (to reflect his 67% interest in Diag AG, with no further reduction for Diag AG's 80% share in Conneco, and with no reduction for the alleged assignment.)

34. Mr Shopp's report was criticised for failing to reflect these adjustments.

35. Finally, reference was made to the payment by the Czech Republic pursuant to the Interim Award in the Commercial Arbitration, noting "the value of the award is inconsistent with my own calculations, but the connection to Mr Bojar's letter presents a clear overlap with the losses the Claimants are asserting in this arbitration".

**Disclosure**

36. The parties then exchanged documentary requests in Redfern schedule format, on which the tribunal ruled on 23 July 2019. The following points should be noted:

i. The Czech Republic requested identification of the beneficiaries of the Koruna Trust and any documents accompanying the trust deed.

ii. The request was explained on the basis that Mr Stava's ownership interest in the bearer shares in Diag SE after the establishment of the Koruna Trust was "difficult to discern". It was said that the documents bear on "matters of quantum and jurisdiction".

iii. The Claimants sought to resist that request on the basis that in RFB, the Czech Republic had indicated an intention to challenge the Claimants' standing, in response to which the Claimants had provided further information with their Answer to the RFB, which had been ignored.

iv. The tribunal ordered production of the documents.

**The Period from Disclosure to the Oral Hearing**

37. The post-disclosure phase began when the Claimants served their Reply on 9 December 2019 – a document of 195 pages, together with a further report of Mr Shopp (among other materials). From the outset, the Reply emphasised the importance of the 2008 Award, and the suggestion that it had preclusive effect in the Investment Treaty arbitration. For example, in Section B ([17]), the Reply contended:

"The question of whether the Respondent caused the destruction of Diag Human's business in the Czech Republic was settled years ago in the Interim and Partial Awards in the commercial arbitration. It was held that the Respondent did cause that destruction. It was further held that at a minimum of CZK 326.7 million was indisputably due to the Claimants (being the sum the Respondent's own expert concluded was the loss suffered) plus interest, and that the total sum due to the Claimants would be determined by the tribunal in a further award. That total sum was then determined in the Final Award. However, the Respondent persists in the present proceedings to argue that the causal link between wrongdoing and harm has not been established. While the present dispute considers wider issues than those considered in the commercial arbitration, the critical causation as to the destruction of Diag

Human's business in the Czech Republic was established in the Interim and Partial Awards."

38. The Reply alleged on more than one occasion that "the Commercial Awards are final and binding on the parties to them" ([25]), expressly including the 2008 Award, or that the Investment Treaty tribunal should show "a high degree of deference" to the three awards of the Commercial Arbitration tribunals (heading to [42]). There was then a section ([45]) setting out "the issues which have already been determined in the commercial arbitration, and which [t]his Tribunal should not re-open, *including*" (emphasis added):

    i. "The minimum amount of damage was indisputable as a result of this breach was CZK 326,60-8,334" (i.e. the amount of the Interim Award).

    ii. "Conneco's competitors had not met the basic requirements for trading, and had relied on fake data", "Conneco enjoyed a competitive advantage over its competitors" and "would have achieved a 100% market share" (three of the key findings underpinning the quantum in the 2008 Award).

39. In addressing the Czech Republic's contention that the 2014 Resolution had set aside the 2008 Award, in addition to advancing arguments as to the effect of the 2014 Resolution under Czech law and preclusion based on the Czech Republic's allegedly inconsistent conduct, the Reply submitted (at [153.4]):

    "To accept the Respondent's case as to the effect of the Resolution would in any event contravene (i) international law (ii) the public policy of the seat and (iii) the Tribunal's obligation to render an enforceable award …. [and] reward the Respondent's abuse behaviour during the commercial arbitration …
    The Tribunal should not condone such behaviour in any way and to ensure that, to the extent the Respondent seeks to benefit from such behaviour … it be barred from doing so."

40. It was also alleged that:

    i. To allow the Czech Republic to advance its case as to the effect of the 2014 Resolution would be "in breach of the Respondent's duty of good faith under the FET standard and abusive" ([225]).

    ii. It would "contravene all basic notions of justice" and of "natural justice and fairness" which would "not be recognised by English law for reasons of public policy" ([239]).

41. The issue of jurisdiction was addressed in Section III. This section began (at [318]) by stating that:

    "despite indicating in its [RFB] that it disputed the Claimants' standing to bring the present arbitration, the Respondent has not pursued this preliminary objection in this Counter-Memorial. The Claimants have, therefore, only addressed the preliminary objections which the Respondent is pursuing."

The Claimants also stated, "the Czech Republic has not argued that the Claimants are not 'investors'" ([320]).

42. Turning to the Czech Republic's argument that "the Claimants did not 'at any time' have an investment protected by the BIT":

    i. The Reply alleged that "the Respondent has not sought to argue that Mr Stava needed to have Swiss nationality at the time that he made his investments" or that "the Claimants are not entitled to protection because the co-operation agreements were prohibited by the Ministry of Health" or that "the relevant contracts were only barter-sale transactions" ([322], referring to the paragraphs where these points had been raised in the RFB).

    ii. It relied on findings in the 2008 Award as to permits and the equipment of 14 transfusion stations; the office-building; the co-operation agreements; the introduction of new technology and systems; the Arbitration Agreement; the Claimants' claims; the 2008 Award; and the shares in Conneco ([323]-[324]). It did not refer to a co-operation agreement with Novo Nordisk.

    iii. It challenged the objection that the breaches complained of were not linked to the investments ([328]).

43. The Claimants then responded to the jurisdiction challenge *ratione temporis*, and the issue of the Czech Republic's responsibility as a successor state to Czechoslovakia ([335]-[342]), and whether the tribunal had "power" to award damages in respect of loss suffered outside the Czech Republic ([392]).

44. Section VI of the Reply advanced essentially the same case on breach as the Memorial, including an alleged breach of Article 4(2) by interference with the Commercial Arbitration ([456]-[458]).

45. Section VII, dealing with the issue of compensation, maintained the same four heads of loss, including "compensation for the Respondent's violations of the BIT in respect of … the Final Award" ([502]). In this context, it was suggested that Mr Lapuerta's report was seeking to relitigate matters determined in the Interim, Partial and 2008 Awards ([505]). The Claimants submitted as follows:

    i. The Partial Award had not fully compensated the Claimants ([505.1]).

    ii. It was said that the Czech Republic could not re-open a series of findings relevant to quantum in the 2008 Award (as identified above) ([505.2]).

    iii. On the issue of percentage shareholdings, the Claimants made the point that "under the BIT, Diag Human SE is treated as a Swiss investor on the basis that it is controlled by Swiss national", and "Mr Stava's level of shareholding in Diag Human SE is irrelevant" ([578]).

    iv. On the alleged 30% assignment, it was noted that "despite the fact that Mr Lapuerta makes this point, it is not pursued by the Respondent itself", and alleged that the assignment agreement was not approved and was invalid ([579]).

v. The Reply did not engage with the payment of the Interim Award in the Commercial Arbitration.

vi. The "Relief Sought" section did not refer to the amount of the 2008 Award, only to the Head of Damage 3 figure ([596]).

46. The Reply was accompanied by a further report from Mr Shopp which addressed damages by reference to four headings:

i. failure to pay the 2008 Award;

ii. interest on the Partial Award;

iii. loss of Czech business enterprise; and

iv. reputational losses.

47. On this occasion, Mr Shopp did deduct the amount paid in response to the Interim Award in the Commercial Arbitration from the third head of loss and referred to certain findings in the 2008 Award which were consistent with his analysis. The report did not otherwise address the relationship between the different heads of loss. On the issue of share ownership and the assignment, Mr Shopp stated that he had been instructed that the Claimants were entitled to 100% of the loss, but "if it is determined that the Claimants are not entitled to 100% of damages associated with the Czech business enterprise … then it would be appropriate to allocate damages based on the relevant ownership interests."

48. The Czech Republic's Rejoinder was served on 14 April 2020. This document is 390 pages long. It began with a "prologue", then an "Executive Summary", followed by a lengthy Section II (nearly 200 pages) attacking the Claimants' factual case and advancing the Czech Republic's account. The following points should be noted:

i. This account addressed the Ministry of Health instructions to hospitals and blood transfusion centres not to enter into co-operation agreements with the Claimants and responded to the argument in the Reply that there had been no power to issue such instructions ([190]-[191]).

ii. It also identified which permits the Claimants did and did not have in February 1991 ([146]-[154]).

iii. This section of the Rejoinder attacked aspects of the reasoning of the Commercial Arbitration tribunal in the various awards, the "flawed evidence" relied upon and the manner in which the tribunal had approached the quantum evidence ([243]- [[253], [260]-[264]).

iv. It referred to the attempted intervention by Mr Oršula on the basis of an "alleged partial assignment of Conneco's claim" ([257]).

v. It stated that "Claimants have not alleged that the supposed 'interference'" in the Commercial Arbitration "changed the outcome of the Domestic Arbitration proceeding to Conneco's detriment" or caused the 2014 Resolution ([277]).

vi. The authority of the tribunal to reach a view on the enforceability of the 2008 Award (and, implicitly, of the effect of the 2014 Resolution on the 2008 Award) was challenged ([366]).

49. Section II also addressed the preclusion arguments raised in the Reply:

i. It denied that the awards in the Commercial Arbitration had preclusive effect in the Investment Treaty arbitration. In summarising the Claimants' case, the Rejoinder submitted "in other words, in lieu of presenting evidence in this investor-State arbitration, Claimants hope to establish a breach of the BIT, causation *and damages* in the present arbitral context by relying upon the purported findings in the Domestic Arbitration awards." (emphasis added) ([369]).

ii. It denied that those findings were binding, inter alia because "the alleged 'findings' in the Domestic Arbitration awards are vague, unaccompanied by citation, and unreliable, such that they should be accorded no weight in the present arbitration" ([371]). Reference was made to the "woefully incomplete" record ([383]); the lack of a discovery phase ([384]); the fact that evidence was not tested ([385]); the "double hearsay" nature of some of that evidence ([385]); the refusal to admit certain evidence ([386]); the unreliable nature of the E&Y expert report ([387]); and the obscurity of the findings which were said to be lacking in support including as to the market share Conneco would have achieved ([388]-[389]).

iii. It was alleged that there were various reasons why the 2008 Award was not binding under Czech law, including that the effect of each party seeking a review had been to suspend the enforceability of the 2008 Award ([265]).

iv. In this regard, the need for an international law tribunal to "exercis[e] its own judgment on the correctness of the findings of the Domestic Arbitration tribunal" by reviewing the record was stressed ([380]).

50. The factual section of the Rejoinder also introduced a new argument that Mr Stava had sold his rights in Diag SE and the 2008 Award, relying on a press release of 1 June 2011 in which Mr Stava announced he had sold his rights to "an international consortium of international investors" ([423]). This has been referred to as the Lawbook transaction. In particular, the Rejoinder submitted:

i. "Neither Mr Stava and Diag Human SE has standing to ask the Tribunal to find the 2008 Award enforceable" ([422]).

ii. "The Claimants assert that 'in the middle of 2011 – that is, around the time of the apparent sale of Diag Human – Mr Stava established a discretionary trust to hold the bearer shares in Diag Human SE. Claimants assert that such trust was created 'primarily for succession planning purposes.' However, the evidence described above suggests that the true purpose was to transfer the economic benefits in Diag Human SE to 'an international consortium of institutional investors.'

In summary, the evidence indicates that Mr Stava sold Diag Human SE along with any rights relating to the 2008 Award. Thus, even if this Tribunal were empowered to find that the 2008 Award is enforceable (quod non), Mr Stava would not have standing to request such a finding ….Further, as discussed below, because Mr Stava apparently sold Diag Human SE, even Diag Human SE itself does not have standing as a protected 'investor' to assert claims under the BIT … Thus, since it is not a Swiss company and since its tie to Mr Stava has been severed, Diag Human SE has no standing to assert claims pursuant to the Switzerland-Czech Republic BIT". ([427]-[428]).

51. The Czech Republic's case on jurisdictional objections was set out in Section III. After addressing an issue with which this application is not concerned, the Czech Republic asserted in an introductory paragraph ([448]):

"Claimants must show that, at the time of each alleged BIT violation, all three of the following were satisfied: (i) the BIT was in force; (ii) the Czech Republic was a 'Contracting Paty' thereto; and (iii) Mr Stava and Diag Human SE were qualifying 'investors' who held 'qualifying investments' that were affected by the alleged violation".

52. It was then stated that "in their pleadings the Claimants have failed to make the requisite showings delineated above" ([449]), with this argument developed in the following paragraphs. This included the following points:

i. Mr Stava did not become Swiss until 10 June 1991 and his claim to indirect ownership based on his ownership of Diag SE did not avail because he sold Diag SE in June 2011 to "an international consortium," with the result that Mr Stava could not assert any claim "in respect of events that occurred after June 2011" ([473])

ii. It was said that "for the period after June 2011, there is no basis on which the Tribunal could deem Diag Human SE to be a Swiss 'investor' since … it was no longer controlled by a Swiss individual" ([474]).

iii. "[I]n sum", it asserted that "Claimants are barred from advancing any claims in respect of conduct … after 1 June 2011 when Mr Stava sold his stake in Diag Human SE and the 2008 Award" ([475])

iv. There was a section addressing the position when the Czech Republic was said to have become bound by the Investment Treaty in 1994:

a) It said that Diag SE only came into existence in 2006 (an argument which assumed it was not the corporate successor to Conneco which is no longer pursued) ([472]) and in any event ceased to be "Swiss" for the purposes of the Investment Treaty when Mr Stava sold his interest ([474]).
b) It was "wholly irrelevant" whether Mr Stava had an investment before February 1994, and by that date, any "alleged pre-existing investment" had ceased to exist ([461]). In this context it was noted that the co-operation agreements were executed "in defiance of the Ministry's earlier instructions", all of which were terminated by mutual consent before February 1994 ([466]).

c) "To demonstrate that by 1994, any alleged pre-existing 'investment' by Mr Stava had already ceased to exist", reference was made to the Minister of Health's directive to hospitals and the early termination of the Co-operation Agreements by mutual consent ([462]-[466]).
d) By January 1993, when the Czech Republic became a sovereign state ([468]), "no 'cooperation agreements' existed"; Conneco had no export permit for plasma for fractionation (with a footnote suggesting Conneco had not proved it had the necessary permits); Conneco had purchased an office building about which "no merits or damages claim was made"; and "whatever blood plasma 'business' Conneco may have had (at some point) was gone".

v. Nothing had changed by February 1994 when the Czech Republic became a party to the Investment Treaty so that Claimants would need to prove that they made some investment after that date ([469]).

vi. The Claimants had not established that any investment was made after February 1994: the Arbitration Agreement was not an investment; nor were the claims pursued in the Commercial Arbitration or the 2008 Award "given that it never took legal effect" ([470]).

53. Section IV addressed breach. One of the points taken was that there had to be a causal link between breach and loss, and, in the context of complaints about the Czech Republic's conduct prior to the 2008 Award, it was alleged that there was no case that this conduct affected the 2008 Award.

54. Section V addressed damages:

i. The Czech Republic repeated its submissions as to the marginal persuasive value of the Commercial Arbitration awards, describing the findings as "deeply flawed" and lacking "both logical and evidentiary basis" ([641]).

ii. It noted that the Claimants' claims were "duplicative both of each other" and of the awards in the Commercial Arbitration ([622]).

iii. It noted that the prayer for relief at the end of the Reply did not include a claim for the value of the 2008 Award, only for the loss of their Czech business ([630]).

iv. It included a section addressing the impact of the ownership structure on the entitlement to damages, referring to Mr Stava's 66.7% stake in Diag AG and submitting that Diag SE could recover no greater amount. The 66.7% figure was combined with Diag AG's 80% share in Conneco to suggest that Diag SE could not recover more than 53.36% ([697]-[699]).

v. It referred to the alleged assignment "of any potential award", stating that Mr Stava had produced no documents to show that the assignment agreement was invalid ([700]).

vi. Reference was made to the alleged sale by Mr Stava of his stake in Conneco in 2011, which was said to prevent Mr Stava and Diag SE from recovering any loss after that date ([701]).

55. The Rejoinder included a table (Figure 9) summarising the position:

Figure 9: Claimants' entitlement to any damages awarded

| Head of damages | Mr. Stava's percentage entitlement | Diag Human SE's percentage entitlement |
|---|---|---|
| "Czech business" | Indirect ownership stake in Conneco: 66.7% x 80% = **53.4%** (jointly with Diag Human SE) | Only entitled to claim insofar as it is owned by a Swiss national (*i.e.*, Mr. Stava): 66.7% x 80% = 53.4%<br>Claim partly assigned to third party: 53.4% x 70% = **37.4%** (jointly with Mr. Stava) |
| "Global business enterprise" | Direct ownership stake in Diag Human AG: **80%** | *Subsidiary* of Diag Human AG: **0%** |
| 2008 Award and interest on the 2002 Award [**no** compensation sought[1783]] | Indirect ownership stake in Conneco: 66.7% x 80% = **53.4%** (jointly with Diag Human SE)<br>No right to claim for any post-2011 measures | Only entitled to claim insofar as it is owned by a Swiss national (*i.e.*, Mr. Stava): 66.7% x 80% = 53.4%<br>Claim partly assigned to third party: 53.4% x 70% = **37.4%** (jointly with Mr. Stava)<br>No right to claim for any post-2011 measures |
| Moral damages [**not** quantified[1784]] | **100%** (jointly with Diag Human SE) | **100%** (jointly with Mr. Stava) |

56. A second report from Mr Lapuerta accompanying the Rejoinder contained the following:

"Mr Shopp's first report assumed that Claimants are entitled to 100% of the alleged damages. However, in 1992, Mr Stava held only a partial ownership in Diag Human AG – and, via Diag Human AG, a partial ownership in CONNECO. Diag Human SE (the predecessor in title of CONNECO) was a subsidiary of Diag Human AG, and therefore would not be entitled to any damages with respect to the 'global business enterprise'. I understand that there is a legal dispute between the parties as to the percentage of damages that Diag Human SE, a Liechtenstein entity, can claim under the Switzerland-Czech Republic BIT. The Czech Republic considers that, under the BIT, Diag Human is only entitled to the percentage of damages that would correspond to the stake that a Swiss national (Mr Stava) owned in Diag Human SE as of the valuation date (i.e. July 1992). If the Czech Republic is correct, Diag Human SE's entitlement to damages with respect to the Czech business would be limited to 53.36% .
Moreover, in 2001, Diag Human SE transferred 30% of its claim in the commercial arbitration to a third party, which further reduces Diag Human SE's entitlement to damages. Finally, I understand that, in 2011, Mr Stava sold his own ownership stake in Diag Human SE.229 Accordingly, counsel for Respondent believes Mr Stava cannot claim for any losses arising after 2011. Similarly, since Diag Human SE is only entitled to claim under the BIT to the extent that it is owned by Mr Stava, it too cannot claim for any post-2011 losses."

57. Procedural Order No 2 permitted the Claimants a Rejoinder on Jurisdiction. This Rejoinder noted ([2]):

"It is notable that the Respondent has raised new objections which were not previously raised in its Counter-Memorial, while at the same time it has refashioned some objections and abandoned others."

58. It addressed the arguments on breaches pre-dating the coming into force of the Investment Treaty and the position of the Czech Republic as a successor state before turning to the "no investment" issue:

    i. It was stated that the Czech Republic was not denying the Claimants had an investment, but asserting it had ceased to exist by February 1994 ([52]).

    ii. The Claimants denied the relevant date for the existence of assets was February 1994, but contended that the Claimants did have such an investment at that stage, namely the arbitration agreement, their claim against the Czech Republic and the Commercial Arbitration Awards ([59]).

    iii. It responded to the Czech Republic having "criticised the fact that Conneco entered into contracts directly with the various hospitals and transfusion centres" after the Minister of Health's letters, noting "Conneco was not and could not be the addressee of the instruction and thus it could not be aware of it, let alone act in its defiance" ([55]).

    iv. It responded to the Czech Republic's submissions as to which permits it had ([57]).

    v. It addressed what it described as a "new objection" premised on the suggestion that Mr Stava gave up his interest in Diag SE in June 2011, the factual premise of which was denied ([64]).

    vi. It referred (at [59]) to the Claimants' case that "(1) the Arbitration Agreement, (2) the claims which Conneco …. pursued against the Respondent in the commercial arbitration … and (3) finally the awards in the commercial arbitration, notably including the Final Award" were investments. It noted that "the Czech Republic denies that these three categories of rights might constitute an investment protected by the BIT, but its position is inconsistent with the terms of the BIT and even illogical." It did not suggest that any of these points were not open to the Czech Republic.

**The Oral Hearing**

59. The oral hearing lasted 5 days and began with openings. At the tribunal's suggestion made at the pre-hearing conference, these did not extend to jurisdictional objections. The hearing was conducted on a fully remote basis, and it provides an impressive example of how the international arbitration community (tribunal, lawyers and parties) responded to the challenges of the Covid-19 pandemic.

60. The Claimants began their presentation by focussing on preclusion arguments including the Czech Republic's submission that no deference should be shown to the findings of the Commercial Arbitration tribunal because they were "unsupported and unreliable":

i. The Claimants identified the (non-exhaustive) list of matters which they said had been decided in each of the Interim, Partial and 2008 Awards, including in the latter the matters referred to at [38] above.

ii. They also characterised the Czech Republic's submission as asking the Investment Treaty tribunal to give no effect to "a well-reasoned final award …. which final award found that the loss suffered by Diag Human was CZK 4.4 billion plus interest." This included a submission that "this final award was arrived at in a way which, we submit, means that the Respondent cannot reasonably, at least, on reasonable basis challenge it," but, not expressly, a non-recognition argument.

iii. The Claimants set out their case as to why they said the findings in the 2008 Award were reliable.

61. The Claimants' presentation also discussed:

i. whether the Ministry of Health had authority to send the letter regarding the conclusion of co-operation agreements; and

ii. a brief discussion on quantum, in which the Claimants submitted "we understand that there is some overlap between some of these heads of damage" and "the Claimants are not seeking double compensation for anything".

iii. Professor Knieper, one of the arbitrators, picked up that issue in a question, asking "do we have to go in our award at all into all these issues which happened in 1990 to1992, or after your theory, is it not enough that we simply deal with the issue of non-payment of the final award?"

62. The Czech Republic's slide presentation made various points about the Claimants' reliance on the Co-operation Agreements:

i. They "contravened the Ministry's 1991 directive."

ii. The Co-operation Agreements were replaced without incident in 1991, 1992 and 1993 respectively.

iii. In commenting on the damages claim, that the Claimants' only proven source of income were three short-term contracts.

63. As to the Czech Republic's oral opening statement:

i. In a general introduction, in describing what was said to be the "perversity" of the Claimants' case, it was said that Mr Stava had "been Czech his whole life" and "was not Swiss" at the time of the 1990 and 1991 selection procedures, which was said to make the claims "contrary to the spirit, if not the letter, of the BIT".

ii. It noted "the Tribunal expressed a preference not to hear the parties on the jurisdictional issues at this hearing" but made brief submissions on the "temporal reach of the substantive provisions of the treaty, which is a merits issue", referring to the timing of the alleged breaches. In this regard, it specifically challenged the

assertion in the Rejoinder on Jurisdiction that the argument that the Czech Republic succeeded to the Investment Treaty only from 1994 was "a brand-new argument."

iii. The reasons why the Investment Treaty tribunal were not bound by and should not give deference to the awards in the Commercial Arbitration were developed, including the differences between the legal rights in issue.

iv. It was asserted that the Co-operation Agreements contravened the Ministry's February 1991 directive, and were replaced voluntarily "without incident ... So there was no interference with those; they just concluded on their own".

v. It asserted that "before this Tribunal there is a massive amount of evidence that was not before the domestic arbitration tribunals and never considered by them".

vi. It was also submitted that "the Claimants' request to apply issue preclusion is completely hypocritical because they themselves sought to reopen a whole a series of findings in the domestic arbitration awards". Reference was made to "a completely duplicative claim" and the problem of "double recovery for the same harm". It was said that "on damages there are a huge number of issues that Claimants' damages experts seek to revisit … There's a long litany and we can give you chapter and version on this, if you like, in the post-hearing submission." At one point, it was noted:

"They're saying the Czech Republic is barred by issue preclusion from lowering the damages estimate provided by another expert opinion, but they of course are not prevented from inflating their damages … It's a very, very interesting and selective use of issue estoppel."

vii. This led one of the arbitrators, Mr Price, asked the following pertinent question:

"Are you saying that if we apply [preclusion] even-handedly, we, the Tribunal, should apply issue preclusion to both parties?"
to which the Czech Republic, after the opportunity for overnight consideration, replied:
"If the Tribunal were to decide that it must apply issue estoppel, at a minimum, it would have to try to be even-handed in its application …"
before identifying various matters the Claimants should be estopped from re-arguing, concluding:
"You need to do whatever makes sense. You need to apply a little reason and do whatever would advance the goal of justice and the goal of fairness."

viii. One of the issues to which Mr Price specifically drew attention was the fact that the Commercial Arbitration tribunal had awarded no damages for loss of reputation (i.e. clearly positing the issue of whether that should preclude an award in the Investment Treaty arbitration). He asked the Claimants' counsel for a response, but counsel said he would revert on the point. The Claimants never did.

ix. Finally, it was asserted that "the loss of the Czech business alleged in this case is precisely the same as that underlying the 2008 award."

64. So far as cross-examination is concerned:

i. Mr Stava was asked questions early on about his nationality, in which he confirmed he held Swiss, Czech, Canadian and UK dependent territory nationalities and was giving evidence from a home in the Czech Republic. He was also asked to identify the beneficiaries of the Koruna Trust in 2011, and where the bearer shares in Diag SE were held, before cross-examination moved to the Lawbook transaction.

ii. He was also asked, "Did you agree to share with [Mr Oršula] the proceeds of an award that you received?", which he denied. The upshot of that line of cross-examination, which was presumably to encourage the tribunal not to give any deference to the Commercial Arbitration awards, was to ask Mr Stava to confirm that "the individual who was your main legal representative for a nine-year period, the first nine-year period, turned out to be unscrupulous and unethical and a liar". He was not asked about what investments the Claimant had made.

iii. Mr Shopp confirmed that Heads of Damage 1 (the 2008 Award) and 3 (loss of business enterprise) could not be added together "because both of those things capture losses, or sort of the lost business value or profits, over this 1992 through 2000 period." He was cross-examined about alleged inconsistencies between the Head of Damage 3 claim and the findings in the 2008 Award, and he was asked if he "considered [himself] bound by the awards issued in the domestic arbitration as to your method of quantifying the damages?" He was also asked about the percentage shareholdings. Mr Price returned to the issue of the relationship between Heads of Damage 1 and 3 during tribunal's questions, Mr Shopp agreeing with him that he had said that "if the tribunal awards I, it doesn't have to award III", before correcting himself to say "if you award III, you couldn't award I" because the time periods of those loss claims overlapped, but that the time period for III was longer.

iv. The Claimants' cross-examination of Mr Horacek, a lawyer who represented the Czech Republic in the Commercial Arbitration, referred to the issues raised in relation to the purported assignment of "part of the purported receivable" of the company Diag Human against the Czech Republic" (acknowledging that such an assignment could have given rise to a pro tanto defence in the Commercial Arbitration).

**The Post-Hearing Phase**

65. Shortly after the evidentiary hearing, the tribunal formulated a number of questions for the parties to address in post-hearing briefs (**"PHBs"**). These included:

"4. What was the state of Claimants' contractual relations with Novo Nordisk at the various times relevant to assessing both Treaty breaches and damages? What bearing should the state of those relations have on the Tribunal's assessment of Treaty breaches and damages?
…
8. Is there evidence that there were improper or corrupt measures to constitute and influence the 2014 review panel? If so, what bearing should that have on the tribunal's consideration of the review panel's 2014 resolution and of the award of 2008?
9. If the tribunal were to find that non-compliance with a domestic arbitration award could, in and of itself, be considered a breach of a BIT, should it be concerned that the

system of BITs might then constitute a parallel enforcement process to the New York Convention?
10 Would a potential award in this dispute present a risk of double-recovery (i.e. under the BIT and through enforcement proceedings in national courts of the award of 2008) and, if so, would the Claimants be prepared to give an undertaking foregoing the possibility of double-recovery?"

66. The Claimants and the Czech Republic exchanged their first PHBs on 13 October 2020.

67. The Claimants' brief was 101 pages long. It repeated the *res judicata* / preclusion / deference arguments as to the awards in the Commercial Arbitration and made submissions in response to the tribunal's questions on this subject. It also submitted (of the 2014 resolution):

    i. "What has emerged is undeniable proof of the Respondent's attempts to unduly and unlawfully interfere with the arbitral process; and this fact offers a further principled reason why the Tribunal must not depart from the earlier findings" ([10]).

    ii. "Perversely, the Respondent attempts to rely on its own misconduct in interfering with the arbitral process to undermine the res judicata effect of the Commercial Arbitration. The general principle that no one should benefit from his own wrongdoing ('commodum ex iniuria sua nemo habere debet') is central to the administration of justice, whether by international or domestic courts and tribunals. Nothing the Respondent has said or done shows it deserves an exemption" ([33]).

    iii. "Insofar as the Resolution is considered to have disturbed the Commercial Awards, the Respondent's misconduct and interference means that such 'disturbance' cannot be given effect, and the Respondent is in any event prevented from relying on it by fundamental dictates of justice (not relying on its own wrong)" ([42.3]).

    iv. "It would be unjust and unfair for the Respondent to be permitted to take advantage of wrongful conduct which it was behind in the first place" ([228]).

    v. It was submitted that the effect of the allegedly improper or corrupt measures was "to the extent that the tribunal considers there to be any *prima facie* merit to the Respondent's arguments as to the outcome of the review of the Final Award, they should reject them as a result of this interference" ([238]) and that the Czech Republic "cannot be permitted to benefit from its own very serious dishonesty" ([245.3]).

68. The issue of jurisdiction was addressed in Section V of the Claimants' first PHB. In relation to jurisdiction *ratione personae*, it was submitted:

    i. It was "irrelevant that [Mr Stava] is also a Czech national by birth and has a residence in the Czech Republic" and that Diag SE was the legal successor to Conneco ([254.1.1]).

    ii. The argument that Mr Stava lost control of Diag SE through the Lawbook transaction was without merit ([255] and following).

iii. Mr Stava had always retained control of the Koruna Trust through his role as settlor and protector, and "the Respondent's attempt to confound Mr Stava with questions about the distribution of proceeds within his close family went nowhere" ([256.1.2]).

69. In relation to quantum, it was noted that Head of Damage 3 "overlaps in substantial part with" Head of Damage 1 but that the 2008 Award "did not cover all losses suffered by the Claimants in the Czech Republic" ([283.3]).

70. The Czech Republic's first PHB was 113 pages long. Its introductory section addressed a number of themes:

    i. It referred to the Co-operation Agreements as "barter contracts …. signed under questionable circumstances" ([7(c)]).

    ii. It identified findings by which "among others" it was said the Claimants would be bound if, contrary to the Czech Republic's case, the tribunal accorded the awards in the Commercial Arbitration some form of preclusionary effect, including the cut-off date for lost profits ([14]).

    iii. It alleged that the Claimants had failed to establish that "these alleged violations affected the outcome or substance of the 2014 Review Resolution" ([18]) (although see also A72 below).

71. The issues on jurisdiction were addressed in Section V, in response to the tribunal's question 4, although this question was not directly, and certainly not solely, aimed at issues of jurisdiction. This described the key breaches alleged in tabular form (Table 4) and offered commentary as to the "state of play" at the relevant time, with a column headed "jurisdictional context." For relevant purposes:

    i. It referred to certain alleged BIT violations in September-November 1990, 24 October 1990 and 20 February 1991, arguing that the Investment Treaty was not in force and neither Claimants could be investors at that time.

    ii. It referred to the Claimants' case that they had agreed to buy an office building on 8 May 1991, noting that title only vested on 2 April 1993 and that there was no claim that the building had lost value.

    iii. It referred to the short-term Co-operation Agreements, suggesting that there was only evidence of three such agreements, they were entered into in violation of the Ministry's instructions, had ethically questionable aspects and that Conneco had agreed to terminate them all by the end of 1992.

    iv. Reference was made to Mr Stava acquiring Swiss nationality on 10 June 1991, with a comment that he had confirmed he still considered himself "predominantly Czech".

    v. It referred to a further alleged breaches on 25 June and 12 July 1991 and submitted that (i) the Investment Treaty was not in force; and (ii) the only alleged investments at those dates were the Cooperation Agreements which were signed before Mr Stava

acquired Swiss nationality, were executed by the hospitals in breach of the Ministry of Health instructions, and were superseded and terminated in 1992.

vi. It referred to further alleged breaches of 12 August and 5 November 1991 and in February-June and on 9 March 1992, alleging that (i) the Czech Republic was not yet a party to the Investment Treaty and (ii) the only alleged investments were the co-operation agreements, as to which it repeated its submissions.

vii. It referred to the signing of the Arbitration Agreement on 18 September 1996, and challenged the assertion that it was an investment for the purposes of the Investment Treaty.

viii. It referred to the Partial Award of 17 December 2002, noting that no breach of the Investment Treaty was alleged in relation to the Partial Award which was paid in full.

ix. It referred to alleged breaches in relation to the Commercial Arbitration between 17 December 2002 and 3 August 2008, stating "Claimants have failed to explain what 'investment' existed at this time".

x. It referred to the 2008 Award, noting the allegation that it was itself an investment and stating "even if that were true" the 2008 Award did not take legal effect. Later, the argument that the 2008 Award was not an investment was developed.

xi. It referred to the allegations of interference with the 2014 Review between August 2008 and 23 July 2014, arguing that "Claimants have not justified their argument that the 2008 Award constitutes an investment."

xii. It referred to the alleged divestment by Mr Stava of his interest in Diag SE in June 2011, stating that "both Claimants lost any status as to qualifying investors." It was alleged that "Claimants have failed to establish that Mr Stava owned Diag Human SE from 2011 onwards". It noted the objection in the Rejoinder on Jurisdiction that this was a "new objection" and referred back to a generic assertion in the RFB of the need for the Claimants to have a stake in the investment at the date of breach and the submission of the RFA. This argument was developed by reference to (i) the Lawbook transaction and (ii) alleged lack of clarity in relation to the Korua trust.

xiii. It referred to the failure to pay the 2008 Award from August 2014 onwards, stating that there was no breach within the Czech Republic and that the Czech Republic believed in good faith that the 2008 Award was not enforceable.

xiv. When addressing allegations of misconduct by the Review Tribunal, reference was made to the fact that "Mr Oršula … apparently transferred to the offshore entitles the interests that Mr Stava has assigned to him" without the involvement of members of the Review Tribunal ([153]).

72. Section VIII addressed tribunal Question 8 and stated of the alleged interference in the 2014 Review ([156]):

"Claimants' apparent purpose in raising those issues is to encourage this Tribunal to ignore the 2014 Resolution. There is no basis for the Tribunal to do so. First, Claimants have made no effort to establish that any alleged improprieties in the constitution of the Review Tribunal actually affected the outcome of the proceeding that yielded the 2014 Resolution. To the contrary, Claimants' main contention is that the 2014 Resolution was favourable to them and did not affect the validity of the 2008 Award.493 Thus, any request that the Tribunal disregard the 2014 Resolution is unjustified and incoherent. Second, Claimants have made no attempt to establish that the 2014 Resolution, which was issued by a private arbitral tribunal under Czech law, can be second-guessed or annulled by this Tribunal, even if the alleged flaws in the constitution of the Review Tribunal did exist (which they do not). It is simply not the role of this Tribunal to speculate how the Review Proceeding would have unfolded, absent the alleged flaws in the constitution of the Review Tribunal."

73. The section on damages addressed what was said to be uncertainty as to whether the Claimants were claiming both Heads of Damage 1 and 3, noting the Claimants were seeking to claim twice the amount awarded in the 2008 Award, relying on some findings in the Commercial Arbitration but not regarding themselves as being bound by others, in particular whether loss continued after 2000 ([187]). It was said that the Claimants "rely on the findings of the Domestic Arbitration Awards as supposedly *res judicata* while simultaneously departing from findings they consider inconvenient" ([189]).

74. A second round of (thankfully shorter) PHBs was exchanged on 18 November 2020. The Czech Republic's second PHB began (at [1]) with 14 questions for the tribunal including:

    i. "Can Mr Stava be recognised as Diag Human SE's owner after having publicly represented … that he had sold the company?"

    ii. "When relying on 'res judicata' may Claimants disregard findings in the Domestic Arbitration and related court proceedings that they find inconvenient?"

    iii. "Have Claimants proven any injury resulting from Respondent's alleged procedural misconduct related to the Domestic Arbitration?"

* * * *

# AUGUST JUDGMENT ANNEX 3
# THE KORUNA TRUST AND THE LAWBOOK TRANSACTION

1. In the course of 2011, two connected events took place:

   i) On 25 May 2011, Kingfish Financial Ltd, a company incorporated in the Turks and Caicos Islands, acting as settlor established a Liechtenstein discretionary trust called the Koruna Trust. The trustee was a Liechtenstein legal person, LNR Trust Reg (**"the Trustee"**), established by Dr Rabanser, a Liechtenstein lawyer who acted as Mr Stava's personal lawyer. I am satisfied that Kingfish Financial Ltd was owned by and acting at the direction of Mr Stava.

   ii) On 27 May 2011, a suite of five contracts were signed relating to the sale of the shares in Diag SE to a company called Lawbook Limited, which was said to be indirectly owned by "a partner in Aram International Partners LLP" ("**the Lawbook Transaction**").

## The Lawbook Transaction

2. Lawbook Limited has its registered seat in the Irish township of Ballylickey in Bantry, Co Cork. ARAM Global describes itself as a company founded in 2009 by Raja Visweswaran and Michael Balboa, based around a group of 15 experienced financiers and investment managers who specialise in debt recovery.

3. The Lawbook Transaction comprised:

   i) A Share Purchase Agreement between Mr Stava and Lawbook Limited selling the shares in Diag SE to Lawbook Ltd which, unusually, did not contain the price but provided for it to be paid in three instalments (31 August, 31 October and 31 December 2011), with interest.

   ii) A Purchase Price Agreement between Mr Stava and Lawbook Limited providing that the price would be CZK 10,050,000,000 less any creditors. To provide some context to that figure, the amount of the Final Award made in Diag SE's favour in the Commercial Arbitration (which was its only asset of significance) was of the order of CSK 8.9 billion, on which interest would run. A statement of the outstanding amount as of 3 November 2011 was CZK 10,399,480,375.75. A rough adjustment for interest between 27 May and 3 November 2011 is CSK 216 million. The Lawbook Transaction, therefore, involved the sale of a company whose only significant asset was a highly contested arbitration award which had been set aside in the Czech Republic and the enforcement of which was being successfully resisted by the Czech Republic for something close to 100 cents on the dollar, that huge enforcement and recovery risk notwithstanding.

   iii) An Agreement Regarding Conditions Subsequent providing that if the price was not paid before 31 December 2011, the Share Purchase Agreement and the Purchase Price Agreement would be cancelled, and the shares would be transferred by the purchaser to Mr Stava or instantaneously owned by Mr Stava and any part-payment of the purchase price repaid.

iv) An Assignment Agreement between Mr Stava and the Trustee as trustee of the Koruna Trust assigning all of Mr Stava's rights under the Share Purchase Agreement, the Purchase Price Agreement and the Agreement Regarding Conditions Subsequent to the Trustee.

v) A Pledge Agreement between Lawbook Limited and the Trustee as trustee of the Koruna Trust by which Lawbook Limited pledged all of the shares and associated entitlements in Diag SE to the Trustee as security for performance of the obligations assigned to the Trustee by the Assignment Agreement.

vi) A letter of instruction by which Lawbook Limited as the purchaser of the shares in Diag SE instructed Mr Stava as the seller to transfer the bearer share certificates for Diag SE to the Trustee as trustee of the Koruna Trust.

4. On 27 May 2011, Diag SE retained ARAM International Partners to represent it in negotiations relating to the Final Award in the Commercial Arbitration in return for 12% of the cash proceeds, with Diag SE meeting recovery costs (which made the Lawbook Transaction an even less rational business proposition).

5. On 1 June 2011, Diag SE issued a press release reporting that Mr Stava had transferred all decision-making power in Diag SE with immediate effect, as "part of an agreement through which Mr Stava has sold Diag Human to an international consortium of institutional investors". On 7 June 2011, Mr Stava gave an interview repeating the suggestion he had sold Diag SE, and that "the Czech government already knows perfectly well who the new owner of Diag Human is". On 10 June, another press report appeared referring to "the anonymous new owner of Diag Human" who had hired ARAM Global, and to a press statement by Mr Stava that he had sold Diag SE to a consortium of international investors. The report stated that neither Mr Stava nor ARAM Global would reveal the identity of the buyer.

6. On 8 June 2011, Mr Visweswaran of ARAM Global wrote to the Prime Minister of the Czech Republic referring to "the recent change of ownership" and stating ARAM had been authorised to negotiate on the new owner's behalf.

7. On either 10 or 20 June 2011, the Ministry of Health replied to this letter, indicating that the legal dispute between the Czech Republic and Diag SE was ongoing, and they could see no "evident reason" for talks at that time. It also raised Diag SE's ongoing enforcement efforts in relation to the Commercial Arbitration Award. At no stage did the Ministry of Health ask any questions about the new owner of Diag SE, even though that would have been an obvious point of interest.

8. By 21 June 2011, Mr Balboa of ARAM Global had been appointed to the position of Diag SE's President and to its board of directors, as recorded in the Liechtenstein Public Register.

9. On 20 July 2011, ARAM Global sent a further letter enclosing an authorisation to act for Diag SE signed by Mr Balboa and Dr Rabanser, and a copy of the Liechtenstein Public Register. The Ministry of Health responded in negative terms to the request for negotiations.

10. On 12 October 2011, the Koruna Trust and the Trustee's trusteeship were formally registered in Liechtenstein.

11. On 2 November 2011, Mr Balboa swore an affidavit in English enforcement proceedings commenced by Diag SE, stating ARAM Global had been retained by Diag SE to provide recovery advice.

12. On 27 November 2011, Mr Stava accepted appointment as the Protector of the Koruna Trust.

13. On 1 December 2011, the United States Attorney's Office for the Southern District of New York announced that Mr Balboa had been charged with fraudulently overvaluing hedge fund assets.

14. On 2 December 2011, minutes of a meeting of Diag SE's shareholders record Mr Stava holding 25 bearer shares in the company, and voting to remove Mr Balboa from the position of President and Director of Diag SE.

15. On 6 December 2011, Mr Stava wrote to Lawbook Ltd referring to the non-payment of the first two instalments of the price and stating that the 31 December deadline for payment of the full price would not be extended.

16. On 15 December 2011, Diag SE terminated its engagement letter with ARAM SE for material breach and revoked the authority of ARAM Global.

17. The Lawbook Transaction expired on 31 December 2011.

18. It was Mr Stava's evidence in the BIT Arbitration and before me that the Lawbook Transaction was entered into because in early 2011, the Czech Minister of Finance, with the knowledge of the Czech Prime Minister, suggested that if Mr Stava distanced himself from Diag SE, it would facilitate the settlement of their longstanding dispute. In effect, it was intended to create the illusion that he had severed his connection with Diag SE to facilitate a settlement. That account was challenged by the Czech Republic in the BIT Arbitration and, with less enthusiasm, before me as an untruthful fabrication on Mr Stava's part. The submission made to me was that:

    "It is not accepted that Mr Stava was telling the truth, or all of the truth, about …the Lawbook Transaction never having been intended to be carried through and its origins."

19. I am satisfied that Mr Stava's has been substantially truthful in his evidence that the Lawbook Transaction represented an attempt to create apparent distance between himself and Diag SE following indications from high levels within the Czech Government that this would be helpful to any attempt to resolve the dispute. I have reached this conclusion in reliance on the following matters:

    i) The irrational economics of the Lawbook Transaction if a genuine arms-length transaction.

ii) The press campaign which followed it, in which Diag SE sought to present that illusion to the Czech public.

iii) The correspondence from the Ministry of Health in response to ARAM Global's correspondence making no enquiry about the new owner.

iv) The fact that the Czech Republic did not call any evidence to challenge Mr Stava's account, either in the BIT Arbitration or before me.

It is no answer that the illusion was one which it would not have been difficult for a diligent journalist to uncover because, for example, Mr Stava remained on Diag SE's register – not least because that reflects the inherent tension between trying to create the illusion of non-involvement with Diag SE while retaining it.

**The Koruna Trust**

20. By contrast, there is no dispute that the Koruna Trust created a valid trust which was intended to and did take effect in accordance with its terms and the applicable principles of Liechtenstein law. There was some debate about why the Koruna Trust was established. The one consistent – but not at all times the only – explanation offered by or on behalf of Mr Stava was "succession planning". I did not find that a particularly informative explanation of why a discretionary trust was set up whose sole asset was shares in a non-trading company whose sole business was the attempt to enforce a commercial arbitration award against the Czech Republic. I accept, however, that Mr Stava had benefiting his family in mind when he established the trust, as evidenced by the Class of Beneficiaries (see [23(iii)] below). I also accept that "asset protection" may have been a reason why this asset – which by this point had had a controversial and troubled history, in which the resources of the Czech state had been deployed to a striking degree in an attempt to prevent the realisation of any value – appears in a discretionary trust essentially on its own. In neither respect am I persuaded that the purpose of the trust imposed a meaningful limit on the Trustee's responsibilities outside the context of fixing the members of the Class of Beneficiaries and in the distribution of Trust assets.

21. Finally, I accept that it is likely that there is some written record of Mr Stava's intentions in relation to the distribution of the Koruna Trust, and that this has not been produced despite disclosure orders by this court. However, I am not persuaded this would have added meaningfully to the obvious fact that Mr Stava intended the Stava family to benefit.

**The Koruna Trust Deed**

22. The terms of the Koruna Trust were set out in the Trust Deed, which was subject to an express choice of Liechtenstein law and the jurisdiction of the Liechtenstein courts (clause 2). The Koruna Trust was declared to be irrevocable (clause 30).

23. The Trust Deed identified:

i) Mr Stava was a Settlor (by virtue of the Definition and the settling of the shares in Diag SE into the Koruna Trust) and the "Original Protector" (the Definitions and

Schedule B). The Protector was entitled to nominate a person who would become Protector once they ceased to hold that office, with the Trustee having power to nominate a Protector during any period in which the office would otherwise be vacant (clauses 21.2 and 21.3).

ii) The Trustee as the trustee (the identification of the parties and the Definitions). The Protector had the power to appoint new or additional trustees or remove any trustee with "the prior written consent of at least three Persons qualifying as Beneficiaries" (clauses 22.1 and 22.2). At least one trustee had to be domiciled in Liechtenstein (clause 2.2(b)) and if there was more than one trustee, they were to act by majority decision (clause 19.4). Any trustee was permitted to resign on giving three months' notice (clause 22.4).

iii) The class of Beneficiaries comprised Mr Stava's three daughters; their ancestors in linear line (and thus, without naming him, Mr Stava himself); their issue and remote issue in linear line; and those added to the class of Beneficiaries by the trustee (Schedule A). On the evidence, Mr Stava's three daughters all hold Swiss nationality, although I have not relied upon this in reaching my conclusion.

24. The Trust Deed relieved the Trustee of various default obligations arising under Liechtenstein trust law (including keeping records) (clause 2.2) and accorded the Trustee wide powers, including:

i) to sell trust assets to convert them into money to be invested in other assets (clause 3);

ii) to receive additional property into the Koruna Trust (clause 4);

iii) to add or exclude class persons to the Class of Beneficiaries with the written consent of the Protector (clause 5);

iv) to appoint or transfer trust property to other trusts with the written consent of the Protector (clauses 6 and 11);

v) to advance or apply trust assets for the benefit of any Beneficiary as they saw fit (clauses 72, 10 and 18);

vi) to release their powers with the written consent of the Protector (clause 12);

vii) to terminate, shorten or lengthen the trust with the written consent of the Protector (clause 16);

viii) to exercise powers of management, dealing and disposition including investment, sale, alienation, exchange, etc and "all other powers …. of an absolute beneficial owner" to the widest extent possible (clause 17);

ix) wide administrative powers, including to appoint investment managers or advisers and delegate powers and discretions to them, or to use nominees, or to delegate any of their powers on such terms as they saw fit (clauses 19.2 and 19.5); and

x) to amend the proper law of the trust or the administrative provisions of Trust Deed with the written consent of the Protector (clauses 20 and 23).

25. Clause 24 provided that "the Trustee shall not be required to interfere in the management or conduct of the business of any Company, securities of which comprise the whole or part of the Trust Fund".

26. So far as the members of the Class of Beneficiaries are concerned:

    i) No appointment by the Trustee is to be invalid on the ground that an insubstantial, illusory or nominal share of the trust assets is appointed to one Beneficiary, or a Beneficiary is excluded altogether (clause 14).

    ii) No Beneficiary has any right or entitlement to any part of the Trust Fund or income save as arises on the valid exercise of the Trustee's powers (clause 15.1), and no right to call for accounts or information (clause 15.2).

    iii) The Trustee is entitled to its exercise discretions as it thinks fit for the benefit of all or any Beneficiaries and is entitled to exercise or refrain from exercising any discretion or power for the benefit of any Beneficiary without being obliged to consider the interests of the others, with any decision and action being conclusive and binding on all the Beneficiaries (clause 25).

27. Clause 26 permits any Trustee to acquire assets from the Koruna Trust or dispose of assets to the Koruna Trust "without being liable to account for any profit and without the transaction being void provided any transaction is effected at a market price or a price certified as fully commercial" by qualified professionals.

**The applicable principles of Liechtenstein law**

28. Liechtenstein is a classic, continental European civil jurisdiction in which laws enacted by Parliament are the central sources of law. The principal statute relevant to issues in this case is the Persons and Companies Law (**"the PGR"**) which incorporates the Trust Enterprise Law ("**TrUG"**). The General Civil Code (**"ABGB"**) and the Property Law (**"SR"**) are also relevant to some extent.

29. The following matters of Liechtenstein trust law were common ground between the Liechtenstein law experts:

    i) A trustee is obliged to comply with the trust deed and owes a duty to manage trust property with the diligence of a prudent businessman and a fiduciary duty of loyalty to act in what the trustee considers to be the best interest of the trust. I accept that these are separate duties, so that if a trustee acted in his own interests or those of a third party, there would still be a breach of trust even if the decision or action taken was one which a prudent business could have taken. While I regard this debate as rather theoretical, to the extent that there was a dispute between Dr Batliner and Mr Reithner on this issue, I prefer Mr Reithner's analysis which reflects the familiar and fundamental distinction between duties of care and duties of loyalty.

ii) A trustee is in general obliged to avoid a conflict between its own interests and those of the trust enterprise or participants as such, and to eliminate such a conflict if it arises.

iii) The same duties are owed by a protector of the trust, who cannot hold the trust assets in the trustee's place, or deal with third parties in relation to trust assets by virtue of the office of protector alone (as opposed to when acting on behalf of the trustee, e.g. pursuant to a power of attorney).

iv) It is possible to be a trustee, a protector and/or one of the beneficiaries (or one of the potential beneficiaries) of a trust at the same time, although the prohibition against self-dealing would continue to apply.

v) A settlor cannot retain a continuous right of instruction, which is inconsistent with the existence of a trust.

vi) A trustee must comply with the principle of equal treatment of beneficiaries (although that does not necessitate equal distribution, but the application of the same standards and principles of consideration).

vii) A trustee must exercise his discretion by reference to objective criteria (rather than arbitrarily), and without regard to the trustee's extraneous self-interest.

viii) A settlor or beneficiary who consents (expressly or tacitly) to a specific act in apparent violation of the trustee's duty is barred from raising a claim about it thereafter and if all potential claimants consent and no creditor is harmed, a subsequent trustee will not be able to bring a claim. To the extent that Mr Reithner suggested that in such a scenario there might be a breach of duty, but no one capable of enforcing it, I found that an unduly theoretical analysis. In any event, at least so far as the "no self-dealing rule" is concerned, Mr Reithner moved away from that position in the course of his cross-examination, to support a "no breach" rather than a "no standing to complain" analysis. That sensible concession undermined the coherence of the "breach but no standing" analysis more generally.

ix) The beneficiaries (or class of potential beneficiaries) do not have any property rights with regard to the trust property (i.e. Liechtenstein law recognises no concept of "equitable property" or "beneficial ownership" as a feature of its trusts or property law, even if the latter phrase appears in certain money laundering legislation). They have the right to demand the trustee faithfully executes the terms of the trust and diligently conduct its business, and if necessary to notify the court of actual or threatened breaches so that the court can act *ex officio*. They also have the right to bring a claim against a trustee who breaches the restrictions on self-dealing.

x) The beneficiaries also have the right to bring a claim for the benefit of the trust against any third party that is in improper receipt of trust assets, and to seek an order against such a third party for the reconstitution of the trust.

xi) An agent who acts on behalf of a trustee must act in an orderly, diligent and conscientious manner in what they believe to be the best interests of the trust, must

follow any lawful instructions the trustee gives and cannot exercise the rights delegated to them in their own interests or by reference to extraneous considerations.

xii) The voting rights attached to a share in a Liechtenstein company cannot be transferred separately from the shares themselves.

30. I will now briefly consider the matters on which the experts were not agreed.

31. First, there is a dispute as to what happens if a trustee enters into a mandate with the settlor and binds himself to follow the settlor's instructions: Mr Reithner saying there is no trust in such a scenario, and Dr Batliner saying the trustee could bind himself in this way, although this would not relieve him from the obligation to comply with his duties as trustee. I am not persuaded on the evidence that any binding agreement of this kind was entered into – there is no documentary evidence to support it, Mr Stava's evidence was at best equivocal as to whether there was a mutual understanding to this effect with Dr Rabanser or that was merely his own understanding, and Dr Rabanser did not give evidence, from which I have inferred that he would not have supported the suggestion he had bound the Trustee in this way. Accordingly, it is not necessary to decide this point.

32. Second, there is an issue as to whether a protector who is also a beneficiary could exercise the power to remove the existing trustee and/or appoint himself as trustee and distribute trust property to himself. As to this:

i) The protector's exercise of his power of appointment or removal would be subject to the duties in [29(iii)] and, once appointed, the power of distribution would be subject to the trustee's duties as summarised in [29].

ii) However, in principle, someone with a power to remove trustee can appoint themselves as a replacement trustee (s.53 of the TrUG), and the mere fact that the decision to remove the trustee was taken with a view to appointing the protector as trustee would not involve a breach of duty if the powers were nonetheless exercised in accordance with the general duties in (i).

iii) Mr Reithner suggests that the effect of clause 22 of the Koruna Trust Deed is that Mr Stava would need the consent of three other beneficiaries in order to appoint or remove a trustee. I prefer Dr Batliner's construction of clause 22.2 that the need for the consent of three beneficiaries to the appointment or removal of a trustee would include Mr Stava's approval, even when he was acting *qua* protector. Clause 22 is drafted against a background of Liechtenstein law in which a beneficiary can also be a trustee or protector. It would have been known when it was drafted that Mr Stava was a potential beneficiary and the protector. Against that background, if Mr Stava was not to count for the purposes of clause 22 when acting as protector, I would have expected the clause to say so.

iv) Mr Reithner appears to suggest that for Mr Stava *qua* beneficiary to consent to actions by Mr Stava *qua* protector would involve self-dealing within the meaning of Article 925(2) and 925(3) of the PGR. For reasons I explain at [33] below, I have found Dr Batliner's evidence as to the application of the self-dealing rule where a beneficiary also holds the office of trustee or protector more persuasive.

33. Third, whether clause 26.1 of the Koruna Trust Deed and Article 925 of the PGR would prevent a trustee who is also a beneficiary from making any distribution to himself. As to this:

    i) Once again, the trustee would be subject to the duties in [29], and any such distribution would have to be undertaken in compliance with them.

    ii) I am not persuaded that clause 26 of the Koruna Trust Deed applies to distributions to a trustee who is also a beneficiary in its capacity as a beneficiary. So far as clause 26.1 is concerned, the receipt of a distribution does not readily fall within the language of "acquire from" (which clearly contemplates the sale of trust assets to the Trustee) and "dispose of to" (which clearly contemplates the sale of assets by the Trustee to the trust). That conclusion is reinforced by (i) the reference to "without being liable to account for any profit"; (ii) the description of these events as "such transaction"; and (iii) the transaction comparators – the market price of the purchase or sale or the "value of the transaction" on fully commercial terms. These are obviously inapplicable to the gratuitous disposition by a trustee to a beneficiary. Clause 26.2 would not apply because any receipt would be *qua* beneficiary, not "by virtue of his position as a director, officer, employee or member or as agent or adviser of any Company, undertaking or firm". Further, I would find such a conclusion surprising in what Mr Reithner accepted was a family trust (a context in which it is not difficult to conceive of a parent or elder sibling assuming a trustee role).

    iii) Nor am I persuaded that Article 925(1) of the PGR – "in the absence of any directive to the contrary in the trust instrument … the trustee is not entitled to any benefit from the trust" – applies to benefits to the trustee *qua* beneficiary (alternatively, to the extent the trustee is a beneficiary, the trust deed does provide otherwise). Indeed Article 925(2) – which contemplates a trustee being able to "appropriate assets of the trust property for the trustee's own account … to the extent that such transactions do not go beyond the scope of orderly administration" – would appear to contemplate distributions to a trustee/beneficiary (it being difficult to identify any other case in which a trustee's appropriation of trust assets for its own account would be within "the scope of orderly administration"). Mr Reithner accepted that "if the trustee was the father and the only two beneficiaries of the trust were children, you would expect the trustee to be able to distribute trust assets to close relatives."

    iv) More generally, it is common ground that a beneficiary can be a trustee provided it is not the sole beneficiary (something implicitly recognised in Article 927(6) of the PGR). If that deprived the trustee of his rights as beneficiary, that would not be possible (the most important right – to receive distributions – being put in abeyance for so long as the beneficiary exercised the office of trustee). Commentary to which I was referred does not support the view that a beneficiary who is appointed a trustee cannot receive distributions: Gasser, *Liechtensteinisches Trustrecht*, [54] notes that "personal union with the settlor, the trustee or with individual or all beneficiaries may have unintended consequences regarding … civil and tax assessment", but it does not suggest that one consequence is that the beneficiary who becomes a trustee forfeits his eligibility for a distribution. Alexander Schopper and Mathias Walch, *Trust, Trust Companies and Special Asset Dedication in Liechtenstein*, [404] note that a trust can be set up with a single trustee who is one of two beneficiaries, with the other "being

awarded a symbolic amount ($10/year) and/or a payout but subject to conditions that may occur theoretically but whose probability of occurrence is very low ($10, but only in years when it snows 1 metre high in Cairo on August 20)." It also notes that a sole beneficiary can be a trustee provided that there is a co-trustee ([405]), in which eventuality there would be no one else in whose favour a distribution might be made.

v) Finally, I should briefly address Mr Reithner's reliance upon Supreme Court Case LES 2009, 202, a case decided before the 2009 Foundation Law Reform, which applied Article 925 of the PGR in circumstances in which the Foundation Law was silent. In that case, CB and her husband established the Foundation with a trust company, the board of which comprised A (a professional trustee and lawyer) and B, his employee. After her husband's death, CB was the sole discretionary beneficiary. She wanted to make a gift to A, who claimed to have suffered some misfortune, and consented to A and also B making withdrawals from the Foundation. After CB fell out with A and B, CB was able to require A and B to return the amounts received to the Foundation. The Supreme Court held that the gifts amounted to self-dealing, but this was not a case in which A was a discretionary beneficiary under the Foundation (such that the trust deed expressly contemplated his benefit). For that reason, I do not derive any assistance from the case.

**The Arbitral Claimants' new ownership case**

34. There is one further submission which I should address, namely that Mr Stava owned the shares in Diag SE because he held the bearer shares at the end of 2011. In closing, Mr Riches KC accepted that "it's not how the case has been put" but said that the submission was "based on the fact that Mr Reithner accepted in his evidence that if you hold the bearer shares as a matter of Liechtenstein law, that makes you the owner. Now I accept that's not the way we pleaded it". The background to this issue is now set out.

35. The Arbitral Claimants in their pleading pleaded that Mr Stava was the legal and beneficial owner of the entire share capital in Diag SE until 27 May 2011 when legal title in the shares was transferred to Lawbook Limited, but that Mr Stava continued to control Diag SE, doing so "as holder of all of the bearer shares." It was expressly accepted, therefore, that Mr Stava's ownership of the shares in Diag SE ended on 27 May 2011.

36. The Arbitral Claimants also served a pleaded case on Liechtenstein law in which they made the following admissions (which they have not sought or obtained the court's permission to be released from):

i) that Mr Stava "ceased to be the legal owner of the shares in D1 after the time they were settled in the Koruna Trust", albeit he held legal rights (which were necessarily not rights of ownership) which "entitled him to re-acquire legal ownership";

ii) that "Mr Stava was not at any time following the settlement of the Koruna Trust the legal owner of the trust property";

iii) that "as a matter of Liechtenstein law, shares in [Diag SE] … were formally owned by the Trustee";

iv) (specifically under a heading dealing with Mr Stava's holding of the bearer shares) that the physical bearer share certificates and the shares became trust property once they were settled into the Koruna Trust.

These unequivocal admissions were made even though it was expressly pleaded that from 25 May 2011 to 28 November 2013, Mr Stava had possession of the bearer share certificates, the pleading accepting that this involved a delegation of voting rights by the Trustee.

37. In support of the argument the Arbitral Claimants sought to advance in closing that ownership of the shares was in fact vested in Mr Stava, reliance was placed on Mr Reithner's first report. This had stated "when the shares became trust property, the Trustees were obliged to take control of them … They were (and are) the owners of the shares". Mr Reithner also referred to Mr Stava taking "possession of the share certificates on behalf of the Trustee" and acting "as an agent of the Trustee". However, in a section addressing events in 2014, and the effect of a 2014 document which, on one view, purported to transfer voting rights separate from the shares, Mr Reithner stated:

"Bearer shares are negotiable securities … A Liechtenstein law core principle of securities is that the physical paper not only evidences the holder's ownership rights or clams, but the claim is transferred only with the physical paper and can only be exercised by the person possessing the paper."

The section said nothing about the position where possession was held on behalf of or in the right of someone else (as, for example, where a bank clerk holds the bearer certificates in their capacity as an employee or the bank which holds the certificates as custodian).

38. Dr Batliner's report stated that the Koruna Trust became the owner of the shares as from 1 January 2012. He noted the evidence that the bearer shares were in the physical possession of Mr Stava from 27 May 2011 to 28 November 2013 and that there was no evidence as to what agreements were in place to deal with this state of affairs. However, he stated that Mr Stava was only the shareholder until 27 May 2011, with the Koruna Trust "holding the share certificates as pledgee from 27 May until 31 December 2011" and becoming "the owner of the shares as of 1 January 2012", suggesting he had to assume that Mr Stava held the certificates "by mutual agreement", on the basis of "an unlimited power of attorney". He expressly stated that this did not involve a transfer of the shares out of the Koruna Trust.

39. The experts' Joint Memorandum referred to Mr Stava acting as an agent of or custodian for the Koruna Trust when holding and voting the shares.

40. In the Arbitral Claimants' opening, reference was made to the quoted paragraph of Mr Reithner's report in support of the submission that Mr Stava "was the only person entitled to exercise the voting rights in respect of the … shares", but "even if Mr Reithner was wrong about this and the bearer shares were owned by the Koruna Trust while held by Mr Stava", Mr Stava had an unlimited power of attorney. A later paragraph stated, "as noted above, at least when voting with possession of the bearer shares, the Claimants' expert evidence is that Mr Stava was as a matter of

Liechtenstein law *treated as owner"* (emphasis added). Finally, in opening submissions, Mr Riches KC finished with a "final general observation" in which he stated, "it is not disputed that the trustee had some form of de jure control, subject to the undisputed Liechtenstein law evidence that the holder of the bearer shares is the owner".

41. With the benefit of hindsight, it is possible to see in these fleeting references an early attempt subtly to embrace the new ownership case, but there was nothing to suggest that the Arbitral Claimants were seeking to depart from the extensive admissions they had made, still less seeking the requisite permission to do so. As will be apparent from my summary, there was no "undisputed Liechtenstein law evidence" that Mr Stava's physical possession of the shares made him the owner to the extent that he was holding the shares (as both experts accepted he was) as agent or custodian for the Koruna Trust.

42. The order of the expert witnesses was reversed because of availability issues, Dr Batliner going first. In the course of his cross-examination Dr Batliner confirmed the following:

    i) "once the shares in Diag Human SE were vested in the Koruna Trust, then from that point in time onwards the trustee … had ownership of the shares subject to the terms of the trust deed";

    ii) "from that point in time onwards, the trustee was the sole owner of the shares";

    iii) Mr Stava held the shares either as a custodian or agent for the Trustee and had taken possession on behalf of the Trustee;

    iv) "the Trustee became the legal owner, even though the shares were not physically in the possession of the Trustee but appear to have been held by Mr Stava at that time";

    v) the Koruna Trust was the owner even though Mr Stava held the shares because he was holding the shares as the Trustee's agent; and

    vi) when Mr Stava was holding the bearer shares, he was holding them as agent only.

43. Mr Riches KC raised the point very briefly as his sole point in re-examination (and he did not cross-examine Mr Reithner about this topic):

    "Dr Batliner, you agreed with Mr Dunning that rights in bearer shares are indivisible under Liechtenstein law. In 2012 in Liechtenstein, *in general*, how would you transfer ownership of bearer shares"?

    (emphasis added).

    Dr Batliner replied, "handing them over". The re-examination was about to come to an end, when Dr Batliner continued:

"Well, one remark. I mean handing them over, it would be distinguished between an obligation or a contract; it's the basis and disposal is the handing over. There are two transactions, one is --- you need to have a contractual basis and the one is the handing over."

44. The point made by Dr Batliner is one which any English lawyer will immediately recognise. The postman or courier delivering bearer shares does not, by virtue of their possession, became the share owner, however briefly, nor the safety deposit box company where bearer share certificates are stored. Nor, closer to home, did the custodians with whom bearer shares in Liechtenstein companies have had to be deposited since 1 March 2013 and who are obliged to maintain a register, giving the names and details of the shareholders. This is because there is no *basis* for the transfer of the shares, even if there has been a handing over (with the result that the custodian is not holding them in their own right). So too of Mr Stava from 27 May 2011 who held the shares as agent or custodian for their owner, the Trustee on behalf of the Koruna Trust. That is the consistent effect of the evidence of Mr Reithner and Dr Batliner, as I have sought to show, and it is fatal to the Arbitral Claimants' attempts to depart from their pleaded case and argue that Mr Stava was the owner of the shares on 1 January 2012. That is sufficient to dispose of the point, but I would in any event have held that it was not open to the Arbitral Claimants to advance it, against the procedural background I have outlined.

**Mr Stava's ability to influence Diag SE's actions and decisions**

***Control of the legal rights which were Diag SE's only assets***

45. It is important to note the following matters:

i) Diag SE had been deleted from the Czech Commercial Register on 7 September 1996 (when it stopped trading).

ii) Its annual general meeting of 13 October 2008 noted a negative net balance of EUR 16,476,424.64.

iii) Its only assets of any substance were the legal claims it had arising from events while it was still trading, and in particular the Final Award in the Commercial Arbitration, the enforcement of which was facing strong (and generally effective) resistance by the Czech Republic. This was stated in Mr Balboa's affidavit in the Commercial Court enforcement proceedings of November 2011 and in Mr Stava's witness statement in the same proceedings of 23 March 2013 in response to the Czech Republic's application for security for costs. It was also noted by Mr Justice Burton when rejecting the Czech Republic's security for costs application, reported at [2013] EWHC 3190 (Comm), Mr Justice Burton finding at [42(i)] that Diag SE "is impecunious. It has not traded since 1996."

46. When settled into the Koruna Trust, therefore, as the Czech Republic stated, Diag SE "had no business other than seeking to recover under its commercial arbitration award." I accept that it was Mr Stava who was in de facto control of that process – he was the only person with first hand knowledge of the relevant events, not LNR Trust Reg nor Dr Rabanser. It was Mr Stava who was the sole source of funding for the

litigation: this was stated in Mr Stava's witness statement in the English enforcement proceedings in response to the Czech Republic's application for security for costs; and it was noted by Mr Justice Burton in [2013] EWHC 3190 (Comm), at [42(i)]. When the Czech Republic later sought a third-party costs order against Mr Stava on the basis that he was "Diag SE's owner and controller" – and I should interject there that I place no reliance on that particular statement – it stated that Mr Stava "was directly responsible for the instigation of this litigation. He was the sole funder of the litigation for [Diag SE]" (Mr Bridson's eleventh witness statement of 6 November 2015). Mr Bridson also referred to confirmation from two firms of solicitors who had acted for Diag SE in English proceedings that Mr Stava was the sole funder and asserted it was clear that those solicitors received instructions from Mr Stava. Mr Bridson's description of Mr Stava as the guiding hand and financial force behind Diag SE was accurate.

47. I accept, therefore, that to all intents and purposes Mr Stava had practical control of the pursuit of Diag SE's only assets, whose pursuit was dependent on funding by him. In seeking to pursue and realise those assets, there was no scope for any conflict between Mr Stava and the Trustee (the interests of Mr Stava and the Koruna Trust which he had had established, of which he, his daughters and their children were in the Class of Beneficiaries, and into which he had settled Diag SE were perfectly aligned in that respect). Nor was there any practical scope for the Trustee to second-guess Mr Stava's decisions in the attempt to realise that asset. These matters were peculiarly within Mr Stava's knowledge and were being funded by assets outside the Koruna Trust.

48. Clauses 19.2, 19.5 and 24 of the Trust Deed permitted the Trustee to act in a way which reflected that alignment of interest, and Mr Stava's greater knowledge of and ability to pursue the exploitation of Diag SE's only asset. The Trustee was also entitled (but not obliged) to have regard to the wishes expressed by Mr Stava as settlor, protector and a member of the Class of Beneficiaries and on issues relating to the pursuit of legal claims open to Diag SE, I am sure the Trustee would have done so. Deferring to Mr Stava on matters relating the pursuit and control of Diag SE's claim would inevitably comply with the "business judgment rule" and, as I have stated, there was no meaningful possibility of the Trustee forming and seeking to act on a different view to Mr Stava's as to how to enforce Diag SE's claims.

49. However, Mr Stava was not exercising legal powers of control held by him in his own right and those powers could not be exercised exclusively in his own interests. The immediate source of those powers was Diag SE itself.

***The management of Diag SE***

50. Mr Stava was a member of the board and President of Diag SE and held sole signatory rights. Those rights were held on behalf of Diag SE, and fell to be exercised in the best interests of the company, and in particular its sole shareholder, the Koruna Trust.

51. As the holder of the bearer share certificates in Diag SE at the end of January 2012, Mr Stava had the legal right to exercise the voting rights which attached to those shares in what he believed to be the best interests of the Koruna Trust. The exercise of

those voting rights was determinative of decision-making within Diag SE. The Czech Republic also accepted that, independently of the voting rights, Mr Stava was able to influence Ms Dagmar Stava and Dr Rabanser (two other board members).

52. I accept that the combined effect of the very limited nature of Diag SE's business, the particular dependence of Diag SE on Mr Stava if it was to seek pursue those rights, and the absence of any realistic scope for a conflict between Mr Stava's personal interests and those of Diag SE and the Koruna Trust in seeking to enforce Diag SE's rights, was that Mr Stava was the determinant voice in all decisions taken by Diag SE.

***The operation of the Koruna Trust***

53. For the reasons I have set out, I am satisfied that the Trustee had effectively delegated the conduct of Diag SE's sole business – the exploitation of its rights under the Commercial Arbitration award and any associated rights – to Mr Stava, and that this was a perfectly proper course.

54. The Trustee of the Koruna Trust had the legal right to sell the shares in Diag SE, where the Trustee formed the good faith view that such a sale was in the business interests of the Koruna Trust and represented a prudent business judgement. However, it is virtually inconceivable that the Trustee would have concluded that the best interests of the Koruna Trust, and prudent business judgement, justified such a sale if Mr Stava was opposed to it. That reflected the fact that Mr Stava was uniquely placed to assess the value of Diag SE and how best to realise that value. In addition, it is difficult to see how such a sale would have been a viable business proposition without Mr Stava's support.

55. Had the Trustee been intent on pursuing such a sale in defiance of Mr Stava's wishes, I am satisfied that Mr Stava's daughters would have supported Mr Stava in removing the Trustee in the exercise of his legal power as Protector to take that course with the requisite beneficiary consent. This would have been a means of giving effect to a straightforward business judgement, on an issue where Mr Stava's daughters would have deferred to Mr Stava's judgement as to the best means of securing value from the company he had created and the claims he had pursued for so long and with such effort. I am also satisfied that, in such an eventuality, Mr Stava would have been entitled properly to exercise his powers to remove the Trustee seeking to effect a sale and to appoint himself as Trustee, together with a Liechtenstein domiciled trustee. He was uniquely placed to administer the Koruna Trust given its very limited and particular asset base. Mr Stava would have been supported by his daughters in doing so. That situation never came to pass – nor was it ever remotely likely that it would be necessary.

56. In his capacity as Protector, Mr Stava had the legal power to prevent the Trustee adding an individual to or excluding an individual from the Class of Beneficiaries (by withholding the required consent). That power was one which Mr Stava was obliged to exercise in the interests of the Koruna Trust. Equally, the Trustee was not obliged to follow Mr Stava's instructions to add or exclude individuals from the Class of Beneficiaries.

57. I accept that the Trustee would not automatically have followed Mr Stava's wishes in relation to the addition or exclusion of potential Beneficiaries or in making distributions from the Koruna Trust. These were very different contexts to the management of Diag SE's business. While I accept that as the Settlor and a member (albeit one of ten) of the Class of Beneficiaries, Mr Stava would have had a very important voice in these decisions, the Trustee would have had regard to all relevant circumstances (including Mr Stava's wishes as Settlor and the source of the assets, the views of members of the Class of Beneficiaries, the purpose of the Koruna Trust of settlement planning, tax consequences, whether there were any creditors etc).

58. In January 2012, had Mr Stava's three daughters (as members of the Class of Beneficiaries themselves and as parents of the other members of the Class of Beneficiaries save for Mr Stava) supported Mr Stava's wishes as to membership of the Class of Beneficiaries or the distribution of assets from the Koruna Trust, it is virtually certain that the Trustee would have formed the perfectly proper professional judgement that it should act in the manner supported by the Stava family.

59. I accept the evidence of Mr Stava's three daughters that they found it difficult presently to foresee circumstances in which they would have opposed their father's wishes in relation to the identity of eligible Beneficiaries or the distribution of assets from the Koruna Trust. In my assessment, it is highly unlikely that there would have been any disagreement between Mr Stava and his daughters had these issues arisen as at January 2012. Had it been necessary to do so, I am satisfied that there is a high likelihood that Mr Stava's daughters would have supported him if he had decided to exercise his legal power to remove the Trustee if it had refused to give effect to his wishes on these issues, and to appoint himself as Trustee together with a Liechtenstein-domiciled trustee.

60. However, I accept Mr Dunning KC's submission that it is not fanciful to suppose that there could be circumstances in which there would be a disagreement within the Class of Beneficiaries as to who the members of the Class of Beneficiaries should be or how assets should be distributed from the Koruna Trust. In that eventuality, it is not possible to determine how the Trustee would have acted or whether the Trustee could have been removed. Everything would depend on the particular circumstances.

**Conclusion**

61. My conclusions are as follows:

    i) Mr Stava made an investment in Diag SE and through Diag SE in the Czech Republic, for the reasons set out in my reasoning on the "No Investment" challenge.

    ii) No investment was made by the Koruna Trust or the Trustee.

    iii) The Lawbook Transaction was not a genuine arms-length transaction but an attempt to create apparent distance between Mr Stava and Diag SE following indications from high levels within the Czech Government that this would be helpful to any attempt to resolve the dispute by negotiation.

iv) Mr Stava's legal decision-making powers as chairman of Diag SE, holder of the bearer shares in Diag SE and as Protector of the Koruna Trust:

a) were not, in the first two instances, held in his own right; and

b) in each case, were not exercisable solely by reference to his own interests, but only in what Mr Stava believed to be the best interest of Diag SE / the Koruna Trust (as appropriate).

That was also true of the Trustee's powers.

v) There was no realistic possibility of a conflict of interest between Mr Stava's own interests and those of the Koruna Trust in relation to the conduct of Diag SE's only business, its attempt to enforce the Commercial Arbitration Award. In relation to that matter, the Trustee was entitled to and did leave the enforcement efforts to Mr Stava (who also funded them).

vi) There was no realistic possibility of the Trustee or any other member of the Class of Beneficiaries disagreeing with or seeking to challenge any decision take by Mr Stava in the conduct of Diag SE's business.

vii) The Trustee of the Koruna Trust had the legal right to sell the shares in Diag SE, where the Trustee formed the good faith view that such a sale was in the business interests of the Koruna Trust and was a prudent business judgement, but it is virtually inconceivable that it would have followed such a course if Mr Stava had opposed it. Had the Trustee been intent on pursuing such a sale in defiance of Mr Stava's wishes, I am satisfied that Mr Stava's daughters would have supported Mr Stava in removing the Trustee in the exercise of his powers as Protector and/or appointing himself as Trustee together with a Liechtenstein-domiciled trustee and that Mr Stava would have been able to act so as to prevent a sale which he opposed consistent with his duties as Protector.

viii) Mr Stava had a legal power to prevent the Trustee adding or removing members of the Class of Beneficiaries, to be exercised in what he believed to be the best interests of the Koruna Trust.

ix) As the Settlor and a member of the Class of Beneficiaries, Mr Stava would have had significant influence over any decisions by the Trustee to add or exclude members of the Class of Beneficiaries or to make a distribution. However, he had no legal right to require the Trustee to act in certain way, and the Trustee would not have automatically followed Mr Stava's wishes but would have had regard to all relevant circumstances.

x) In the circumstances prevailing in January 2012, Mr Stava's three daughters would have supported his wishes as to the eligibility of Beneficiaries or the distribution of assets from the Koruna Trust (albeit they were under no legal obligation to do so), and in those circumstances it is virtually certain that the Trustee would have formed the perfectly proper professional judgement that it should act in the manner supported by the Stava family. Had the Trustee refused to do so, there is a high likelihood that Mr Stava's daughters would have supported him if he had decided to remove the Trustee

and/or appoint himself as trustee together with a Liechtenstein-domiciled trustee (although they were under no legal obligation to provide such support).

xi) It is not fanciful to suppose that there could be circumstances in which there would be a disagreement within the Class of Beneficiaries as to how assets should be distributed from the Koruna Trust. In that eventuality, it is not possible to determine how the Trustee would have acted or whether the Trustee could have been removed. It would all depend on the circumstances.