IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 195

Originating Summons No 492 of 2016

Between

Kingdom of Lesotho

… *Plaintiff*

And

(1) Swissbourgh Diamond Mines (Pty) Limited

(2) Josias Van Zyl

(3) Trustees of the Josias Van Zyl Family Trust

(4) Trustees of the Burmilla Trust

(5) Matsoku Diamonds (Pty) Limited

(6) Motete Diamonds (Pty) Limited

(7) Orange Diamonds (Pty) Limited

(8) Patiseng Diamonds (Pty) Limited

(9) Rampai Diamonds (Pty) Limited

… *Defendants*

JUDGMENT

[Arbitration] — [Award] — [Recourse against award] — [Setting aside]

[Arbitration] — [Arbitral tribunal] — [Jurisdiction]

[International law] — [International investment law] — [Bilateral investment treaty] — [Investor-State arbitration]

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This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Kingdom of Lesotho
v
Swissbourgh Diamond Mines (Pty) Limited and others

[2017] SGHC 195

High Court — Originating Summons No 492 of 2016
Kannan Ramesh J
4–6 January, 6, 15, 28 March; 4 April 2017

14 August 2017 Judgment reserved.

Kannan Ramesh J:

Introduction

1 This is the first case in Singapore in which an investor-State arbitral award on the merits is sought to be set aside. It engages intriguing questions of arbitral and international investment law which have yet to be considered by a Singapore court.

2 The Kingdom of Lesotho ("the Kingdom") is a member of the Southern African Development Community ("the SADC"), an inter-governmental socio-economic organisation comprising 15 Southern African States. The SADC was established by the Treaty of the Southern African Development Community (17 August 1992) 32 ILM 116 (entered into force 30 September 1993) ("the SADC Treaty") on 17 August 1992. The SADC Treaty also established a

tribunal ("the SADC Tribunal") to ensure adherence to and to interpret the Treaty, with the jurisdiction to adjudicate disputes and issue advisory opinions. One of the SADC's objectives is to promote the economic growth of the region, to which end the SADC signed a Protocol on Finance and Investment ("the Investment Protocol") on 18 August 2006 (entered into force 16 April 2010). Importantly, amongst the various protections that the Investment Protocol conferred on investors was the option of referring certain investor-State disputes to international arbitration, under Annex 1 to the Investment Protocol ("Annex 1"). Various fora were provided therein, one of which was the SADC Tribunal. This complemented the existing procedural protection of referring disputes to the SADC Tribunal under the provisions of the SADC Treaty.

3 The defendants in this application claimed that their investments, namely leases to mine certain territories in the Kingdom, were unlawfully expropriated by the Kingdom between 1991 and 1995. Having unsuccessfully pursued actions in the Kingdom's domestic courts, the defendants commenced proceedings in the SADC Tribunal in 2009, alleging that the Kingdom had breached its obligations under the SADC Treaty by wrongfully expropriating the mining leases. Unfortunately for the defendants, the SADC Tribunal was dissolved by resolution of the SADC Summit before it had an opportunity to determine the defendants' claim. Undeterred, the defendants then commenced international arbitration proceedings against the Kingdom in 2012 pursuant to Annex 1, on the basis that the Kingdom, by contributing to or facilitating the shutting down (or "shuttering", the term adopted in the arbitration and by the parties) of the SADC Tribunal without providing alternative means by which the defendants' expropriation claim might be heard, again breached its obligations under the SADC Treaty. This arbitration was administered by an *ad hoc* tribunal constituted under the auspices of the Permanent Court of Arbitration ("the PCA Tribunal" and "the PCA" respectively), and the PCA

Tribunal elected Singapore as the seat of arbitration. The PCA Tribunal rendered two awards in the defendants' favour: a partial final award on jurisdiction and merits on 18 April 2016 ("the Award") and a final award on costs on 20 October 2016 ("the Costs Award"). The Award determined that the Kingdom had breached various obligations under the SADC Treaty and granted relief by directing the parties to constitute a new tribunal to hear the defendants' expropriation claim. It also determined that the Kingdom was liable to pay the defendants' costs in the arbitration, for which the quantum was subsequently fixed by the Costs Award.

4 By Originating Summons No 492 of 2016 ("OS 492"), the Kingdom applies for the court to set aside the Award in its entirety, on the basis that the PCA Tribunal lacked jurisdiction and/or that the Award exceeded the terms or scope of the submission to arbitration. In the alternative, it applies for that part of the Award concerning the Kingdom's liability to pay the defendants' costs of the arbitration to be set aside for breach of the rules of natural justice, and/or for the Kingdom having been unable to present its case, and/or on the basis that that part of the Award exceeded the terms or scope of the submission to arbitration.

5 Having carefully reviewed the Award, the parties' submissions and other relevant material, I have come to the view that the PCA Tribunal did not have jurisdiction over the parties' dispute and I set aside the Award in entirety. In the premises, I do not need to address the Kingdom's alternative argument that the portion of the Award dealing with the Kingdom's liability to pay the defendants' costs of the arbitration should be set aside for, *inter alia*, breach of the rules of natural justice. It follows, as a matter of logic, that the Costs Award must also fall away because it was made pursuant to the determination in the Award that the Kingdom was liable to pay the defendants' costs of the arbitration and reasonable legal costs (Award at [11.1(g)] and Costs Award at

[1.2]–[1.4]). The Costs Award is therefore without basis. However, there are two residual but important issues: (a) the court's jurisdiction to make an order as to the costs of the arbitral proceedings; and (b) the appropriate costs order I should make as regards those proceedings. I consider these issues towards the end of this judgment.

6 As this is a judgment of some length, I set out a brief roadmap of its contents:

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Background to the dispute

The defendants

7 The first defendant, Swissbourgh Diamond Mines (Pty) Limited ("Swissbourgh"), is a company registered under the laws of the Kingdom and was incorporated by the second defendant, Mr Josias Van Zyl ("Mr Van Zyl"),

a national of the Republic of South Africa ("South Africa"), on 12 November 1986. The third and fourth defendants are the representatives of the Burmilla Trust and the Josias Van Zyl Family Trust ("the JVZF Trust") respectively. Both trusts were established under the laws of South Africa.

8 When Swissbourgh was first incorporated, 5% of its shares were held by Mr Van Zyl, 85% were held by a nominee of Mr Van Zyl and the remaining 10% were halved between two other persons. In March 1989, all the shareholders other than Mr Van Zyl divested their shareholding to the JVZF Trust, which thus acquired 95% of the shares in Swissbourgh. In June 1997, the JVZF Trust transferred 90% of the shares in Swissbourgh to the Burmilla Trust. The ownership of Swissbourgh has remained unchanged to date and is divided between Mr Van Zyl (5%), the JVZF Trust (5%) and the Burmilla Trust (90%).

The Mining Leases and the Tributing Agreements

9 By 1987, Swissbourgh had submitted applications first for prospecting leases and then for five mining leases in five regions of the Kingdom, namely the Matsoku, Motete, Rampai, Orange, and Patiseng/Khubelu regions ("the Mining Leases").

10 In brief, the review of such applications involved the following stages. First, negotiations between the applicant and a committee of senior government officials who would advise the Ministry for Water, Energy and Mining. Secondly, approval by the Ministry for Water, Energy and Mining. Thirdly, approval by the Kingdom's Mining Board. Fourthly, recommendation by the Kingdom's Mining Board to the Kingdom's Military Council following consultations with the local chiefs responsible for the land which was the subject of the applications. Fifthly, approval by the Kingdom's Military Council. Finally, approval by the King of Lesotho.

11 In June 1988, at the conclusion of the above-mentioned process, the King of Lesotho granted Swissbourgh's applications for the Mining Leases. On 26 October 1988, the Kingdom's Registrar of Deeds in Maseru registered the Mining Leases. However, the Kingdom subsequently claimed to discover, after the Mining Leases had been registered, that there was no evidence that the local chiefs in the Rampai area had been consulted or had agreed to the grant of a lease. This sparked the issues between the parties.

12 The fifth to ninth defendants – Matsoku Diamonds (Pty) Limited, Motete Diamonds (Pty) Limited, Orange Diamonds (Pty) Limited, Patiseng Diamonds (Pty) Limited and Rampai Diamonds (Pty) Limited (collectively "the Tributees") – were incorporated in 1988 under the laws of the Kingdom, apparently by Swissbourgh and/or Mr Van Zyl, and named after the regions in which they were to carry out diamond mining operations. Between 15 December 1989 and 10 January 1990, the Tributees sub-leased the Mining Leases from Swissbourgh under agreements which I refer to hereinafter as "the Tributing Agreements". Under the Tributing Agreements, the Tributees would hold and exercise the mining rights under the relevant Mining Leases. The Tributing Agreements were registered at the Maseru Deeds Registry during the same period.

13 In September 1994, ownership of the Tributees was transferred to the Burmilla Trust (which acquired 99% of the shares) and the JVZF Trust (which acquired the remaining 1%).

14 On 16 September 1994, Swissbourgh and the Tributees signed an "Agreement of Sale and Cession of Claims", by which they agreed to assign to the Burmilla Trust their rights relating to any claims against the Kingdom due to its purported interference with the Mining Leases. From 1994 to 1997,

Swissbourgh and the Tributees assigned their claims against the Kingdom to the Burmilla Trust.

The alleged expropriation of the Mining Leases and court proceedings

15 The alleged expropriation of the Mining Leases has a convoluted history. The five mining areas were of interest not only to the defendants but also to the Kingdom. In 1986, shortly before Swissbourgh applied for the Mining Leases, the Kingdom and South Africa had entered into a large-scale commercial joint venture – the Lesotho Highlands Water Project ("LHWP"). The objective of the LHWP was to control the flow of the Orange-Senqu River, which rises in the Kingdom and flows through South Africa and Botswana into Namibia, and to divert water from the river to South Africa. The Kingdom benefitted from the LHWP by receiving a royalty for water transferred under the LHWP, which accounted for a considerable part of the Kingdom's annual budget, and by deriving electricity from its hydropower stations, which satisfied a significant portion of the Kingdom's energy needs.

16 The Lesotho Highlands Development Authority ("LHDA") was created in 1986 to implement, operate and maintain the LHWP. By 1989, the LHDA had commenced construction works in the Rampai area, which was the subject of one of the Mining Leases.

17 In April 1991, General Justin Lekhanya, the then Chairman of the Military Council, the governing body of the Kingdom at the time, was ousted. Colonel Elias P Ramaema became the country's new leader.

18 July 1991 saw the defendants' dispute with the Kingdom spark into life. On 18 July 1991, Swissbourgh and Rampai Diamonds (Pty) Limited, *ie*, the first and ninth defendants, obtained an *ex parte* interim injunction from the High

Court of Lesotho ordering that the LHDA be "interdicted … from performing any works and/or from destroying, using up, disturbing, mixing up and/or covering up any gravel deposits or other minerals" in the Rampai lease area. On 25 July 1991, the LHDA filed a counter-application to have the interim injunction set aside. On 29 July 1991, the parties agreed that the order be set aside but no settlement agreement was executed.

19 Between end July or early August and end August 1991, the Kingdom's Commissioner of Mines issued written notices to Swissbourgh alleging that it had breached its obligations under all five Mining Leases. The notices threatened to cancel the Mining Leases if the breaches were not remedied within 60 days. Between 10 October and 4 November 1991, the Commissioner of Mines purported to cancel all five Mining Leases, although it subsequently became apparent that he was not entitled to do so because the Mining Leases provided for the resolution of such disputes by arbitration. The Commissioner of Mines ordered the defendants to remove their property from the lease areas within 90 days, and instructed local police to prevent the defendants from continuing operations and to oversee the removal of their property from the lease areas.

20 On 28 October 1991, Swissbourgh requested that the dispute over the purported cancellation of its Mining Leases by the Commissioner of Mines be referred to *ad hoc* arbitration.

21 On 18 November 1991, the Kingdom granted the LHDA a lease over parts of the territory subject to the Mining Leases for the purposes of water storage and electricity generation.

22 On 19 November 1991, Swissbourgh and the Tributees instituted judicial review proceedings in the High Court of Lesotho against the Commissioner of Mines ("the 1991 JR Proceedings") for annulment of the purported cancellations of the Mining Leases and interim relief pending the outcome of the arbitral proceedings. The High Court granted the application for interim relief the next day and permitted the Tributees to continue mining in the Matsoku and Patiseng lease areas. The parties subsequently agreed to stay the arbitral proceedings pending the outcome of the 1991 JR Proceedings.

23 On 20 March 1992, the Kingdom's Military Council passed the Revocation of Specific Mining Leases Order of 1992 ("the 1992 Revocation Order"), which revoked the Mining Leases as well as the Tributing Agreements, discharged all the defendants' pending claims before domestic courts and arbitral tribunals, required the defendants to vacate the lease areas and excluded any right to compensation as well as any right for the defendants to seek judicial or arbitral redress. On 7 April 1992, Swissbourgh and the Tributees commenced proceedings in the High Court of Lesotho, seeking the annulment of the 1992 Revocation Order and an interim injunction restraining the LHDA from interfering with the defendants' rights under the Mining Leases. Pending these proceedings, the defendants were unable to enter the lease areas or exercise their mining rights. On 27 September 1994, the Chief Justice of the High Court of Lesotho declared the 1992 Revocation Order null and void. The Court of Appeal of Lesotho affirmed this decision in January 1995.

24 While the legal challenge to the 1992 Revocation Order was underway, the defendants terminated all of the Mining Leases (save for the Rampai lease) on 11 March 1993 on the basis that the Kingdom had breached and repudiated them.

25 On 2 March 1995, the LHDA filed a counter-application in the 1991 JR Proceedings, seeking a declaration that the Rampai lease was void *ab initio* due to the Kingdom's purported failure to consult the relevant chiefs before approving the Mining Leases ("the Rampai Lease Proceedings"). On 27 March 1995, Swissbourgh and the Tributees obtained an order from the High Court recording their agreement with the Commissioner of Mines to set aside his purported cancellation of the Mining Leases in 1991.

26 On 16 and 17 August 1995, the Kingdom enacted two pieces of legislation, the Lesotho Highlands Development Authority (Amendment) Act (No 5 of 1995) and the Lesotho Highlands Development Authority (Validation of Activities in respect of Phase 1A and Phase 1B Scheme) Act (No 6 of 1995) ("the LHDA Acts"). The LHDA Acts enabled the Kingdom to expropriate any area that fell within the LHWP, subject to compensating the holders of valid mining leases in the affected areas. Pursuant to the LHDA Acts, areas in Rampai subject to the Rampai lease were expropriated by October 1995. In July 1996, the defendants filed a claim for compensation in respect of the Rampai lease but the LHDA refused to consider the claim until the Rampai Lease Proceedings were concluded. The argument of the LHDA was that until the validity of the Rampai Lease was decided, it would be premature to consider the issue of compensation.

27 In May 1996, Swissbourgh and the Tributees commenced proceedings against the Kingdom in the Lesotho High Court to recover damages in respect of four of the Mining Leases ("the 1996 Proceedings"). The proceedings did not involve the Rampai lease as its validity was the subject of the Rampai Lease Proceedings. Swissbourgh and the Tributees claimed that the Kingdom had unlawfully and intentionally deprived Swissbourgh of its rights under the four

Mining Leases by purporting to cancel or revoke the leases and by hindering Swissbourgh from exercising its mining rights.

28 In September 1998, Swissbourgh and Rampai Diamonds (Pty) Limited, *ie*, the first and ninth defendants, commenced proceedings against the LHDA in the Lesotho High Court, seeking damages for the expropriation of the Rampai lease ("the 1998 Proceedings").

29 On 28 April 1999, the Lesotho High Court granted the LHDA's application in the Rampai Lease Proceedings and decided that the Rampai lease was void *ab initio*. The Court of Appeal of Lesotho dismissed the defendants' appeal on 6 October 2000. Since the Rampai lease had been found to be void, the defendants were not eligible for compensation in respect of that lease under the LHDA Acts. The defendants did not pursue the 1998 Proceedings further as a result. The defendants also did not pursue the 1996 Proceedings, because they suspected that the other Mining Leases suffered from the same defect as the Rampai lease and were likewise void.

30 Between 2000 and 2007, the defendants requested the Government of South Africa to exercise diplomatic protection with regard to their investments in the Kingdom. The Government of South Africa denied their request. Attempts to review the Government's decision were unsuccessful in the High Court of South Africa and the Supreme Court of Appeal of South Africa. The defendants then commenced proceedings against the Kingdom before the SADC Tribunal for expropriation of the Mining Leases.

Proceedings in the SADC Tribunal

31 Some background to the SADC and its organs is necessary:

(a) As stated earlier, the SADC Treaty was signed on 17 August 1992 and entered into force on 30 September 1993. The SADC's supreme policy-making body is the Summit of Heads of State or Government ("the SADC Summit"), comprising the heads of State of all SADC Member States. Article 9(1)(g) of the SADC Treaty established the SADC Tribunal, although no judges were appointed to the SADC Tribunal until 2005.

(b) On 7 August 2000, the Protocol on Tribunal in the Southern African Development Community ("the Tribunal Protocol") was signed. The Tribunal Protocol clarified the operation of the SADC Tribunal, including its composition, powers, functions, jurisdictions and procedures. It entered into force on 14 August 2001.

(c) As noted earlier, the Investment Protocol (see [2] above), along with 11 Annexes, was signed on 18 August 2006 and entered into force on 16 April 2010.

32 On 12 June 2009, having failed to obtain diplomatic protection from South Africa, the defendants commenced proceedings in the SADC Tribunal. They sought damages for the Kingdom's purported violations of Arts 4(c) and 6 of the SADC Treaty by its measures in respect of the Mining Leases. It should be noted that this was a claim brought under the SADC Treaty and the Tribunal Protocol, and not under Annex 1 of the Investment Protocol, which only came into force on 16 April 2010. I shall refer to the defendants' claim before the SADC Tribunal as "the SADC claim".

33 However, the SADC Tribunal was eventually unable to determine the SADC claim. From 2007 to 2009, the SADC Tribunal made a series of decisions in a separate dispute between the Republic of Zimbabwe and one of its investors

("the *Campbell v Zimbabwe* case") which were not received favourably by Zimbabwe. In 2010, at Zimbabwe's bidding, the SADC Summit (including the Kingdom) unanimously adopted the resolution that the terms of office of five SADC Tribunal judges, which were to expire in October 2010, would not be renewed, pending a review of the SADC Tribunal's role and responsibilities. The SADC Summit also decided that the SADC Tribunal would not hear any new cases. The failure to extend the five judges' terms of office left the SADC Tribunal inoperable, since Art 3(1) of the Tribunal Protocol required that the SADC Tribunal consist of at least 10 judges. This meant that the SADC claim could not proceed.

34 On 25 January 2011, the defendants filed another application with the SADC Tribunal in response to its purported suspension, requesting that the SADC Tribunal continue its operations in respect of the SADC claim. The application was not allowed.

35 In May 2011, the SADC Council of Ministers (comprising the ministers for foreign affairs, economic planning, or finance from each SADC Member State) decided that the suspension of the SADC Tribunal would continue until August 2011 and that no judges would be re-appointed. The SADC Summit endorsed these decisions at an extraordinary meeting held around the same period.

36 By a letter dated 22 August 2011, the defendants sought the Kingdom's agreement to submit the pending SADC claim to arbitration by the PCA. The Kingdom declined on 5 October 2011.

37 In a significant development, in August 2012, the SADC Summit resolved to dissolve the SADC Tribunal as it then existed entirely, and to

negotiate a new protocol limiting the SADC Tribunal's jurisdiction to inter-State disputes. This prevented the SADC Tribunal from determining the cases pending before it, including the SADC claim. The defendants were therefore left without a forum for the SADC claim. Acknowledging this, the SADC Justice Committee (comprising the Ministers of Justice or Attorneys-General of the SADC Member States) advised the SADC Council of Ministers and the SADC Summit that the dissolution of the SADC Tribunal left a "legal vacuum". It advised that the parties in existing cases before the SADC Tribunal "may elect to pursue them before other regional or international legal forums as they will be left with no prospect of them being resolved at the SADC regional level", and recommended that the SADC Council of Ministers and the SADC Summit "give guidance on the way forward".

38 On 18 August 2014, the SADC Summit unanimously adopted a new Protocol on the SADC Tribunal that restricted the Tribunal's jurisdiction to inter-State disputes and abolished jurisdiction over cases brought by individuals or legal entities other than States. As a result, the SADC Tribunal was unable to determine the SADC claim. It appears that the new Protocol has not entered into force.

39 According to the Kingdom, on 17–18 August 2015, the SADC Summit approved the proposal that "each Member State may decide on an alternative forum for the resolution of a SADC Tribunal pending case of which that Member State has been named a respondent". It appears that no steps have been taken by the Kingdom in this regard with respect to the SADC claim.

The PCA Arbitration

Arbitral proceedings

40 On 20 June 2012, the defendants commenced arbitral proceedings against the Kingdom by a Notice of Arbitration, pursuant to Art 28(1) of Annex 1. Article 28 is of critical importance in OS 492 and states:

> **ARTICLE 28**
>
> **SETTLEMENT OF INVESTMENT DISPUTES**
>
> 1. Disputes between an investor and a State Party concerning an obligation of the latter in relation to an admitted investment of the former, which have not been amicably settled, and after exhausting local remedies shall, after a period of six (6) months from written notification of a claim, be submitted to international arbitration if either party to the dispute so wishes.
>
> 2. Where the dispute is referred to international arbitration, the investor and the State Party concerned in the dispute may agree to refer the dispute either to:
>
> (a) The SADC Tribunal;
>
> (b) The International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the ICSID Convention and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings); or
>
> (c) An international arbitrator or ad hoc arbitral tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.
>
> 3. If after a period of three (3) months from written notification of the claim there is no agreement to one of the above alternative procedures, the parties to the dispute shall be bound to submit the dispute to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The parties to the dispute may agree in writing to modify these Rules.
>
> 4. The provisions of this Article shall not apply to a dispute, which arose before entry into force of this Annex.

41 The third option under Art 28(2) was chosen, *ie*, *ad hoc* arbitration. The PCA Tribunal comprised three arbitrators: Mr R Doak Bishop, nominated by the defendants (the claimants in the arbitration); Mr Justice Petrus Millar Nienaber, nominated by the Kingdom; and Prof David A R Williams QC as Presiding Arbitrator, chosen by the designated appointing authority. With the benefit of the parties' submissions, the PCA Tribunal decided on Singapore as both the place of arbitration and the hearing venue. The arbitral proceedings were bifurcated into two phases. The first phase was to deal with all issues of jurisdiction and liability, including all jurisdictional objections. Subject to the findings in the first phase, a second phase would be dedicated to all issues of remedies. The first phase was heard in Singapore from 24 to 27 August 2015. No second phase was ultimately convened.

42 The defendants' case in the arbitration was that by participating in the shuttering of the SADC Tribunal without providing an alternative means for the SADC claim to be determined, the Kingdom had breached its obligations under Arts 14 and/or 15 of the Tribunal Protocol; Arts 6(1) and 27 of Annex 1; and Art 6(1) read with Art 4(c) of the SADC Treaty. The defendants requested the PCA Tribunal to "step into the shoes" of the SADC Tribunal and award the defendants "such relief and compensation … as could have been granted by the SADC Tribunal" for the expropriation of the Mining Leases, as well as all costs incurred in connection with the arbitration.

43 The Kingdom disputed the PCA Tribunal's jurisdiction on seven main grounds:

(a) The Kingdom submitted that the true dispute was the alleged expropriation of the Mining Leases from 1991 to 1995 ("the expropriation dispute"). It said that the PCA Tribunal had no jurisdiction

since Art 28(4) of Annex 1 confined its jurisdiction to disputes arising *after* the Investment Protocol's entry into force on 16 April 2010. The defendants counter-argued that the dispute in this case was not the expropriation dispute, but rather the termination without recourse of the pending SADC claim as a result of the shuttering of the SADC Tribunal ("the shuttering dispute"), which occurred after the entry into force of the Investment Protocol (*ie*, the shuttering dispute was within the PCA Tribunal's jurisdiction *ratione temporis*).

(b) According to the Kingdom, it followed from the principle of non-retroactivity of international treaties that Annex 1 did not apply to investments pre-dating the entry into force of the Investment Protocol in April 2010. The Kingdom pointed out that Swissbourgh had acquired the Mining Leases, and the JVZF Trust and the Burmilla Trust had acquired their shareholding in Swissbourgh, before that date. The defendants denied that the date of the investment was relevant to jurisdiction since Annex 1 specifically referred also to "existing investments".

(c) The Kingdom contended that Swissbourgh and the Tributees, being incorporated under the laws of the Kingdom, could not qualify as "investors" for the purpose of Annex 1. The Kingdom submitted that "investors" had to be foreign entities or individuals to qualify for investment treaty protection. Moreover, the Burmilla Trust (to which their rights had been assigned) and the JVZF Trust lacked legal capacity to bring legal proceedings under South African law, which required that the *trustees* (rather than the trust itself) be named as claimant. The defendants counter-argued that Annex 1 did not distinguish between domestic and foreign investors, that the definition of "investor" in

Annex 1 included trusts, and that it did not matter whether the trusts or their trustees were named in the arbitration.

(d) The Kingdom submitted that the right to claim in an international forum such as the SADC Tribunal could not constitute an "investment" for the purposes of Annex 1, both as a principle of general international investment law and in light of the precise wording of the Investment Protocol. The defendants contended that the secondary right to remedies before an international tribunal could constitute an investment, being part of a bundle of rights along with the primary right to have the Mining Leases performed.

(e) The Kingdom submitted that the defendants did not have an "admitted" investment for the purposes of Art 28(1) of Annex 1 as neither the Mining Leases nor any litigious claims emanating from them had been subject to a proper admission procedure. The defendants asserted that the Kingdom had "admitted" their investment by granting the Mining Leases pursuant to its internal procedure and by endorsing the validity of these leases for several years.

(f) The Kingdom denied that it bore any relevant "obligation … in relation to" either the Mining Leases or the defendants' right to claim in the SADC Tribunal within the meaning of Art 28(1) of Annex 1. The defendants interpreted Art 28(1) of Annex 1 differently, contending that it was the *dispute* rather than the *obligation* that had to relate to the admitted investment.

(g) The Kingdom asserted that local remedies (*ie*, remedies in Lesotho) had not been exhausted, relying on Art 28(1) of Annex 1 to the Investment Protocol and general principles of international law. The true

dispute was the expropriation dispute, in respect of which local remedies remained unexhausted. Alternatively, as regards the shuttering dispute, the defendants could have pursued a local remedy described as an "Aquilian action", *ie*, seeking compensation for economic loss caused by the Kingdom's participation in the shuttering of the SADC Tribunal, but did not do so. The defendants denied that any local remedy was available.

44 As to the merits of the defendants' claim, the Kingdom denied that it had breached any obligations, asserting that the SADC Member States had acted within their sovereign powers in suspending the SADC Tribunal. The Kingdom disputed that the defendants had been denied justice, as both domestic and international legal remedies remained available to them. Generally, the Kingdom denied any responsibility for decisions made by the SADC Summit, since these could only result in the liability of the SADC as an international organisation, and not in the liability of any of its individual Member States.

The Award

45 At the conclusion of the first phase, the PCA Tribunal (Justice Nienaber dissenting) found in favour of the defendants and ruled as follows:

(a) The PCA Tribunal had jurisdiction to hear and determine the claims of the second, third and fourth defendants only. While Art 28 of Annex 1 was broad enough to cover domestic investors, Swissbourgh and the Tributees had assigned their claims to the Burmilla Trust, which was the proper party. Swissbourgh and the Tributees' claims were therefore dismissed.

(b) The Kingdom's other jurisdictional objections were dismissed. In particular, the PCA Tribunal found that the true dispute was the shuttering dispute, which had arisen after the entry into force of Annex 1. This dispute concerned the obligations of the Kingdom relating to the defendants' right to refer disputes to the SADC Tribunal, which was an "investment", being part of a bundle of rights related to the Mining Leases. This investment had been "admitted" via the Kingdom's acceptance and confirmation of the Mining Leases. There were no local remedies for the defendants to exhaust in respect of the shuttering dispute.

(c) The Kingdom had breached Arts 14 and 15 of the Tribunal Protocol by unilaterally withdrawing its consent to the SADC Tribunal's jurisdiction over the SADC claim.

(d) The Kingdom had breached Art 6(1) of Annex 1 by failing to accord fair and equitable treatment to the defendants and their investment.

(e) The Kingdom had breached Art 27 of Annex 1 by failing to protect the defendants' right of access to the SADC Tribunal, which was a judicial tribunal or other authority competent under the laws of the Kingdom.

(f) The Kingdom had breached Arts 4(c) and 6(1) of the SADC Treaty by failing to uphold the rule of law.

46 By way of relief, the PCA Tribunal found that the parties should establish a new tribunal to hear and determine the SADC claim. The new tribunal was to be seated in Mauritius (unless the parties agreed on another seat)

and comprise three independent and impartial arbitrators who were nationals of SADC Member States. The new tribunal would have the same jurisdiction which the SADC Tribunal had in 2009 when the defendants first filed the SADC claim. The arbitration would be administered by the PCA (unless the parties agreed otherwise) under the UNCITRAL Arbitration Rules 2010, save that the tribunal should take into account the SADC Tribunal Protocol and Rules where practicable, including in relation to jurisdiction. The parties were required to confirm in writing to the PCA Tribunal, within 30 days of the issuance of the Award, that they agreed to submit, and thereby consented, to arbitration before the new tribunal of the expropriation dispute.

47 Justice Nienaber authored a strong dissenting opinion ("the Dissenting Opinion"). He disagreed that the PCA Tribunal had jurisdiction. He thought that the dispute was properly characterised as the expropriation dispute, which pre-dated the entry into force of the Investment Protocol, rather than the shuttering dispute. The PCA Tribunal thus lacked jurisdiction *ratione temporis*. He also took the view that the defendants had not exhausted local remedies (in particular, the remedy of an Aquilian action as regards the shuttering dispute) prior to commencing the arbitration.

48 The PCA Tribunal issued the Costs Award on 20 October 2016. It found that the defendants were entitled to be reimbursed by the Kingdom for the costs of the arbitral proceedings, which it quantified as US$2,137,061.28, €265,703.04, £10,350.49 and ZAR775,517.71, subject to the Kingdom's entitlement to offset the costs by ZAR1,826,299.07 plus interest for its costs in the litigation in the Kingdom's domestic courts. The Costs Award was the subject of separate proceedings for enforcement in Singapore: see *Josias Van Zyl and others v Kingdom of Lesotho* [2017] SGHC 104.

49 I will examine the reasoning of the majority of the PCA Tribunal as well as of Justice Nienaber in greater detail in my analysis below of each of the Kingdom's jurisdictional objections.

Interpretation of the Award

50 On 13 May 2016, the Kingdom sought an interpretation of the Award under Art 37 of the UNCITRAL Arbitration Rules 2010. In light of the PCA Tribunal's finding that it had jurisdiction to hear and determine the claims of the second to fourth defendants only, the Kingdom sought confirmation that the obligation to establish the new tribunal applied to the second to fourth defendants only, and that only the second to fourth defendants' claims were to be submitted to arbitration by the new tribunal.

51 On 18 May 2016, a day after filing OS 492, the Kingdom confirmed by letter to the PCA Tribunal that it would submit to the jurisdiction of the new tribunal, subject to the outcome of its request for interpretation.

52 On 27 June 2016, the PCA Tribunal issued an Interpretation of the Partial Final Award on Jurisdiction and Merits ("the Interpretation"). It gave the following clarifications:

(a) Only the second to fourth defendants, and the Kingdom, were ordered to establish the new tribunal under the Award (at [7.7] of the Interpretation). The PCA Tribunal only had jurisdiction to order the second to fourth defendants to participate in the arbitration before the new tribunal (at [7.8]).

(b) Nevertheless, the new tribunal, being invested with the jurisdiction of the SADC Tribunal prior to its being shuttered, had

jurisdiction to accept claims from all nine defendants (at [7.12]). Accordingly, Swissbourgh and the Tributees could voluntarily apply to participate in the new arbitration should they consider it necessary or desirable to do so (at [7.8]).

(c) Unless the second to fourth defendants and the Kingdom agreed otherwise, the proper procedure for Swissbourgh and the Tributees to be involved in the new arbitration would be for them to apply to the tribunal to be joined under Art 17(5) of the UNCITRAL Arbitration Rules 2010. It would be for the new tribunal to decide whether to permit such joinder (at [7.9]–[7.10]). The PCA Tribunal made no finding as to the proper parties to pursue the SADC claim, and this was a matter for the new tribunal to determine (at [7.12]).

Parties' cases

53 In OS 492, the Kingdom seeks the following orders:

(a) that the entire Award be set aside or reversed pursuant to:

(i) s 10(3) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA") – *ie*, an appeal against the PCA Tribunal's ruling on jurisdiction; or, in the alternative,

(ii) s 3(1) of the IAA read with Art 34(2)(*a*)(iii) of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") – *ie*, on the basis that the Award exceeded the terms or scope of the submission to arbitration,

or, in the further alternative,

(b) that that part of the Award finding the Kingdom liable to pay the defendants' costs of the arbitration be set aside or reversed pursuant to:

(i) s 24(*b*) of the IAA – *ie*, a breach of the rules of natural justice; and/or

(ii) s 3(1) of the IAA read with Art 34(2)(*a*)(ii) and/or Art 34(2)(*a*)(iii) of the Model Law – *ie,* that the Kingdom was unable to present its case on costs and/or that the finding of liability for costs exceeded the terms or scope of the submission to arbitration;

(c) that the costs of both OS 492 and the arbitration proceedings before the PCA Tribunal be awarded in the Kingdom's favour; and

(d) such other relief as the court might think fit.

54 To justify setting aside the Award in entirety, the Kingdom essentially reiterated the jurisdictional objections that it had raised before the PCA Tribunal (see [43] above). As regards its liability to pay costs, the Kingdom submitted as follows:

(a) The Kingdom had not been given an opportunity to make submissions on the question of costs before the PCA Tribunal rendered its decision, thus offending s 24(*b*) of the IAA and Art 34(2)(*a*)(ii) of the Model Law.

(b) By ruling on an issue without having given the parties a reasonable opportunity to present their cases on it, the PCA Tribunal rendered a decision beyond the scope of the submission to arbitration, thus offending Art 34(2)(*a*)(iii) of the Model Law.

55 The defendants raised a preliminary objection to OS 492, submitting that this court lacked jurisdiction to set aside the Award under either s 10(3) of the IAA or Art 34(2)(*a*)(iii) of the Model Law. Section 10(3) of the IAA had no application to arbitral awards containing decisions on both jurisdiction and merits, while Art 34(2)(*a*)(iii) of the Model Law only addressed situations where the tribunal *exceeded* jurisdiction, rather than situations where it lacked jurisdiction to begin with. The defendants strove to justify the PCA Tribunal's findings on both its jurisdiction and the merits.

Preliminary objection: jurisdiction of this court

Parties' submissions

56 The defendants challenged the Kingdom's ability to bring the present action under s 10(3) of the IAA, which states:

> If the arbitral tribunal rules —
>
> > (*a*) on a plea as a preliminary question that it has jurisdiction; or
> >
> > (*b*) on a plea at any stage of the arbitral proceedings that it has no jurisdiction,
>
> any party may, within 30 days after having received notice of that ruling, apply to the High Court to decide the matter.

57 According to the defendants, s 10(3) of the IAA could not apply to an arbitral award dealing with *both* jurisdiction and the merits of a dispute. This was supported by *AQZ v ARA* [2015] 2 SLR 972 ("*AQZ v ARA*"), where the plaintiff in that case was precluded from relying on s 10(3) of the IAA (or Art 16(3) of the Model Law) to set aside an award which predominantly concerned jurisdiction but also marginally addressed issues of liability.

58 The Kingdom counter-argued that the Award *was* a ruling "on a plea as a preliminary question" because the true dispute was the expropriation dispute,

on which the PCA Tribunal did not rule. Moreover, the Award had been issued after the first phase of the bifurcated proceedings, which dealt with "jurisdiction and liability", as opposed to the potential second phase concerning remedies.

59 The defendants also called into question the Kingdom's alternative basis for review, *ie*, Art 34(2)(*a*)(iii) of the Model Law, which states that an arbitral award may be set aside on proof that:

> the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;

60 The defendants cited various authorities to support their contention that Art 34(2)(*a*)(iii) was unavailable where the applicant disputed the *existence* of a tribunal's jurisdiction. First, they referred to the Court of Appeal decision of *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 ("*CRW Joint Operation*") at [31]:

> … Art 34(2)(a)(iii) *is not concerned with the situation where an arbitral tribunal did not have jurisdiction to deal with the dispute* which it purported to determine. Rather, it applies where the arbitral tribunal improperly decided matters that had not been submitted to it or failed to decide matters that had been submitted to it. In other words, Art 34(2)(a)(iii) addresses the situation where the arbitral tribunal *exceeded (or failed to exercise) the authority that the parties granted to it* (see Gary B Born, *International Commercial Arbitration* (Wolters Kluwer, 2009) at vol 2, pp 2606–2607 and 2798–2799). …
>
> [emphasis added]

61 The defendants also referred to Blackaby *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th Ed, 2015) ("*Redfern and Hunter*") at para 10.46, which states:

> … [Art 34(2)(*a*)(iii)] contemplates a situation in which an award has been made by a tribunal that *did have jurisdiction* to deal with the dispute, but which *exceeded its powers* by dealing with matters that had not been submitted to it. …
>
> [emphasis added]

62 They also cited Gary Born, *International Commercial Arbitration*, vol III (Wolters Kluwer, 2nd Ed, 2014) ("*International Commercial Arbitration*") at p 3288:

> … [Art 34(2)(*a*)(iii)] is directed towards cases *where a valid arbitration agreement existed*, but the matters decided by the tribunal either exceeded the scope of that agreement or the scope of the issues presented to the tribunal by the parties in the arbitration. The excess of authority ground also applies where the tribunal failed to decide matters presented to it in the arbitration. …
>
> [emphasis added]

63 The defendants also referred to materials on Art V(1)(*c*) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) 330 UNTS 38 (entered into force 7 June 1959, accession by Singapore 21 August 1986) ("the New York Convention") and s 31(2)(*d*) of the IAA. Notably, Art 34(2)(*a*)(iii) of the Model Law derives from Art V(1)(*c*) of the New York Convention (see *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration*, UN Doc A/CN.9/264 (1985) at p 72, para 6), albeit that the former pertains to the setting aside of an award while the latter concerns the refusal to recognise or enforce an award. Similarly, s 31(2)(*d*) of the IAA, which is a ground for refusing the enforcement of a foreign award, is based on Art V(1)(*c*) of the New York Convention.

64 In this regard, the defendants relied on *Halsbury's Laws of Singapore: Arbitration* vol 1(2) (LexisNexis, 2014 Reissue) ("*Halsbury's*"), which explains at para 20.145 that s 31(2)(*d*) of the IAA "assumes that the tribunal has

jurisdiction over the parties". Similarly, *International Commercial Arbitration* states at p 3542 that Art V(1)(*c*) "does not apply where there is a dispute as to the existence of a valid arbitration agreement (which is the subject of Article V(1)(a))" but "concerns only the excess of jurisdiction, or authority, rather than the absence of any jurisdiction at all". Mercédeh Azeredo da Silveira & Laurent Lévy, "Transgression of the Arbitrators' Authority: Article V(1)(c) of the New York Convention" in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Emmanuel Gaillard & Domenico Di Pietro eds) (Cameron May, 2008) at pp 639–640 observe that Art V(1)(*c*) "presupposes that the parties have concluded a valid arbitration agreement and pertains to situations where the scope – not the existence – of the arbitrators' jurisdiction is at issue".

65 The defendants also cited *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd and another* [2006] 3 SLR(R) 174 ("*Aloe Vera*"), in which the second defendant sought to resist enforcement of an arbitral award under s 31(2)(*d*) of the IAA. The court found that the second defendant could not rely on s 31(2)(*d*), which "relates to the scope of the arbitration agreement rather than to whether a particular person was a party to that agreement" (at [69]). *Aloe Vera* was cited with approval in *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 ("*Astro*") at [153].

66 The Kingdom counter-argued that *CRW Joint Operation* did not conclusively limit the applicability of Art 34(2)(*a*)(iii) of the Model Law, which encompassed challenges to the tribunal's jurisdiction generally (including the objection that the dispute before the tribunal was not within the scope of the arbitration agreement). It also cited a helpful passage from an older version of *International Commercial Arbitration*, which I reproduce at [74(a)] below.

My analysis

67 I agree with the defendants that I do not have jurisdiction to set aside the Award under s 10(3) of the IAA. However, I find that I have such jurisdiction under Art 34(2)(*a*)(iii) of the Model Law read with s 3 of the IAA.

Section 10(3) of the IAA

68 In *AQZ v ARA* (see [57] above), Judith Prakash J (as she then was) conducted a thorough review of the drafting history of the Model Law and concluded that Art 16(3), from which s 10(3) of the IAA derives, does not apply to an award that deals with the merits of the dispute, *however marginally* (at [65]–[69]). Prakash J held that the same principle applies to s 10(3) of the IAA (*AQZ v ARA* at [70]).

69 The Kingdom did not contend that *AQZ v ARA* was wrongly decided. Indeed, it seemed to accept that s 10(3) did not apply where there was a ruling on both jurisdiction and merits. It therefore sought to persuade me that the PCA Tribunal did not rule on the merits of the dispute in the Award. I agree with Prakash J on the scope of s 10(3) of the IAA.

70 Here, the Award dealt with the merits of the defendants' claim. It was described as a "Partial Final Award on Jurisdiction and *Merits*" [emphasis added], and was clearly neither preliminary nor limited to a ruling on jurisdiction. The Award disposed of what the PCA Tribunal saw as the substance of the defendants' claim, *ie*, the Kingdom's purported breach of its treaty obligations as a result of its participation in the shuttering of the SADC Tribunal (*ie*, the shuttering dispute), on its merits. The Award also ordered relief in the form of the mandatory constitution of a new tribunal to hear the

defendants' SADC claim. Obviously, the PCA Tribunal only ordered relief because it had determined the merits of the dispute.

71 In my judgment, the Kingdom's emphasis on the fact that the Award was made after the first phase of proceedings was misplaced. The arbitration never entered a second phase precisely because the relief ordered at the end of the first phase brought the proceedings to a close, save for the quantification of costs of the arbitral proceedings, which the Costs Award addressed. The very fact that a new tribunal was ordered to be constituted to hear the SADC claim shows that the PCA Tribunal had completed its mission. There was nothing left for it to decide. In any event, the important distinction is not between jurisdiction/merits and *remedies*, but between jurisdiction and *merits*. The Award dealt with both. The Kingdom's argument to the contrary is thus unarguable.

72 Thus, applying *AQZ v ARA*, I find that s 10(3) of the IAA does not apply. I therefore have no jurisdiction to set aside the Award on this basis. I now turn to Art 34(2)(*a*)(iii) of the Model Law.

Article 34(2)(a)(iii) of the Model Law

73 I find that I have jurisdiction to determine the Kingdom's jurisdictional challenges under Art 34(2)(*a*)(iii) of the Model Law for the following reasons.

74 First, the parties did not dispute that there was a valid agreement to refer their dispute to *ad hoc* arbitration pursuant to Art 28(2)(c) of Annex 1. The crux of the Kingdom's jurisdictional objections was, rather, that there was no dispute which fell within the terms or scope of that arbitration agreement. In my judgment, these objections fall squarely within the terms of Art 34(2)(*a*)(iii). The first limb of Art 34(2)(*a*)(iii) concerns the situation where "the award deals

with a dispute which is not contemplated by or not falling within the terms of the submission to arbitration". In my view, a dispute beyond the bounds of the arbitration agreement falls outside "the terms of the submission to arbitration" and therefore engages the first limb of Art 34(2)(*a*)(iii). This view is supported by academic commentary:

(a) First, Born expresses the following view in *International Commercial Arbitration* at p 3295:

> An award will also be subject to annulment if an arbitral tribunal purports to decide issues that are *not within the scope of the parties' arbitration agreement.* Indeed, this is one of the paradigmatic examples of an excess of authority under most national arbitration regimes … *It is sometimes suggested that the "excess of authority" basis for annulment under Article 34(2)(a)(iii) of the Model Law and similarly-worded legislative provisions does not apply to claims that the award decided issues outside the scope of the arbitration agreement (as distinguished from claims outside the scope of the parties' submissions in the arbitration). This interpretation is contrary to at least some modern legislation and to the better reading of the language and purposes of the Model Law. There is no satisfactory reason to interpret the phrase "submission to arbitration" as limited solely to the submissions made by the parties in particular arbitral proceedings, and as excluding the matters submitted to arbitration by the parties' arbitration agreement.* If an award addresses matters that are clearly not within the scope of the parties' agreement to arbitrate, then it should be subject to annulment on excess of authority grounds.
>
> [emphasis added]

(b) Secondly, *Redfern and Hunter* states at para 10.38:

> … Article V of the New York Convention sets out the grounds on which recognition and enforcement of an international award may be refused, while Article 34 of the Model Law sets out the same grounds (with only slight differences of language) on which an award may be set aside. These grounds are:
>
> …

> *the award deals with matters not contemplated by, or falling within, the arbitration clause or submission agreement,* or goes beyond the scope of what was submitted;
>
> …
>
> [emphasis added]

Furthermore, this view is indirectly supported by *Aloe Vera* and *Astro*, which describe s 31(2)(*d*) of the IAA and Art V(1)(*c*) of the New York Convention respectively as pertaining to the "scope of the *arbitration agreement*" [emphasis added] (*Aloe Vera* at [69]; *Astro* at [155]). On the defendants' interpretation, Art 34(2)(*a*)(iii) would permit an award to be set aside only where it decides matters exceeding the scope of the dispute which the parties submitted for arbitration, but not where the entire submitted dispute *itself* exceeds the scope of the arbitration agreement. The latter situation surely involves an even more serious infraction. In my view, Art 34(2)(*a*)(iii) applies to both situations.

75 I therefore conclude that, if a tribunal decides on a dispute beyond the terms or scope of the arbitration agreement, its decision is liable to be set aside under Art 34(2)(*a*)(iii) of the Model Law.

76 Secondly, in my view, the passages in *CRW Joint Operation*, *Aloe Vera* and *Astro* which the defendants relied on do not preclude me from reaching this conclusion. The remarks made in those cases need to be understood in context. I will discuss these three authorities in turn.

77 I first address the observations made in *CRW Joint Operation* at [31] (see [60] above). In that case, it was clear that the dispute submitted to arbitration was within the terms of the arbitration agreement. The applicant's complaint was that the tribunal had essentially converted a previous adjudicator's decision into a Final Award without assessing the merits of the

defence and the adjudicator's decision as a whole. The Court of Appeal held that the tribunal had exceeded its jurisdiction in failing to consider the merits of the adjudicator's decision, because the arbitration agreement provided for the arbitration to take place as a rehearing so that the entirety of the parties' disputes could finally be "resolved afresh" (at [66] and [82]). The Final Award was therefore set aside under Art 34(2)(*a*)(iii) of the Model Law. Plainly, the facts in *CRW Joint Operation* were very different from those here. Thus, to the extent that the Court of Appeal's remarks (at [31]) suggest that Art 34(2)(*a*)(iii) does not apply if the dispute falls outside the arbitration agreement, they were strictly *obiter*.

78 In any event, I do not consider that the Court of Appeal's remarks in fact go that far. Notably, after making the remarks cited by the defendant (at [31]), the court added at [33] that Art 34(2)(*a*)(iii) "applies where an arbitral tribunal exceeds its authority by *deciding matters beyond its ambit of reference* …" [emphasis added]. In view of the authorities referred to at [74] above, I consider that the phrase "ambit of reference" does not merely refer to what the parties actually submit for decision. It must first and foremost be determined by reference to the arbitration agreement, which fixes the bounds of what disputes may be submitted to arbitration in the first place. I therefore consider that the Court of Appeal did not foreclose my conclusion that an award which pertains to a dispute falling outside the terms of an arbitration agreement may be set aside under Art 34(2)(*a*)(iii).

79 Turning then to the case of *Aloe Vera*, the second defendant, who was the president of the first defendant (a company that he had established), denied that he was a party to the arbitration agreement between the plaintiff and the first defendant and argued that the award could thus not be enforced against him (*Aloe Vera* at [58]). He sought to resist enforcement under s 31(2)(*d*) of the IAA.

The court accepted that "s 31(2)(*d*) did not overlap with s 31(2)(*b*) which was the proper section to invoke when a challenge was being made on the basis that a person was not a party to the arbitration agreement" (*Aloe Vera* at [67] and [69]). In this light, when the court remarked that s 31(2)(*d*) "relates to the scope of the arbitration agreement" (see [65] above), it was simply making plain that s 31(2)(*d*) does not apply where it is the existence of an arbitration agreement between the parties to the proceedings that is in question. The court was not remarking on a situation where there *was* an arbitration agreement between the parties but the dispute fell outside its scope.

80 The same principle was reiterated by the Court of Appeal in *Astro* (see [65] above). The inquiry facing the court was "whether the existence of an arbitration agreement between two parties should fall under the first [*ie*, Art 36(1)(*a*)(i) of the Model Law, which corresponds to Art V(1)(*a*) of the New York Convention] or third ground [*ie*, Art 36(1)(*a*)(iii) of the Model Law, which corresponds to Art V(1)(*c*) of the New York Convention]" (at [152]). The Court of Appeal considered *Aloe Vera* to be support for the first ground and agreed with *Aloe Vera* (at [153] and [158]). I do not understand the Court of Appeal to have held that Art V(1)(*c*) of the New York Convention or Art 36(1)(*a*)(iii) or Art 34(2)(*a*)(iii) of the Model Law would not apply to a dispute falling outside the bounds of the arbitration agreement.

81 In my judgment, the passages cited by the defendants sought to clarify the boundary between challenges to the *existence and validity of the arbitration agreement* and challenges to the *substantive jurisdiction of the tribunal*: see Born's and da Silveira & Lévy's remarks at [62] and [64] above. Similarly, the passage from *Halsbury's* (see [64] above) makes the point that s 31(2)(*d*) of the IAA is not intended to accommodate arguments that the tribunal lacks jurisdiction over the parties for the reason that there is no valid arbitration

agreement. Article 34(2)(*a*)(i) of the Model Law, like Art V(1)(*a*) of the New York Convention, provides specifically for situations where there is no valid arbitration agreement and it would be inappropriate to bring a challenge in such circumstances under Art 34(2)(*a*)(iii) or Art V(1)(*c*) instead. The passages relied on by the defendants therefore juxtapose the *scope* of jurisdiction with whether jurisdiction exists *in the sense of whether a valid arbitration agreement has been concluded between the parties*. *Aloe Vera* and *Astro* can also be understood in this way.

82 Thirdly, my conclusion that an award concerning a dispute falling outside the terms of the arbitration agreement can be set aside under Art 34(2)(*a*)(iii) is consistent with authority, principle and policy.

83 As a matter of authority, my conclusion is consistent with *AQZ v ARA*, where Prakash J opined at [69] as follows:

> … [R]elief under Art 16(3) is not available when a party seeks to set aside a ruling which is predominantly on jurisdiction but also marginally deals with the merits because that is simply not the purpose that the drafters intended Art 16(3) to serve. *In such situations, the dissatisfied party can seek to set aside the award pursuant to s 3(1) of the IAA read with the relevant limbs of Art 34(2) of the Model Law.* That would be the obvious and more appropriate remedy. …
>
> [emphasis added]

This conclusion is also in line with the Law Reform Committee's observations: see *Report of the Law Reform Committee on Right to Judicial Review of Negative Jurisdictional Rulings* (January 2011) ("the Law Reform Committee Report") at para 27):

> We do not recommend that there be judicial review of a positive jurisdictional ruling made in an award on the merits. With such ruling, the tribunal would have proceeded to an award. *The ruling should only be open for scrutiny on a setting aside*

> *application under Article 34*, or in a challenge to enforcement of the award.
>
> [emphasis added]

Similar remarks are made in Howard M Holtzmann & Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation, 1989) at p 486 (cited in *AQZ v ARA* at [68]).

84 As a matter of principle, the Court of Appeal has affirmed that no State will permit a binding arbitral award to be given within its territory without being able to review the award or, at least, without allowing the parties an opportunity to address the court if there has been a violation of due process or other irregularities in the arbitral proceedings: *CRW Joint Operation* at [26]. My interpretation of Art 34(2)(*a*)(iii) of the Model Law upholds this principle. An award which determines a dispute outside the scope of an arbitration agreement cannot be set aside under any *other* limb of Art 34. I do not agree with the defendants that Art 34(2)(*a*)(i) of the Model Law would apply. Art 34(2)(*a*)(i) only applies where a party to the arbitration agreement was under some incapacity, or where the arbitration agreement is not valid under the law to which the parties have subjected it (or, failing any indication thereon, the law of Singapore). It deals with "the existence *and* validity of arbitration agreements", not their "*scope*" [emphasis in original] (*Astro* at [155]).

85 As a matter of policy, to hold that Art 34(2)(*a*)(iii) does not apply, where no other limb under Art 34(2) would be engaged, would allow an arbitral tribunal to immunise its awards against judicial scrutiny by delivering its conclusions on both jurisdiction and merits in a *single award*. That would take the award out of the purview of s 10 of the IAA as well. The interpretation of Art 34(2)(*a*)(iii) which I have arrived at avoids this unsatisfactory result.

86 I therefore find that this court does have jurisdiction to determine the Kingdom's jurisdictional challenges under Art 34(2)(*a*)(iii) of the Model Law.

87 It is settled law, and undisputed, that I must apply a *de novo* standard of review in assessing the Kingdom's jurisdictional objections, even in relation to an investor-State arbitration invoking principles of public international law (*Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 ("*Sanum*") at [40]–[42]). While the court will of course consider what the tribunal has said, which may well be persuasive, it is not bound to accept its findings on the matter (*Sanum* at [41]).

Applicable law and principles of treaty interpretation

88 As OS 492 engages novel and complex legal questions, I think it is prudent to set out the applicable laws and interpretive approach before exploring the Kingdom's jurisdictional objections. An application to set aside an international arbitral award will typically involve different substantive laws applying at different strata. The treatise by Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2nd Ed, 2017) ("*McLachlan*") identifies the three following strata in an investor-State treaty arbitration:

> (a) First, the law applicable to the substance of the dispute (*lex causae*). The substantive law applied in a treaty arbitration is the treaty itself and the applicable law for the interpretation of the treaty is international law. The primary obligations (*ie*, the substantive rights provided by the treaty) that the investor seeks to enforce are thus interpreted according to public international law. However, subsidiary questions – for example, the nationality of a person, the validity of a right asserted to be an investment, or the purported breach of an

investment contract – may require the interpretation and application of domestic law (see *McLachlan* at paras 1.63–1.68, 3.99, 3.107 and 3.128).

(b) Secondly, the law applicable to the arbitration agreement between the investor and the State (see *McLachlan* at para 3.112). This is usually relevant where the arbitration clause is found in an investment contract to which the investor and the State are parties, but is not relevant here given that the arbitration agreement arises under Art 28 of Annex 1.

(c) Thirdly, the law applicable to the arbitration procedure itself (*lex arbitri*). In the case of an international arbitration not conducted under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965) 575 UNTS 159 (entered into force 14 October 1966) ("the ICSID Convention"), the law governing the arbitration procedure would be municipal law and it is on this basis that national courts have reviewed the actions of bilateral investment treaty ("BIT") tribunals (see *McLachlan* at para 3.113).

89 In this case, the Award does not expressly state the substantive law (*lex causae*) which the PCA Tribunal applied. However, since the dispute concerned alleged breaches of the Kingdom's obligations under the SADC Treaty and protocols, it is clear that the SADC Treaty, its related protocols and the general principles of international law applicable to the interpretation of the same constitute the *lex causae*.

90 Unlike awards issued under the ICSID Convention, an *ad hoc* arbitration award is subject to the rules for enforcement and challenge in the same way as any private international arbitral award through the courts of the country where

the tribunal had its seat (James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 8th Ed, 2012) ("*Brownlie*") at p 743). In setting-aside proceedings, the jurisdiction of the national courts is determined by the choice of the seat of arbitration, which provides the rules applicable to the proceedings. It was not disputed by the parties that Singapore law is the curial law of the arbitration for the purposes of OS 492. This followed from the PCA Tribunal's choice of Singapore as the seat of the arbitration.

91 Applying Singapore law as the *lex arbitri*, the arbitration was clearly an "international" one within the meaning of s 5(2) of the IAA as the parties have no connection at all to Singapore. The applicable statute is therefore the IAA, s 3(1) of which gives the Model Law (with the exception of Chapter VIII) "the force of law in Singapore". The grounds for setting aside the Award are found in s 24 of the IAA and Art 34 of the Model Law, given my view that s 10 of the IAA is inapplicable.

92 In determining the jurisdictional challenges brought under these provisions, the court is required first and foremost to interpret the arbitration agreement. In this case, that agreement is found in Annex 1. General international law principles of treaty interpretation are thus of relevance in OS 492.

93 It is commonly accepted that many provisions of the Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331 (entered into force 27 January 1980) ("the VCLT") are declaratory of customary international law, and its provisions are therefore regarded as applicable "irrespective of whether the VCLT applies *qua* treaty in the given case" (*Brownlie* at pp 367–368; see also *McLachlan* at para 7.85). In particular, the International Court of Justice ("the ICJ") has recognised that Arts 31 and 32 of the VCLT reflect customary

international law (see, *eg*, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ 43 at [160]). In *Sanum*, the Court of Appeal noted (at [46]) that the rules of treaty interpretation are governed by Art 31 of the VCLT, which states:

> *Article 31.* GENERAL RULE OF INTERPRETATION
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 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 connexion with the conclusion of the treaty;
> >
> > (*b*) Any instrument which was made by one or more parties in connexion 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.

94 Article 31(1) of the VCLT enshrines the principle of ordinary meaning. This functions as a presumption: a person advocating a meaning other than the ordinary meaning of words in the treaty bears the burden of establishing the special meaning. It is complemented by the principle of integration: "the

meaning must emerge in the context of the treaty as a whole (including the text, its preamble and annexes, and any agreement or instrument related to the treaty and drawn up in connection with its conclusion) and in the light of its object and purpose" (*Brownlie* at p 381).

95 The approach under Art 31 of the VCLT is a holistic one, embracing the three aspects of ordinary meaning, context, and object and purpose. It has been described by the tribunal in *Aguas del Tunari, S.A. v Republic of Bolivia*, ICSID Case No ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005 at [91] (cited in *McLachlan* at para 3.130) as follows:

> Interpretation under [Art 31 of the VCLT] is a process of progressive encirclement where the interpreter starts under the general rule with (1) the ordinary meaning of the terms of the treaty, (2) in their context and (3) in light of the treaty's object and purpose, and by cycling through this three step inquiry iteratively closes in upon the proper interpretation. …

96 The tribunal added:

> … [The VCLT] does not privilege any one of these three aspects of the interpretation method. The meaning of a word or phrase is not solely a matter of dictionaries and linguistics. … Rather, the interpretation of a word or phrase involves a complex task of considering the ordinary meaning of a work or phrase in the context in which that word or phrase is found and in light of the object and purpose of the document. …

In *Sanum*, the Court of Appeal adopted a similar approach in considering the ordinary meaning of the relevant words in the bilateral investment treaty entered into between the People's Republic of China and the Lao People's Democratic Republic ("PRC–Laos BIT"), the context of the PRC–Laos BIT, and its object and purpose (see *Sanum* at [125] *et seq*).

97 Article 31(3)(*c*) of the VCLT embodies what *McLachlan* (at para 7.95) terms a "principle of systemic integration", which recognises that treaties are

themselves creatures of international law and not a "self-contained closed legal system" (see also Bruno Simma & Dirk Pulkowski, "Two Worlds, but Not Apart: International Investment Law and General International Law" in *International Investment Law* (Marc Bungenberg *et al*, eds) (C H Beck, Hart & Nomos, 2015) ("*Bungenberg*") at p 361 and p 363 at para 6). Customary international law may intersect with investment treaty arbitration by, for example, shedding light on the meaning of the terms used by the treaty, stipulating rules or maxims of interpretation, delimiting the bounds of State responsibility and giving content to the international minimum standard of treatment (*McLachlan* at para 7.95; Simma & Pulkowski's chapter in *Bungenberg* at paras 6–16). Customary international law is most often used under Art 31(3)(*c*) where the treaty rule is unclear or open-textured and its meaning is determined by reference to a developed body of international law and/or the treaty terms have a recognised meaning in customary law, to which the parties can therefore be taken to have intended to refer (Report of the Study Group of the International Law Commission, "Fragmentation of International Law: Difficulties Arising from Diversification and Expansion of International Law", UN GAOR, 58th Sess, UN Doc A/CN.4/L.682 (13 April 2006) at para 467).

98 Article 32 of the VCLT "cautiously qualifies" the textual approach enshrined in Art 31 by permitting recourse to further means of interpretation in certain circumstances (*Brownlie* at p 383). Article 32 states:

> *Article 32*. SUPPLEMENTARY MEANS OF INTERPRETATION
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (*a*) Leaves the meaning ambiguous or obscure; or

> (*b*) Leads to a result which is manifestly absurd or unreasonable.

99 There was little opportunity to invoke Art 32 in this case. I invited the parties to tender the *travaux préparatoires* of the SADC Treaty and its protocols or annexes, but they did not do so. The *travaux préparatoires* for the Investment Protocol, in particular, were of interest to me. Counsel for the Kingdom explained that despite his best efforts, and presumably those of the Kingdom, the same could not be secured. This was unfortunate as the *travaux préparatoires* would have helped to shed light on some of the complex issues I had to grapple with.

100 Treaties should not be interpreted either liberally or restrictively (August Reinisch, "The Interpretation of International Investment Agreements" in *Bungenberg* at p 397, para 53). Indeed, neither of these terms is part of Art 31(1) of the VCLT. The object and purpose of investment treaty interpretation can rarely, if ever, be reduced to an unequivocally pro-investor or a pro-State approach. Usually a BIT, as well as a multilateral investment treaty like the SADC Treaty, strikes a balance between investor protection and State interests. The tribunal in *Saluka Investments BV v The Czech Republic (Partial Award)*, PCA Case No 2001-04, 15 ICSID Rep 274, IIC 210 at [300] (cited in *McLachlan* at para 1.90) astutely observed:

> … The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations. That in turn calls for a balanced approach to the interpretation of the Treaty's substantive provisions for the protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties' mutual economic relations.

101 Similarly, the tribunal in *Daimler Financial Services AG v Argentina Republic*, ICSID Case No ARB/05/1, Award, 22 August 2012, observed at [161] (referred to with approval in *McLachlan* at para 3.150):

> … In considering [the] interpretation [of the relevant BIT], it is essential to recall that BITs are reciprocal bilateral treaties negotiated between two sovereign State parties. The general purpose of BITs is of course primarily to protect and promote foreign investment; but it is to do so within the framework acceptable to both of the State parties. These two aspects must always be held in tension. They are the *yin* and *yang* of bilateral investment treaties and cannot be separated without doing violence to the will of the states that conclude such treaties. It is in this context that the exact wording of dispute resolution clauses plays a key role, as such clauses are one of the privileged places where the imbalances between the interests of both parties are often precisely defined as a result of the treaty's negotiation process.

102 An interpretation of the SADC Treaty and Annex 1 likewise must take into account the object and purpose of those instruments in light of both the potential interests of investors as well as those of the SADC Member States. This is an important consideration in this matter.

103 Another pertinent question is the value to be ascribed to past decisions of other international tribunals and courts. There is no system of precedent in international law. Past decisions have no precedential value even where the same treaty or State is involved (*McLachlan* at para 3.158). That said, "a *de facto* doctrine of precedent for investment treaty arbitration definitely exists" and investment tribunals approach their task "by carefully considering the work of other tribunals" (*McLachlan* at para 3.164). The consensus appears to be that this is both conducive to the development of a *jurisprudence constante* in international investment law, and helpful to individual tribunals in examining how similar issues have been resolved or as illustrating the application of established principles (Marc Bungenberg & Catharine Titi, "Precedents in

International Investment Law" in *Bungenberg* at pp 1508–1510, paras 4–7). It is important, however, to analyse particular cases in context – "both as to their functional response to the subject-matter of the claim, and as to their consistency with the overall development of the law in this area" (*McLachlan* at para 7.100).

104 With that, I turn to the Kingdom's jurisdictional objections. In investment treaty disputes, the arbitrator's jurisdiction can be analysed within the framework of three core elements – jurisdiction *ratione temporis*, jurisdiction *ratione materiae* and jurisdiction *ratione personae*. First, the tribunal lacks jurisdiction *ratione temporis* if the dispute falls foul of temporal restrictions in the investment treaty. For example, the investment treaty may limit the tribunal's jurisdiction to disputes arising after the treaty's entry into force or to investments made after that time. Secondly, a dispute is beyond the tribunal's jurisdiction *ratione materiae* if its subject matter is not capable of being submitted to arbitration under the investment treaty. For example, investment treaties may require the dispute to pertain to such "investment" as is defined in the treaty. Third, the tribunal lacks jurisdiction *ratione personae* if one of the parties before it lacks standing in the arbitration proceedings, say if he or she is not an "investor" within the meaning of the treaty or not a national of a signatory State. I address the Kingdom's jurisdictional objections in the following sequence:

(a) First, the PCA Tribunal lacked jurisdiction *ratione temporis* over the dispute, which arose before the entry into force of Annex 1 and thus fell foul of Art 28(4) of Annex 1 (at [105]–[180]).

(b) Secondly, the PCA Tribunal lacked jurisdiction *ratione materiae* because the dispute did not have the necessary connection to an

"investment" within the meaning of Art 28(1) of Annex 1 (at [181]–[228]).

(c) Thirdly, the defendants' purported investment had not been "admitted" within the meaning of Art 28(1) (at [229]–[252]).

(d) Fourthly, the dispute was not one which concerned an "obligation" of the Kingdom "in relation to" the defendants' purported investment within the meaning of Art 28(1) (at [253]–[277]).

(e) Fifthly, the dispute was not one in relation to which the defendants had exhausted local remedies, which was a requirement under Art 28(1) (at [278]–[319]).

(f) Sixthly, the PCA Tribunal lacked jurisdiction *ratione personae* over Swissbourgh and the Tributees, who were not capable of qualifying as "investors" for the purposes of Art 28(1) of Annex 1 and thus lacked standing to commence the arbitration (at [320]–[339]).

First objection: jurisdiction *ratione temporis*

105 Article 28(4) of Annex 1 states that "[t]he provisions of this Article shall not apply to a *dispute*, which arose before entry into force of this Annex" [emphasis added]. Annex 1 entered into force on 16 April 2010 (see [31(c)] above). As I have said, the defendants characterised the dispute as one concerning the Kingdom's participation in the shuttering of the SADC Tribunal from 2010 to 2014 (the shuttering dispute), and took pains to emphasise that the arbitration did *not* concern the Kingdom's alleged expropriation of the Mining Leases (the expropriation dispute). The Kingdom, on the other hand, submitted that the defendants' characterisation was an "artifice". The "real dispute" had to be objectively determined by the PCA Tribunal, and was the expropriation

dispute, which had arisen well before April 2010. This is a key point because if the Kingdom's contention is correct, the dispute was beyond the PCA Tribunal's jurisdiction *ratione temporis* as it arose before the entry into force of Annex 1.

PCA Tribunal's findings

106 The majority had "some sympathy" for the Kingdom's argument that the "true" dispute was the expropriation dispute (Award at [7.201]). Nevertheless, it cited three arbitral decisions for the proposition that it was "possible for a separate dispute to arise out of the dispute resolution process to determine the initial dispute": *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador*, PCA Case No 2007-02, Interim Award, 1 December 2008 ("*Chevron v Ecuador*"), *ATA Construction, Industrial and Trading Company v The Hashemite Kingdom of Jordan*, ICSID Case No ARB/08/2, Award, 18 May 2010 ("*ATA v Jordan*") and *Mondev International Ltd v United States of America*, ICSID Case No ARB(AF)/99/2, Award, 11 October 2002 ("*Mondev v USA*") (Award at [7.202]). The majority found that a "separate and discrete dispute" had arisen in this case upon the shuttering of the SADC Tribunal by the SADC Member States, including the Kingdom, "without providing an alternative forum for [the defendants'] claims to be heard and decided" (at [7.203]). The majority identified (at [7.204]–[7.206]) the following differences between the expropriation dispute and the shuttering dispute:

(a) The expropriation dispute "concern[ed] the substance of the investment and its treatment", whereas the shuttering dispute "focuse[d] on the procedure (*i.e.*, the forum) for deciding the expropriation claim" and was limited to "whether an existing international forum for hearing the underlying claim was improperly denied to [the defendants]".

(b) The expropriation dispute was "governed by both domestic and international law", whereas the shuttering dispute was "governed wholly by treaty and international law" – in particular "customary international law and the Treaty and Protocol".

(c) The proper remedy for the shuttering dispute would be "an international arbitral forum to hear and decide the expropriation dispute", whereas the proper remedy for the expropriation dispute would be monetary compensation.

(d) If a *lis pendens* analysis were employed "by analogy", the two disputes would be considered distinct because they did not "involve the same cause of action or the same relief, when properly analysed and limited".

107 The majority acknowledged (at [7.204]) that determining the shuttering dispute would be a "necessary prerequisite for deciding the underlying [expropriation] dispute", but this did not mean that they were "the same dispute".

The Dissenting Opinion

108 Justice Nienaber strongly disagreed with the majority's conclusions. He thought that the "true dispute" was the expropriation dispute, which was beyond the Tribunal's jurisdiction *ratione temporis*.

109 Justice Nienaber seemed to accept that there was a conceptual difference between the two disputes – in his words, the shuttering dispute did not deal "with any particular aspect of the merits of the real dispute between the parties about the expropriation of the mining leases" but concerned "an entirely

collateral procedural matter relating to the judicial means of resolving the merits of the real dispute" (Dissenting Opinion at [2.28]). Unlike the expropriation dispute, it had nothing to do with "the substantive dispute between the parties about the fall-out following the expropriation of the mining leases", but had "everything to do with the interference with the judicial process of determining that dispute" (at [2.29]).

110 However, he took the view that this conceptual difference did not suffice. In order to qualify as a distinct dispute, the shuttering dispute must be a "discrete", "complete" and "self-contained" dispute "severable from, and which superseded" the expropriation dispute in order to be within the Tribunal's jurisdiction (at [2.21]). The two must be "wholly detached" (at [2.30]). In Justice Nienaber's view, the correct test was "whether, judged on its own and without reference to the claim for compensation for loss of the mining rights, [the shuttering dispute] would constitute a viable cause of action" (at [2.21]). In his judgment, the shuttering dispute failed this test. It was "inchoate" and could not itself "give rise to a viable cause of action", because it could not be conceptualised without reference to the expropriation dispute (at [2.27] and [2.29]).

111 Justice Nienaber saw the shuttering dispute as simply a means to the defendants' end of obtaining compensation in the expropriation dispute, and hence "part and parcel of one broad dispute relating to the loss of the mining rights". It was only an "additional step in the continuing process of implementing and enforcing the [defendants'] true cause of action for compensation for the loss of the mining rights", and it would be wrong to "elevate" that one step into a dispute in its own right, thereby circumventing the *ratione temporis* limitation which rendered the expropriation dispute beyond the PCA Tribunal's jurisdiction (at [2.23]). The shuttering dispute was "accessory"

to the expropriation dispute and "an attribute of the substantive right to the promised performance". Thus, rather than establishing a new jurisdiction where none existed over the expropriation dispute, the shuttering dispute must share the other's "jurisdictional fate" (at [2.39]–[2.40]).

112 Indeed, the remedy adopted by the majority (*ie*, the constitution of a new arbitral tribunal to determine the expropriation dispute) exemplified the "inescapable nexus between the closing down of the SADC Tribunal and the earlier complaint about the loss of the mining leases" (at [2.22]). The proper remedy to the shuttering dispute, then, would have been a "declaratory order" as to the illegality of shuttering the SADC Tribunal, but such an order would have had little practical benefit for the defendants (at [2.27]). I note that Justice Nienaber did not address any cases in his analysis of this issue.

Parties' submissions

113 The defendants did not maintain the position that they had adopted in the arbitral proceedings that an arbitral tribunal was required to accept a claimant's characterisation of the dispute. They strove to defend the majority's reasoning, emphasising the differences between the expropriation dispute and the shuttering dispute (see [106] above). They also pointed out another difference, *viz*, that all nine defendants had been party to the expropriation dispute whereas only the second to fourth defendants (Mr Van Zyl, the JVZF Trust and the Burmilla Trust) had been found capable of pursuing the shuttering dispute. The defendants submitted that the remedy ordered by the majority (*ie*, the constitution of a new tribunal to hear the expropriation dispute) further "demonstrate[d] the essential difference" between the expropriation dispute and the shuttering dispute.

114 The defendants referred to Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009) ("*Douglas*") at p 341, which states that a tribunal is entitled to "take into account facts relating to the claim but occurring prior to the tribunal's jurisdiction *ratione temporis* provided that those facts are not relied upon as constituent elements of the breach of the obligation forming the basis of the claim". They also referred to various passages from the three cases that the PCA Tribunal had relied on (*Mondev v USA*, *Chevron v Ecuador* and *ATA v Jordan*) (see [106] above). I examine these cases in detail below. The defendants argued that these cases were analogous to the present case and supported their view that the shuttering dispute was distinct from the expropriation dispute.

115 The defendants also referred to *Jan de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Decision on Jurisdiction, 16 June 2006 ("*Jan de Nul v Egypt*"), which was cited with approval in *MCI Power Group LC and New Turbine, Inc v Republic of Ecuador*, ICSID Case No ARB/03/6, Award, 31 July 2007 ("*MCI Power Group*"). The tribunal in *MCI Power Group* distinguished disputes arising prior to the entry into force of the BIT from "disputes arising after that date that have the same cause or background with those prior disputes". It also observed that "a prior dispute may evolve into a new dispute", although "disputes that continue after the entry into force of the BIT are not covered by the BIT". Disputes that "arose or became evident after the entry into force of the BIT" were within the tribunal's jurisdiction *ratione temporis* "independently of whether they had a causal link with, or served as the basis of, allegations concerning acts or disputes prior to the entry into force of the BIT" (*MCI Power Group* at [65]–[66] and [190]).

116 The Kingdom, on the other hand, maintained that this characterisation was an "artifice". The PCA Tribunal (and now the court) need not unquestioningly accept the defendants' characterisation of the nature of the dispute, which was to be objectively determined. The cases of *Mondev v USA*, *Chevron v Ecuador* and *ATA v Jordan* were distinguishable and had no application to the facts at hand. The test that should be applied in determining the true dispute was that stated by the ICSID tribunal in *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v Republic of Peru*, ICSID Case No ARB/03/04, Award, 7 February 2005 ("*Lucchetti v Peru*") at [50] (approved in *ATA v Jordan* at [102]), which I reproduce at [126] below.

117 The Kingdom also referred to *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*, PCA Case No 2011-03, Award, 18 March 2015 ("*Chagos Marine*"), in which the tribunal asked itself at [211] and [220] "where the relative weight of the dispute" lay, what the dispute "primarily concern[ed]" and what the "true object of the claim" and the "relief sought" were. The Kingdom criticised the majority for having failed to have regard to any of these tests. In this regard, the Kingdom identified various portions of the defendants' pleadings in the arbitration referring to the expropriation dispute and inviting the PCA Tribunal to assume the role of the SADC Tribunal and order compensation for expropriation of the Mining Leases.

118 Applying these tests, the Kingdom submitted that the "real, and long-standing, dispute" was really about the "validity and performance of the [M]ining [L]eases and whether the [d]efendants are entitled to compensation with respect to the alleged mistreatment of those [M]ining [L]eases between 1993 and 2000". This dispute had arisen prior to 16 April 2010, the effective date of the Investment Protocol and by necessary implication, Annex 1, and was therefore outside the PCA Tribunal's jurisdiction *ratione temporis*.

My analysis

119 I agree with the Kingdom that I should not simply accept the defendants' characterisation of the subject of the dispute, but should determine this on an objective basis. This position has been adopted in the ICJ (see, *eg*, *Fisheries Jurisdiction (Spain v Canada) (Jurisdiction)* [1998] ICJ 432 ("*Fisheries Jurisdiction*") at [30]–[31]) and followed by the PCA (*Chagos Marine* (see [117] above) at [208] and [211]). While these precedents are not binding on Singapore courts, they are persuasive and I agree with the approach therein (in this respect) in principle. An arbitral tribunal must be entitled to look beyond what one party says or alleges in determining its own jurisdiction, as the PCA Tribunal was empowered to do pursuant to Art 23(1) of the UNCITRAL Arbitration Rules 2010. The same applies to a court, which would otherwise be unable to effectively review the tribunal's jurisdiction *de novo*. This is a matter of common sense and logic. Having said that, having regard to the relevant material – including the parties' cases in the arbitration, their submissions in OS 492, the relief sought and the cases cited to me – I accept the defendants' position that the true dispute before the PCA Tribunal was the shuttering dispute, which arose after the entry into force of Annex 1. The shuttering dispute is within the PCA Tribunal's jurisdiction *ratione temporis*.

Past arbitral decisions

120 Article 28(4) of Annex 1 is at the heart of the issue of whether the dispute is within jurisdiction *ratione temporis*. The interpretation of Art 28(4) of Annex 1 should be guided by "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose", which are to be ascertained with reference to the provisions of the SADC Treaty, the Investment Protocol and Annex 1 (Art 31(2) of the VCLT, see [93] above). However, the key terms of Art 28(4) ("dispute" and "arose") are not defined in

any of these instruments, whose stated objectives are also crafted too generally to be determinative of the question whether the shuttering dispute should be understood as distinct from the expropriation dispute. I also did not have the advantage of perusing the relevant *travaux préparatoires*. The parties' submissions relied largely on awards by other arbitral tribunals analysing the question of whether the dispute submitted for arbitration was one which, properly characterised, had arisen before an investment treaty's entry into force. Insofar as the treaties under consideration use the same terms as Art 28(4) of Annex 1, these awards shed some light on the ordinary meaning of Art 28(4) of Annex 1. I turn to them now. I will set out the facts and findings of *Lucchetti v Peru*, *Mondev v USA*, *Chevron v Ecuador*, *ATA v Jordan* and *Jan de Nul and Egypt*, before distilling – not without some difficulty, I should add – the principles to apply in this case.

(1) *Lucchetti v Peru*

121 *Lucchetti v Peru* is often cited for its consideration of the question of when a dispute can be considered distinct from an earlier dispute arising before the treaty's entry into force. The claimants were a Chilean pasta producer and a company established to supply local and export markets in Peru. They constructed a plant, for which they claimed they had obtained all necessary authorisations and permits, near a protected wetland known as "Pantanos de Villa". Nevertheless, from 1997 to 1998, the Municipality of the Lima Province ("the Municipality of Lima") annulled these permits, referring to environmental problems and supposed deficiencies relating to the granting of the permits. It also issued a stop work notice to the claimants. In response, the claimants commenced proceedings in January 1998 against the Municipality of Lima and other local authorities. The proceedings culminated in four court judgments from January to May 1998 in the claimants' favour which went unchallenged.

Another court judgment in September 1998 ordered the Municipality of Lima to authorise the construction of the claimants' plant. In December 1998, the Municipality of Chorrillos – a district within the Lima Province – issued a construction licence and an operating licence to the claimants.

122 On 16 August 2001, the Council of the Municipality of Lima promulgated Decrees 258 and 259. Decree 258 charged the Mayor of Lima to present to the Peruvian legislature proposals for the legislative expropriation of all areas necessary for the preservation, maintenance and protection of the Ecological Reserve of Pantanos de Villa. Decree 259 specifically revoked the second claimant's operating licence, purportedly in response to the industrial plant's environmental impact on Pantanos de Villa.

123 The claimants commenced ICSID arbitral proceedings against Peru for breach of its obligations under the BIT between the Republic of Peru and the Republic of Chile (2 February 2000) (entered into force 3 August 2001) ("the Peru–Chile BIT"), alleging that Decrees 258 and 259 and subsequent acts had caused enormous losses to their investment and violated their rights. Article 2 of the Peru–Chile BIT stated:

> This Treaty shall apply to investments made before or after its entry into force by investors of one Contracting Party, in accordance with the legal provisions of the other Contracting Party and in the latter's territory. *It shall not, however, apply to differences or disputes that arose prior to its entry into force.*
>
> [emphasis added]

124 Peru disputed the tribunal's jurisdiction *ratione temporis* on the basis that the Peru–Chile BIT did not apply to disputes pre-dating its entry into force on 3 August 2001, whereas the dispute between the claimants and the Peruvian authorities began in 1997–1998. The subject-matter of that dispute was the same as in 2001 when Decrees 258 and 259 were adopted, and the conflict between

the claimants and the Peruvian authorities during that entire period of time amounted to an interrelated series of events together comprising a single dispute. The claimants counter-argued that the dispute really related to Decrees 258 and 259, which were only issued in 2001. The acts of the Peruvian authorities in 1997–1998 had been definitively resolved by the court judgments in 1998.

125 The tribunal held that it had no jurisdiction *ratione temporis*. First, it gave the following analysis of the term "dispute" at [48], citing from past decisions of the ICJ:

> … [A]s a legal concept, the term dispute has an accepted meaning. It has been authoritatively defined as a [*sic*] "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons," or as a "situation in which two sides hold clearly opposite views concerning the question of the performance or non-performance" of a legal obligation. In short, a dispute can be held to exist when the parties assert clearly conflicting legal or factual claims bearing on their respective rights or obligations or that "the claim of one party is positively opposed by the other."

126 It went on to say at [50]:

> … The Tribunal must therefore now consider whether, in light of other here relevant factors, the present dispute is or is not a new dispute. In addressing that issue, the Tribunal must examine the facts that gave rise to the [present] dispute and those that culminated in the [previous] dispute, seeking to determine in each instance *whether and to what extent the subject matter or facts that were the real cause of the disputes differ from or are identical to the other.* According to a recent ICSID case, the critical element in determining the existence of one or two separate disputes is *whether or not they concern the same subject matter.* The Tribunal considers that, whether the focus is on the "real causes" of the dispute or on its "subject matter," it will in each instance have to determine whether or not the facts or considerations that gave rise to the earlier dispute continued to be central to the later dispute.
>
> [emphasis added]

127 The tribunal observed (at [51]–[52]) that the preamble to Decree 259 "related" it "directly to the measures the municipal authorities took in 1998" to force the claimants to comply with regulatory requirements, and "focuse[d] on the failure of the municipal authorities to achieve their objective because of the judgments entered in the [c]laimants' favour in 1998". It thus found (at [53]) that the "reasons for the adoption of Decree 259 were thus directly related to the considerations that gave rise to the 1997/98 dispute", *viz*, the Municipality of Lima's commitment to protect the environmental integrity of Pantanos de Villa and its repeated efforts to compel the claimants to comply with applicable rules and regulations. The two disputes had the "same origin or source", namely, the Municipality of Lima's "desire to ensure that its environmental policies are complied with and the [c]laimants' efforts to block their application to the construction and production of the pasta factory". They were thus one dispute which had "crystallized by 1998" and was "continued" by the adoption of Decrees 258 and 259 (at [53]). Indeed, the Municipality of Lima "never considered" that its dispute with the claimants had ended with the judgments in 1998, and "adopted Decrees 258 and 259 as soon as it concluded" that it could "reassert its earlier position" notwithstanding those judgments (at [56]).

128 It is not clear whether the tribunal in *Lucchetti v Peru* was invoking at [50] one test or multiple tests for the distinctness of the dispute. John P Gaffney notes in his commentary, "The Jurisdiction *Ratione Temporis* of ICSID Tribunals" (2007) 22(7) MEALEY'S International Arbitration Report 1 at p 8 that:

> In *Lucchetti* the tribunal "appeared to regard as synonymous the "real causes" and the "subject matter" of the dispute … while later on it also considered whether the two disputes at issue had the same "origin or source". In the author's view, it is open to doubt whether these terms have the same meaning. For example, the Concise Oxford Dictionary defines: "subject matter" as "the matter treated of in a … lawsuit"; "cause" as

> "that … which gives rise to an action"; and "origin" as "a beginning or starting-point."

129 *McLachlan* also observes at para 6.69 that the tribunal's focus on subject-matter "runs counter" to the approach adopted by other tribunals which, in considering the meaning of "dispute", have typically focused "on the parties and the cause of action rather than the subject-matter", *ie*, a *lis pendens*-type analysis.

130 I agree with these remarks. It would seem that the cause-of-action approach is a better way of ascertaining the real dispute than the subject-matter approach. Taking the former approach would clearly differentiate the facts that are *background to the dispute* from the facts that are *core to the claim*. Apart from providing a general sense of what the subject matter of the dispute was, I do not consider that the subject-matter approach assists one in drawing this distinction, which I consider to be important. I note, moreover, that the *Lucchetti v Peru* tribunal (at [50]) based its criterion of "subject matter" on an earlier ICSID decision, *CMS Gas Transmission Company v Republic of Argentina*, ICSID Case No ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, which made the remark in quite a different context. There, the Republic of Argentina criticised the claimant for having submitted two distinct disputes, arising from different measures employed by the State, in the same arbitration. In the claimant's defence, the tribunal observed (at [109]) that "[a]s long as [the measures] affect the investor in violation of its rights and cover the same subject matter, the fact that they may originate from different sources or emerge at different times does not necessarily mean that the disputes are separate and distinct". Given the difference in context, the above remarks and the ambiguity of the phrase "subject matter", I do not find the phrase in *Lucchetti v Peru* particularly helpful as a test of distinctness, at least for present purposes.

(2) *Mondev v USA*

131 This was an ICSID arbitration commenced by Mondev International Ltd ("Mondev") against the city of Boston and the Boston Redevelopment Authority ("the BRA") concerning a decision by the Massachusetts Supreme Judicial Court ("the MSJC"). For reasons that will become apparent, I did not find *Mondev v USA* instructive for present purposes.

132 In 1978, Boston and the BRA entered into a tripartite agreement with Lafayette Place Associates ("Lafayette"), a limited partnership owned by Mondev, for the construction of a department store, retail mall and hotel in a dilapidated area of the city. Lafayette subsequently claimed that the city of Boston and the BRA had breached their contractual obligations and sued them in 1992. The trial judge ruled on 17 August 1995 that the city and the BRA had breached the tripartite agreement, but that the BRA enjoyed statutory immunity from suit for intentional torts. On appeal, on 20 May 1998, the MSJC affirmed the trial judge's decision regarding the BRA and upheld Boston's appeal against its liability for the contractual claim. Lafayette thus lost its claims against both entities. After Lafayette's petition for rehearing before the MSJC and its application for *certiorari* before the US Supreme Court were denied on 1 July 1998 and 1 March 1999 respectively, Mondev commenced ICSID arbitral proceedings in 1999 pursuant to Art 1116 of the North American Free Trade Agreement (17 December 1992) 32 ILM 289 (entered into force 1 January 1994) ("the NAFTA") for loss and damage caused to its interests in Lafayette. Mondev claimed that the US had breached various NAFTA obligations due to the MSJC's decision and the acts of the city of Boston and the BRA.

133 The US challenged the ICSID tribunal's jurisdiction *ratione temporis* on the basis that the contractual dispute had arisen from 1985 to 1991, which was

well before the NAFTA entered into force in 1994. Mondev counter-argued that the contractual breaches were not perfected until the US courts dealt with Lafayette's claims under domestic law. The pre-1994 conduct of Boston and the BRA was wrongful both in terms of the international minimum standard and Massachusetts law, and this created *a continuing situation* which the US was obliged to remedy under Article 1105 of the NAFTA. The US' failure to remedy this situation after 1994 constituted a breach of the NAFTA.

134 The ICSID tribunal took the view that the NAFTA lacked retrospective effect. It thus followed that conduct occurring before 1994 could not itself constitute a breach of the NAFTA. That said, it was possible for an act "of a continuing character", initially committed before the NAFTA entered into force, to constitute a breach of NAFTA obligations following the NAFTA's entry into force. Such an act must be distinguished from "an act, already completed, which continues to cause loss or damage" (at [58]). On the facts, the tribunal found that there was no continuing wrongful act at the date of the NAFTA's entry into force. But this did not mean that events prior to the NAFTA's entry into force were wholly irrelevant. The tribunal stated at [70]:

> … *[E]vents or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation.* But it must still be possible to point to conduct of the State after that date which is itself a breach. *In the present case the only conduct which could possibly constitute a breach of any provision of Chapter 11 is that comprised by the decisions of the [MSJC] and the Supreme Court of the United States, which between them put an end to LPA's claims under Massachusetts law. …*
>
> [emphasis added]

135 The tribunal thus accepted that it was possible for the *post-1994 conduct* of the US courts in dealing with Lafayette's claims under Massachusetts law, seen in the context of the factual dispute out of which those claims arose, to

constitute breach of the US' NAFTA obligations. The courts' conduct was within the tribunal's jurisdiction *ratione temporis*, even though this conduct comprised judgments in respect of alleged breaches by the BRA and the city of Boston committed *prior to 1994* (*ie*, the substantive dispute occurred before 1994).

136 The defendants argued that *Mondev v USA* (as well as *ATA v Jordan* and *Chevron v Ecuador*, which I shall deal with later) were analogous to the present facts in that the defendants' "secondary rights had accrued before the relevant treaty came into force, but were adversely affected after the relevant treaty came into force".

137 I did not find *Mondev v USA* helpful or relevant here. As the Kingdom pointed out, unlike Art 28(4) of Annex 1, there was no NAFTA provision excluding jurisdiction over pre-existing disputes. In *Mondev v USA*, the question before the tribunal was not whether the *dispute* had arisen after the NAFTA's entry into force, but rather whether the acts alleged to have breached the NAFTA (*ie*, the *breach*) had occurred after the NAFTA's entry into force. This explains the tribunal's remarks (see [134] above). Articles 1116(1)(a) and 1117(1)(a) of the NAFTA, read in light of the general principle of non-retroactivity, only confer jurisdiction over breaches of specified obligations arising after the NAFTA entered into force. To put it simply, the treaty provisions in *Mondev v USA* were different from those in the present case. The ICSID tribunal did not undertake any analysis of whether the *dispute* could be said to have arisen after that date. It might be reasonably argued that if the dispute had been the defining term in the treaty, the tribunal would have come to the same conclusion as in *Lucchetti v Peru.* I will therefore say no more about *Mondev v USA*.

(3) *Chevron v Ecuador*

138 In 1964, the Government of Ecuador granted oil exploration and production rights in the Amazon region to Texaco Petroleum Company ("TexPet") through a concession contract with TexPet's local subsidiary. This contract was superseded by a new concession contract in August 1973 and a supplemental agreement in December 1977. The agreements entitled TexPet to explore and exploit oil reserves in regions of Ecuador, and required TexPet to provide a percentage of its crude oil production to the Government to meet Ecuadorian domestic consumption needs. The Government of Ecuador was entitled to set the price at which it would purchase the oil from TexPet for Ecuadorian domestic consumption needs, referred to as the "domestic market price". The Government also had the right to purchase additional oil in excess of the amount required for domestic consumption at international market prices. After fulfilling its obligations to the Government, TexPet was free to export the remainder of its oil at prevailing international market prices, which were always substantially higher than the domestic market price.

139 Between 1991 and 1993, TexPet filed seven breach of contract claims against the Government of Ecuador in the Ecuadorian courts, claiming over US$553m in damages. These were for Ecuador's purported breaches of the 1973 and 1977 contracts and related violations of Ecuadorian law. Essentially, Ecuador had overstated the domestic demand for oil and purchased oil from TexPet, which was not meant for domestic consumption, at domestic market rates instead of international market rates.

140 TexPet alleged that six of its seven cases had been left pending in Ecuadorian courts for over 10 years without decision. TexPet claimed that these cases had been ready for decision under Ecuadorian law since 1998 but the

courts refused to rule. In the seventh case, the courts allegedly refused to take evidence from the appointed experts for over 14 years. Ecuador disputed this, asserting that TexPet's claims were legally complex and that it was far from clear that the claims were even made out. After TexPet served notice of its intention to file the arbitration in May 2006, three of TexPet's claims were dismissed by the Ecuadorian courts in 2006 and 2007. A fourth was determined in TexPet's favour.

141 The claimants argued that there had been undue delay in deciding TexPet's seven cases, and that the three dismissals were "grossly incompetent, biased and manifestly unjust" decisions made in "manifest disregard of clear principles of Ecuadorian law". Ecuador's conduct purportedly gave rise to two claims: a denial of justice claim under customary international law, and a violation of Ecuador's obligations to TexPet under the Treaty Between the Government of the United States of America and the Government of the Republic of Ecuador for the Encouragement and Reciprocal Protection of Investment (27 August 1993) (entered into force 11 May 1997) ("the US–Ecuador BIT").

142 Ecuador submitted that the tribunal lacked jurisdiction *ratione temporis*. Although the US–Ecuador BIT did not explicitly bar disputes which arose prior to its entry into force, Ecuador submitted that this must be the case given the principle of non-retroactivity enshrined in Art 28 of the VCLT. Ecuador referred to *Lucchetti v Peru* at [50] (see [126] above). It also cited *Sociedad Anónima Eduardo Vieira v Chile*, ICSID Case No ARB/04/7, Award, 21 August 2007 ("*Vieira v Chile*") at [72]–[76] for the proposition that acts occurring after the BIT's entry into force would not create a new dispute if the acts were "'secondary' in importance or centrality to the overall dispute when compared with the pre-BIT acts". It pointed out that TexPet's claims in the Ecuadorian

courts were the source of the dispute and that Ecuador's acts after the BIT's entry into force were merely accessory to the denial of justice claim. The dispute had thus crystallised prior to the BIT's entry into force.

143 The claimants counter-argued that there was no need for the dispute to arise only after the BIT's entry into force, as long as the *investment* existed "at the time of entry into force [or was] made or acquired thereafter" (Art XII(1) of the US–Ecuador BIT). The claimants distinguished *Lucchetti v Peru* and *Vieira v Chile* as having been based on specific treaty language absent from the US–Ecuador BIT. Notably, the BIT in *Lucchetti v Peru* contained a clause barring its application to pre-existing disputes. The claimants argued that, in any event, their claims would pass the *Lucchetti v Peru* test because their denial of justice claim centred around acts and omissions of Ecuadorian courts and political branches committed after the BIT's entry into force. While the underlying lawsuits provided the "factual basis" for the BIT violations, Ecuador's liability for denial of justice could be determined without reference to the substantive merits of the nine lawsuits.

144 The tribunal observed that the US–Ecuador BIT made an exception to the principle of non-retroactivity enshrined in Art 28 of the VCLT. Article XII of the BIT stated that it would apply as long as there were "investments *existing* at the time of entry into force" [emphasis added]. There was no requirement for the dispute to arise after its entry into force, unlike the BITs in *Lucchetti v Peru* and *Vieira v Chile*, which were hence distinguishable (at [266]). In this case, there was indeed an existing investment at the time of entry into force, and this sufficed for jurisdiction *ratione temporis* (at [264]). In any event, the tribunal found that a distinct dispute had arisen after the BIT's entry into force. Separate from and subsequent to the disputes relating to Ecuador's breaches of the 1973 and 1977 agreements, the claimants had alleged actions (or inaction) of the

Ecuadorian courts which had crystallised into a new dispute over a denial of justice. A "customary international law claim for denial of justice was a fundamentally different claim than a domestic law claim for breach of contract" (at [269]). This new dispute thus only arose after the entry into force of the BIT.

145 The tribunal (at [283]) also affirmed the principle articulated in *Mondev v USA* at [70] (see the first italicised proposition in the extract quoted at [134] above). In this case, a finding of denial of justice could well require taking into account pre-BIT acts (at [284]).

146 The defendants in OS 492 compared *Chevron v Ecuador* to the facts of the present case, and cited *Chevron v Ecuador* at [283]:

> … [A]s the Claimants have argued, this does not mean that a breach must be based solely on acts occurring after the entry into force of the BIT. The meaning attributed to the acts or facts post-dating the entry into force may be informed by acts or facts pre-dating the BIT; that conduct may be considered in determining whether a violation of BIT standards has occurred after the date of entry into force. …

147 The Kingdom argued against relying on *Chevron v Ecuador* for the following reasons:

(a) There, as in *Mondev v USA*, the tribunal's jurisdiction was not limited to disputes arising after the BIT's entry into force, so the tribunal only considered this objection "briefly" (*Chevron v Ecuador* at [264]–[265]).

(b) The tribunal's view that a separate dispute over denial of justice had crystallised after the BIT's entry into force was based on its prior finding that "a customary international law claim for denial of justice is a fundamentally different claim than a domestic claim for breach of

contract". In the present case, however, the defendants had to distinguish an international law claim for denial of justice (*ie*, the shuttering dispute) from an international law claim for expropriation of the Mining Leases (*ie*, the expropriation dispute).

(c) The tribunal's remarks at [283] and [284], including its approval of *Mondev v USA* at [70], were made in the context of the objection that the *acts* alleged to constitute a breach of BIT obligations had occurred prior to the BIT's entry into force, and had nothing to do with when the *dispute* had arisen.

148 I found *Chevron v Ecuador* of some but limited relevance for the reasons cited by the Kingdom at [147(a)] and [147(c)]. As with *Mondev v USA*, the US–Ecuador BIT applied as long as there were investments existing at the time of entry into force. The issue of when the dispute arose was, strictly speaking, irrelevant to the question of the tribunal's jurisdiction. Perhaps for this reason, the tribunal's analysis of the nature of the dispute was fairly cursory. Nevertheless, I agree with the tribunal's conclusion that a distinct dispute had arisen after the entry into force of the BIT. The conduct of the Ecuadorian courts in purportedly delaying or denying justice to the claimants was itself a potential breach of international law obligations, independent of the courts' decision on the merits of the underlying contractual dispute.

(4) *ATA v Jordan*

149 ATA Construction, Industrial and Trading Company ("ATA"), a Turkish company, was engaged by Arab Potash Company ("APC"), a Jordanian entity, to construct a dike at a site on the Dead Sea pursuant to a contract entered into on 2 May 1998. Upon completion, the dike was handed over to APC, which proceeded to fill it with water, whereupon a section of the dike collapsed. A

dispute arose as to whether the collapse was the fault of ATA or APC. APC commenced arbitral proceedings against ATA before a Fédération Internationale des Ingénieurs-Conseils ("FIDIC") tribunal in accordance with cl 67 of the contract. The FIDIC tribunal issued a Final Award on 30 September 2003 exonerating ATA from any liability for the collapse, and dismissing all of APC's claims. It partly upheld ATA's counterclaim and awarded it compensation of US$5,906,828.30.

150 On 29 October 2003, APC applied to the Amman Court of Appeal to have the Final Award annulled under the Jordanian Arbitration Law. The Amman Court of Appeal annulled the Final Award, principally on the basis that the FIDIC Tribunal had erred in law, and also "dismiss[ed] the arbitration agreement concluded between the parties to the action" by its judgment on 24 January 2006. This was pursuant to Art 51 of the 2001 Jordanian Arbitration Law, which stated:

> … If … the court decides the nullity of the award, its decision is subject to challenge before the Court of Cassation within thirty days following the date of notifying that decision. *The final decision nullifying the award results in extinguishing the arbitration agreement.*
>
> [emphasis added]

151 ATA appealed to the Jordanian Court of Cassation, which upheld the Amman Court of Appeal's judgment on 16 January 2007. Although the Court of Cassation was able to exempt ATA from the operation of Art 51 of the 2001 Jordanian Arbitration Law which prescribed the extinguishing of the arbitration agreement, it did not do so. This was ultimately an issue of critical importance.

152 On 14 January 2008, ATA requested an ICSID arbitration pursuant to the Agreement between the Hashemite Kingdom of Jordan and the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investment

(2 August 1993) (entered into force 23 January 2006) ("the Jordan–Turkey BIT"), *which entered into force the day before the Amman Court of Appeal delivered judgment*. The alleged violations of the Jordan–Turkey BIT included the unlawful expropriation of ATA's claims to money and rights to legitimate performance under the contract and the Final Award, as well as the failure to accord fair and equitable treatment to its investment, *inter alia* by way of serious and repeated denial of justice by the Jordanian courts. ATA also argued that the Court of Cassation judgment gave rise to a denial of justice claim.

153 Jordan argued that the tribunal lacked jurisdiction *ratione temporis* over ATA's claims, because the Jordan–Turkey BIT did not apply to a dispute which arose before its entry into force. It had entered into force on 23 January 2006, by which date all the proceedings in both the FIDIC arbitration and the annulment action before the Amman Court of Appeal had been concluded. Only the Amman Court of Appeal's judgment of annulment and the subsequent proceedings in the Court of Cassation occurred after the BIT's entry into force. Jordan submitted that ATA's complaint was essentially that the Final Award should not have been annulled under the Jordanian Arbitration Law, which was the same dispute that had been presented and litigated in the Court of Appeal. The proceedings in the Jordanian Court of Cassation were merely a continuation of the case presented to the Court of Appeal, and ultimately a continuation of the original dispute which began in 2000. The Court of Cassation had simply affirmed the judgment of the Court of Appeal on the basis of the same record and the same substantive arguments. ATA counter-argued that the dispute had arisen on 16 January 2007, when the Jordanian Court of Cassation delivered the final judgment in the domestic proceedings between ATA and APC, thereby annulling the Final Award and extinguishing the arbitration agreement contained in the contract. The dispute therefore arose after the BIT's entry into force. It further asserted that in any event, the denial of justice claim could not

exist until local remedies had been exhausted, and therefore the "dispute" only arose upon the Court of Cassation's judgment.

154 The tribunal stated that an investment was not a "single right" but consists of "a bundle of rights, some of which are inseparable from others and some of which are comparatively free-standing" (at [96]). It was hence possible for measures concerning "the same investment to give rise to claims of different violations of a BIT" (at [96]), and these claims could be "subject to different jurisdictional objections" (at [97]). The tribunal thus took the view that "different types of claims require different jurisdictional analyses *ratione temporis*: conventional BIT claims, denial of justice claims and extinguishment of arbitral clause claims" (at [97]).

155 The tribunal accepted that it only had jurisdiction *ratione temporis* over the claims if the dispute arose after the BIT's entry into force (at [98]). It adopted the definition of "dispute" from [48] of *Lucchetti v Peru* (see [125] above) as well as its test for the distinctness of the dispute (see [126] above) (*ATA v Jordan* at [99] and [102] respectively).

156 The tribunal determined that ATA's claims in connection with the annulment of the Final Award *per se*, as well as all claims of denial of justice, were inadmissible for want of jurisdiction *ratione temporis*. The dispute giving rise to the Court of Cassation's decision on 16 January 2007 was "legally equivalent to the contractual dispute which was initiated on 6 September 2000 when the arbitration was commenced" (at [95]) and "indistinguishable from the original dispute" (at [103]). The tribunal stated at [102] that:

> … Where an analysis purports to identify two distinct disputes and the "second" dispute is comprised of the same subject-matter and has the same origin or source (in this case the collapse of Dike No. 19) as the first dispute, *Lucchetti* concluded

> that the disputes are legally equivalent. This Tribunal finds the *Lucchetti* holding persuasive.

157 The tribunal therefore found that the dispute over the annulment of the Final Award *per se* (as opposed to the extinguishment of the arbitration agreement) was "indistinguishable" from the original dispute, which had arisen prior to the BIT's entry into force (at [103]). The parties had first expressed disagreement over the validity of the Final Award in October 2003, when APC filed an action in the Jordanian courts for its annulment (at [104]). The proceedings which followed were merely a "continuation over this initial difference of legal opinion regarding the issue of annulment" (at [104]). Characterising the dispute as a "denial of justice claim" did not change the analysis (at [108]).

158 The tribunal also approved, at [109], the dictum from *Mondev v USA* reproduced at [134] above.

159 Crucially, however, the tribunal held that it did have jurisdiction *ratione temporis* over the claim resulting from the Court of Cassation's judgment on 16 January 2007 *insofar as that judgment affirmed that the arbitration agreement was extinguished*. The tribunal adroitly drew a distinction between the dispute over the annulment of the Final Award and the dispute over the failure by the Court of Cassation to exempt the arbitration agreement from the effect of Art 51 of the 2001 Jordanian Arbitration Law. Even after annulment of the Final Award, the arbitration agreement in the contract would have entitled ATA to initiate another arbitration, under both the Jordanian law which existed at the time of the conclusion of the contract in 1998 and under the New York Convention, to which both Jordan and Turkey were party. The tribunal considered this right to arbitration to be a distinct "investment" within the definition in Art I(2)(a)(ii) of the Jordan–Turkey BIT ("claims to […] any other

rights to legitimate performance having financial value related to an investment"). This right to arbitration was not annulled by Art 51 of the new Jordanian Arbitration Law, which had come into effect in 2001 before the BIT's entry into force, but upon the judgment of the Court of Cassation, which could have exempted the claimant from the operation of the new law but did not do so (at [117]–[118]). Hence, this aspect of the Court of Cassation's judgment – occurring after the BIT's entry into force and distinct from the underlying investment – was a separate and distinct dispute from the dispute concerning the Final Award, and fell within the tribunal's jurisdiction *ratione temporis*.

160 The defendants and the Kingdom both relied on *ATA v Jordan* to support their respective positions. The defendants relied on the factual similarity between that case and the present one. The Kingdom submitted that:

(a) *ATA v Jordan* had expressly approved the test in *Lucchetti v Peru* (see [126] above), a proper application of which would lead to the conclusion on the present facts that the shuttering dispute was indistinct from the expropriation dispute;

(b) *ATA v Jordan* affirmed that the application of the test laid down in *Lucchetti v Peru* was fact-specific;

(c) it confirmed that simply re-characterising a dispute which pre-dated the BIT as a "denial of justice" claim could not automatically locate it later in time after the BIT's entry into force; and

(d) the tribunal's finding that the dispute arose after the entry into force of the Jordan–Turkey BIT depended on its finding that the claimants' right to domestic arbitration constituted a distinct "investment" within the terms of the BIT, whereas the defendants'

secondary right in the present case did not constitute such an "investment".

161 Of the cases cited to me, I found *ATA v Jordan* the most instructive. Similar to Art 28(4) of Annex 1, the Jordan–Turkey BIT did not apply to a dispute which arose before its entry into force. The ICSID tribunal rightly drew a distinction between the arbitral and judicial decisions on the merits of the contractual dispute on one hand, and the extinguishment of the arbitration agreement on the other hand. Only the latter gave rise to a new dispute: the former was simply a continuation of a pre-existing dispute.

(5) *Jan de Nul v Egypt*

162 Jan de Nul N.V. and Dredging International N.V. ("the claimants") entered into a contract with the Suez Canal Authority ("the SCA") for the widening and deepening of certain stretches of the Suez Canal. The claimants claimed that Egypt, through the SCA, deceived them by intentionally misrepresenting the conditions under which the contract was to be performed. The SCA denied these allegations and asserted that it had not given any of the alleged guarantees.

163 On 17 July 1993, the claimants brought proceedings against the SCA for breach of contract pursuant to a dispute resolution clause in the contract before the Administrative Court of Port Saïd, which transferred the case to the Administrative Court of Ismaïlia ("the Ismaïlia Court"). On 9 December 1995, the claimants filed a second action against the SCA in the Ismaïlia Court seeking the payment of sums of money which the SCA had deducted from the amount to be paid under the contract. On 22 May 2003, the Ismaïlia Court rendered its decision, rejecting the claims for annulment of the contract in their entirety and awarding approximately a third of the amounts sought by the claimants for

deductions applied by the SCA. On 20 July 2003, the claimants appealed to the High Administrative Court of Egypt.

164 On 23 December 2003, while the appellate proceedings were pending, the claimants commenced ICSID arbitral proceedings. They asserted that Egypt's conduct (both with regards to the contract and the legal proceedings) constituted a breach not only of the contract and of Egyptian law, but also of obligations under two BITs between the Belgo-Luxembourg Economic Union and the Arab Republic of Egypt in 1977 ("the 1977 BIT") and 2002 ("the 2002 BIT") respectively. The 2002 BIT replaced the 1977 BIT when it entered into force on 24 May 2002.

165 Article 12 of the 2002 BIT restricted its applicability to disputes arising after its entry into force on 24 May 2002. It was accepted that the dispute decided by the Ismaïlia Court had arisen well before 24 May 2002 but notably the judgment was issued after the entry into force of the 2002 BIT. The claimants argued that the judgment of the Ismaïlia Court had definitively eliminated all their prospects of obtaining redress from the Egyptian State and gave rise to a dispute within the tribunal's jurisdiction *ratione temporis*. Egypt counter-argued that the real dispute in the case concerned the SCA's breaches of contract. The question was whether the dispute before the tribunal was different from the dispute decided by the Ismaïlia Court.

166 The tribunal determined that it was a distinct dispute, for the following reasons:

(a) The original dispute (decided by the Ismaïlia Court) "related to questions of contract interpretation and of Egyptian law", while the dispute before the ICSID tribunal related to "alleged violations of the

two BITs, specifically of the provisions on fair and equitable treatment, on continuous protection and security, and on the obligation to promote investments" (at [117]).

(b) The "intervention of a new actor", *ie*, the Ismaïlia Court, was "a decisive factor" (at [128]). The claimants' case was "directly based on the alleged wrongdoing of the Ismaïlia Court", and the original dispute had hence "(re)crystallized into a new dispute when the Ismaïlia Court rendered its decision" (at [128]). The BIT violations were attributable to "actions of the court system as such", rather than the acts of the SCA, which had "formed the subject-matter of the domestic proceedings" (at [119]).

(c) One relevant criterion was whether "the facts or considerations that gave rise to the earlier dispute continued to be central to the later dispute" (*Lucchetti v Peru* at [50]; cited in *Jan de Nul v Egypt* at [123]). In *Lucchetti v Peru*, the tribunal had held that the two disputes were indistinguishable as they had both originated from the municipality's commitment to protect the environmental integrity of the Pantanos de Villa. The tribunal distinguished the case before it on the basis that different motivations underlay the SCA's alleged wrongdoings and the acts of the Egyptian courts (*Jan de Nul v Egypt* at [127]).

(d) The 1977 BIT existed at the time that the claimants made their investment. This was another reason to distinguish the case from *Lucchetti v Peru* (at [131]).

167 The tribunal recognised that the domestic dispute "antedated" and ultimately "led towards" the international dispute (*Jan de Nul v Egypt* at [119]). It also recognised (at [127]) that the "previous dispute" was a source, if not the

main source, of the secondary dispute. Nevertheless, it found for the above reasons that the disputes were distinct.

168 I have reservations about the tribunal's conclusion on jurisdiction *ratione temporis*. The Ismaïlia Court had done nothing but adjudicate the pre-existing contractual dispute between the claimants and the State, and the fact that it issued its decision after the 2002 BIT came into force could not have sufficed to transform it into a new dispute. That was a matter of coincidence and fortuitous. It was not alleged, as in *Chevron v Ecuador*, that the Ismaïlia Court had acted improperly or corruptly in hearing the dispute, which might possibly have given rise to a new complaint of denial of justice (as opposed to mere disagreement with its decision on the merits). Nor was it alleged, as in *ATA v Jordan*, that the Ismaïlia Court had determined a different legal right or question distinct from the contractual dispute. I note that the award in *Jan de Nul v Egypt* has drawn criticism for this aspect of its reasoning (see, *eg*, *Douglas* at pp 338–339). Having set out the five cases above, I now turn to my analysis.

Relevant considerations for determining the distinctness of the dispute

169 Not every case in which the dispute is alleged to have arisen prior to the entry into force of the relevant treaty will raise questions about the distinctness of two or more putative disputes. In some cases the difficulty lies simply in identifying the point, along a continuum of naturally progressing events, when a disagreement between the parties crystallised into a "dispute" in the legal sense (*cf* [125] above). A dispute requires "sufficient communication between the parties for each to know the other's views and oppose them" (*Railroad Development Corporation (RDC) v Republic of Guatemala*, ICSID Case No ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010 at [129]). In this regard I respectfully agree with the remarks of the tribunal in

Emilio Agustín Maffezini v The Kingdom of Spain, ICSID Case No ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000 ("*Maffezini v Spain*") at [96]–[97]:

> 96 … [T]here tends to be a natural sequence of events that leads to a dispute. It begins with the expression of a disagreement and the statement of a difference of views. In time these events acquire a precise legal meaning through the formulation of legal claims, their discussion and eventual rejection or lack of response by the other party. The conflict of legal views and interests will only be present in the latter stage, even though the underlying facts predate them. It has also been rightly commented that the existence of the dispute presupposes a minimum of communications between the parties, one party taking up the matter with the other, with the latter opposing the Claimant's position directly or indirectly. This sequence of events has to be taken into account in establishing the critical date for determining when under the BIT a dispute qualifies as one covered by the consent necessary to establish ICSID's jurisdiction.
>
> 97 … The critical date will in fact separate, not the dispute from the claim, but the dispute from prior events that do not entail a conflict of legal views and interests. …

170 This is different from situations where there are two or more disputes that share some common DNA, in the sense that some of the facts that are pertinent to understanding the disputes are common, which is the situation here. The cases – leaving *Mondev v USA* aside – suggest some considerations for the analysis of whether the dispute submitted for arbitration is to be regarded as separate and distinct from an underlying dispute which arose prior to the entry into force of the BIT. I now set out these non-exhaustive considerations, in no particular order. No bright line can be drawn between them, and they only provide different perspectives from which to contemplate where the real dispute lies. However, as stated earlier, a bright line that can or should in fact be drawn between facts which constitute the background and the facts in issue which constitute the dispute.

171 One consideration is whether the two disputes involve the same factual or legal disagreement, *ie*, the same conflict of legal or factual views or claims (see the definition of "dispute" in *Lucchetti v Peru* at [155] above). One indicator of this is whether the second dispute can be resolved without simultaneously determining the first dispute. For example, in *ATA v Jordan*, the tribunal stated at [104]:

> The dispute over the Final Award first commenced in October 2003 when APC filed an action in the Jordanian courts for annulment under Article 49 of the Jordanian Civil Code. It was at this point that the parties first expressed disagreement over the validity of the Final Award. … [T]he Tribunal must view the proceedings that followed as a continuation over this initial difference of legal opinion regarding the issue of annulment.

172 In other words, the Court of Cassation's judgment had two elements: (i) it affirmed the Amman Court of Appeal's decision to set aside the Final Award and (ii) it extinguished the arbitration agreement by refusing to exempt it from the provisions of the new Jordanian arbitration law. The first element decided the dispute over the *validity of the FIDIC arbitral award* as a matter of Jordanian arbitral law, while the second engendered a dispute over the claimant's *right to arbitrate* and whether its extinguishment breached BIT obligations. These were clearly legally distinct questions. The former had been litigated in the Jordanian courts since 2003 and was finally disposed of by the Court of Cassation's decision, while the latter was new. The latter dispute did not affect the determination of the former dispute. Similarly, in *Chevron v Ecuador*, the conflict that had been submitted to arbitration was over the propriety of the acts of the Ecuadorian courts, rather than over Ecuador's alleged breaches of the 1973 and 1977 contracts. Whether the Ecuadorian courts had acted improperly had no bearing on whether Ecuador had breached the contracts in question.

173 A second consideration is whether the two disputes have the same "real cause". This has also been phrased as whether the facts and considerations that gave rise to the earlier dispute continue to be central to the later dispute, or whether the disputes have the same origin or source (*Lucchetti v Peru* at [50] and [53], cited with approval in *ATA v Jordan* at [102], *Jan de Nul v Egypt* at [123] and *Chevron v Ecuador* at [239]).

174 A third consideration is whether the two disputes target or centre on the same conduct (*Chevron v Ecuador* at [207]). One indicator of this is whether the acts of wrongdoing were committed by the same entity. For example, in *ATA v Jordan*, the arbitration agreement had been extinguished by the Court of Cassation's judgment, whereas the original dispute concerned errors in the Final Award issued by the FIDIC tribunal. In *Lucchetti v Peru*, on the other hand, Decrees 258 and 259 were promulgated by the Municipality of Lima, which had also interfered with the claimants' plant in 1997–1998. I found this to be a particularly helpful consideration.

175 It should be noted that a fourth consideration, the motivations underlying the two sets of acts, appears to have been taken into account in *Jan de Nul v Egypt* at [127] (see [166(c)] above). However, this does not seem to be reflected in any of the other cases. It seems to me that the tribunal in *Jan de Nul v Egypt* misinterpreted *Lucchetti v Peru*. The point in *Lucchetti v Peru* at [53] was that the measures challenged by the claimants were part of a unified whole, rather than discrete measures giving rise to distinct disputes. The fact that some measures had been adopted later than others did not have the effect of transforming the underlying dispute into a fresh one. There was only ever one overarching dispute, about the measures as a whole. The claimants' claims thus concerned the same set of acts and were beyond the *Lucchetti v Peru* tribunal's jurisdiction *ratione temporis*. The fact that the same motivation underlay the

different measures simply confirmed that they were indeed part of a unified whole; it was not a criterion for the distinctness of the dispute *per se*.

176 To show that the two disputes were distinct, it clearly does not suffice to show that the acts sought to be challenged appear to breach treaty obligations. That does not answer the question whether the acts are part of a pre-existing dispute or not. Merely re-characterising a pre-existing claim as a "denial of justice" or a breach of treaty obligations cannot serve to shift the dispute later in time after the entry into force of the relevant treaty: *ATA v Jordan* at [108]; *Lucchetti v Peru* at [59]. Otherwise, any dispute whenever occurring would become a "new" dispute upon the entry into force of the treaty provisions, thus rendering ineffective any provision limiting the treaty's application to prospective disputes. For this reason I disagree with the tribunal's analysis in *Jan de Nul v Egypt* at [117], which appeared to take into consideration the fact that the contractual dispute also engaged provisions of the relevant treaty.

Application to OS 492

177 I find that the PCA Tribunal did have jurisdiction *ratione temporis* because it dealt with the shuttering dispute, which was distinct and separate from the expropriation dispute for the following reasons:

> (a) The two disputes did not involve the same legal conflict. *This in my view is crucial.* The substantive disagreement in the expropriation dispute was whether the Kingdom's acts from 1991 to 1995 constituted an unlawful expropriation of the Mining Leases in breach of its treaty obligations. The substantive disagreement in the shuttering dispute was whether the Kingdom's participation in the SADC Summit's decision to shutter the SADC Tribunal without providing alternative recourse

constituted a breach of the Kingdom's treaty obligations. The shuttering dispute is accordingly distinct from the expropriation dispute.

(b) The two disputes did not have the same origin in a meaningful sense. The expropriation dispute provided the factual backdrop to the shuttering dispute, but the real cause of the shuttering dispute, and the facts that related to the cause of action as it were, was the Kingdom's approach and conduct towards the dispute resolution process and not the alleged expropriation of the Mining Leases *per se*. A bright line can sensibly be drawn between the two. The shuttering of the SADC Tribunal was not an act of expropriation of the Mining Leases, but a disruption of the process by which the expropriation dispute was originally meant to be resolved under the Tribunal Protocol. The present case is thus distinguishable from *Lucchetti v Peru*, in which Decrees 258 and 259 were simply the latest in a volley of measures that the Municipality of Lima employed to shut down the claimants' plant. I note in this regard that no evidence was produced to suggest that the shuttering of the SADC Tribunal by the SADC Summit was a continuation of an effort by the Kingdom to expropriate the Mining Leases and put an end to the claims that arose as a result. Indeed, such an argument would seem difficult given that the move to shutter the SADC Tribunal was made not by the Kingdom but by Zimbabwe.

(c) The two disputes involved different conduct, *ie*, different acts of alleged wrongdoing, by different actors. The acts of alleged expropriation of the Mining Leases (*ie*, cancellation of the leases, the 1992 Revocation Order, enactment of legislation permitting the expropriation of the leases and the determination that the Rampai lease was void *ab initio*) were attributable to the Commissioner of Mines, the

Military Council, the Kingdom's legislature and the domestic courts respectively. On the other hand, the acts alleged to have breached the defendants' rights under the SADC Treaty and protocols were attributable to the head of State of Lesotho (in supporting the resolution to shutter the SADC Tribunal) and the political leaders of Lesotho (in failing to provide an alternative forum for the adjudication of the SADC claim).

178 As noted earlier, I find *ATA v Jordan* instructive. The ICSID tribunal found that the Court of Cassation's affirmation of the annulment of the FIDIC Final Award simply amounted to a final rejection of ATA's claims (in the underlying dispute) on their merits; characterising the annulment as a "denial of justice" did not make it a new dispute. By analogy, in the present case, if the SADC Tribunal had dismissed the SADC claim on its merits and the defendants sought to challenge that dismissal, that challenge would be legally equivalent to the expropriation dispute itself. However, the SADC Tribunal did not have the opportunity to consider the SADC Claim because it was shuttered, and the Kingdom did not give the defendants an alternative avenue to pursue the SADC claim. This was analogous to the Court of Cassation's extinguishment of the arbitration agreement in *ATA v Jordan*, because it deprived the defendants of their right to have their disputes determined by the SADC Tribunal (assuming for the moment that that right constituted an "investment", which is an issue of critical importance in these proceedings for reasons stated later). It was also analogous to the conduct of the Ecuadorian courts in *Chevron v Ecuador*, whose purported delay and/or dismissal of the claimants' contractual claims for political reasons gave rise to a new claim of denial of justice, and was not simply a continuation of the claimants' contractual dispute with Ecuador.

179 The Kingdom emphasised that *Chevron v Ecuador* and *ATA v Jordan* concerned actions by domestic courts rather than acts of an international forum. However, this does not necessarily mean that the expropriation and shuttering disputes are not distinct. To the contrary, the fact that domestic courts were involved buttresses the defendants' case in a sense. In those cases, the judicial acts or determinations were a continuation of legal proceedings in the domestic courts which had commenced prior to the entry into force of the relevant BIT. In the present case, however, the shuttering of the SADC Tribunal (causing the termination of the past-heard SADC claim) was distinct and separate from the proceedings in the SADC Tribunal. It was not just another stage in a long-drawn legal battle between the parties, so the argument for distinguishing it from the expropriation dispute is *even stronger*. The issues that have to be addressed in deciding the merits of the expropriation dispute and the shuttering dispute are quite different. This is critical as it speaks to the fact that the disputes are distinct.

180 The Kingdom submitted that the relief sought by the defendants in the arbitration (*ie*, for the PCA Tribunal to "step into the shoes" of the SADC Tribunal and award damages for the Kingdom's expropriation of the Mining Leases) suggested that the true dispute was the expropriation dispute. I agree that such relief would not have been appropriate, since it required adjudication of the expropriation dispute. However, as noted above, it is the similarity of issues and not of reliefs that is more relevant. I find that the defendants' case as formulated genuinely concerned the shuttering dispute, although the relief they requested for was perhaps inappropriate. However, as will be seen, characterising the dispute as the shuttering dispute created additional problems for the defendants in establishing the PCA Tribunal's jurisdiction *ratione materiae*.

Second objection: whether there was an "investment" – jurisdiction *ratione materiae*

181 Under Art 28(1) of Annex 1 (reproduced at [40] above), the dispute must concern an obligation which relates to "an admitted investment". It is important therefore to first identify clearly and accurately what in fact is the investment concerning which it is alleged that a dispute has arisen. There is also the ancillary issue of whether such investment was admitted, which I shall address later. "Investment" is defined in Art 1(2) of Annex 1 as follows:

> **"investment"** means the purchase, acquisition or establishment of productive and portfolio investment assets, and in particular, though not exclusively, includes:
>
> > (a) movable and immovable property and any other property rights such as mortgages, liens or pledges;
> >
> > (b) shares, stocks and debentures of companies or interest in the property of such companies;
> >
> > (c) claims to money or to any performance under contract having a financial value, and loans;
> >
> > (d) copyrights, know-how (goodwill) and industrial property rights such as patents for inventions, trade marks, industrial designs and trade names;
> >
> > (e) rights conferred by law or under contract, including licences to search for, cultivate, extract or exploit natural resources:
> >
> > …

182 One consequence of the defendants characterising their dispute as the *shuttering dispute* rather than the *expropriation dispute* (which would have fallen foul of Art 28(4) of Annex 1) was that the corresponding "investment" was not the Mining Leases, but the right to refer the dispute to the SADC Tribunal. This is an inevitable result. The Award characterised the investment variously as "an international law right to seek compensation for an expropriation of the investment" (at [7.31]); "the right to claim for compensation" (at [7.38]); "the unheard claim" (at [7.104]); "the claim to

compensation" (at [7.107]); the "secondary right to seek relief from the SADC Tribunal in respect of the taking of the primary rights" (at [7.164]) and an "international law right to have their claim heard by the SADC tribunal" (at [7.229]) *etc*. The defendants' written submissions characterised their investment as the "<u>secondary</u> right to bring the SADC Tribunal Claim" [emphasis in original] (at para 90); the "secondary right to claim for compensation" (at para 91); "the [d]efendants' right to claim for compensation" (at para 92); the "right to bring a claim before the SADC Tribunal" (at para 108); "the [d]efendants' right to bring the SADC Tribunal Claim" (at paras 142–143); *etc*. It is thus clear that the alleged investment is not the defendants' claim to compensation *per se*, but rather a *right* to claim for compensation before the SADC Tribunal for the expropriation of the Mining Leases. This also distinguishes the present case from *Mondev v USA* and *Chevron v Ecuador*, in which the lawsuits themselves (rather than the right to sue) were the "investment".

PCA Tribunal's findings

183 The majority said that it was "well-established" that the Mining Leases "create[d] a bundle of rights which [were] protected", including "both primary rights to performance and secondary rights to remedies" (at [7.24]). It thus held (at [7.23]–[7.24]) that the defendants' investment encompassed:

(a) the defendants' shares in Swissbourgh and the Tributees;

(b) the defendants' interest in the Mining Leases through ownership of Swissbourgh and the Tributees;

(c) the money, effort and resources expended by the defendants to pursue the exploitation of the Mining Leases; and

(d) the defendants' *secondary right to seek remedies* should the Kingdom breach its primary obligations under the Mining Leases.

184 The majority took the view that "a legal claim arising out of an investment" constituted a "[claim] to money or to any performance under contract having a financial value" within the definition of "investment". Such a legal claim continued the investment until the claim was "finally resolved" (at [7.29]). After an investment has been made, where operations were subsequently ceased or terminated for any reason, a right to bring a claim arising from that investment was a "necessary and integral part of that investment" (at [7.31]). After all, if the claim itself were not an investment then the State "could, by ending the underlying investment", prevent the resolution of any claim based on that investment (at [7.32]). The fact that the Mining Leases had been terminated did not detract from the status of the Mining Leases (or the defendants' SADC claim) as "investments" under the Investment Protocol (at [7.34]). The majority referred to *ATA v Jordan*, *Chevron v Ecuador* and *Mondev v USA* as support for its view.

185 The majority stated that this analysis applied regardless of whether the secondary right to remedies had its origins in domestic or international law. It gave the example of *ATA v Jordan*, which allegedly concerned a right to bring an international arbitration. The right to a remedy (whether that remedy was provided by a "domestic or multilateral international forum") arose directly out of the Mining Leases, and there was no basis for severing it on the ground that it was "territorially removed" and hence unprotected (at [7.37]). Moreover, there was a "clear territorial nexus" between the investment and the Kingdom (at [7.36]), even if the forum where the claim was heard was located outside the Kingdom's territory. Thus, an international law right to seek compensation for expropriation of the Mining Leases was part of the defendants' investment.

186 Justice Nienaber's Dissenting Opinion did not deal with this issue.

Parties' submissions

187 The defendants adopted the majority's reasoning, contending that the investment consisted of a "bundle of rights", including the secondary right to remedies. This secondary right fell within the definition of an investment as a "claim to money" (limb (c) of the definition of "investment" at [181] above), and was therefore an "investment asset" because claims to money could be classified as *choses* in action, a form of intangible property. The defendants also relied on *ATA v Jordan*, *Chevron v Ecuador* and *Mondev v USA*, in which ATA's right to arbitration as well as Chevron's and Mondev's claims in the Ecuadorian and US courts respectively had been found to be "investments".

188 The defendants submitted that whether the secondary right to remedies was a right to domestic or international arbitration had no bearing on whether it constituted an "investment" for the purposes of Annex 1. They also cited various academic passages which, in their view, stood for the proposition that an arbitration agreement in an international treaty remained effective notwithstanding amendment or termination of the treaty, once the investor commenced arbitration proceedings. However, I note that these passages only say that terminating a tribunal where a claim is part-heard does not dispose of the arbitration agreement or affect the validity of the claim. These passages might have been relevant to the merits of the dispute before the PCA Tribunal insofar as they suggest the wrongfulness of shuttering the SADC Tribunal in the face of the defendants' SADC claim. However, they do not discuss whether the arbitration agreement in an international treaty itself constitutes an "investment" for the purpose of treaty protection (and, therefore, whether the PCA Tribunal had jurisdiction to hear the dispute in the first place).

189 The Kingdom submitted that the definition of "investment" in Art 1(2) was narrower than that provided for in many other BITs, being limited to "the purchase, acquisition or establishment" of "productive and portfolio investment assets". Its submission on the import of those words was twofold.

190 First, a "productive investment asset" was one that generated wealth or income in some way or whose value appreciated over time, such as land; a "portfolio investment asset" was one over which the investor exercised no managerial control but which might be traded on the market. Those words had to be read in light of the examples of assets specified in (a)–(e) of the definition of "investment" in Annex 1, all of which were rights and claims. The phrase "productive and portfolio investment assets" should thus be read to exclude advantages or benefits not amounting to "rights", such as "privileges or liberties". All that the defendants acquired under the SADC Treaty and Tribunal Protocol was an ability to submit claims to the SADC Tribunal. This was merely a benefit or advantage which did not fall within (a)–(e), which referred to property, property rights, rights or claims. Moreover, the term "investment assets" referred to "something of more than ephemeral value", and thus should be read to exclude any rights which were defeasible or terminable at any time without the consent of the investor or the host State. The defendants' ability to refer disputes to the SADC Tribunal was defeasible and could be terminated at any time without the consent of either the investor or the host State, since the continued existence of the SADC Tribunal was subject to the decision-making of the other SADC Member States.

191 Secondly, the term "investment assets" was limited to assets which had been established by and derived from domestic law, and which were located in the territory and jurisdiction of the host State. This was acknowledged as a

general principle by leading treatises and vindicated by the following observations:

(a) The object and purpose of Annex 1 was to protect against the risk that the host State might exercise its regulatory authority and enforce its laws in a manner harmful to the investor and/or its investment. This was a risk that could only materialise in relation to rights established by domestic law through the purchase, acquisition or establishment of investment assets *in the territory of the host State*.

(b) The specified examples of investments in (a)–(e) were all contractual or property rights. Since there was no international law of property or of contract, these necessarily had to be rights arising under domestic law.

(c) The definitions of "Host Government" and "Host State" in Art 1 both referred to an investment "made or located" in the "territory" of the State party. There evidently had to be a territorial nexus between the "investment" and the host SADC State.

(d) The terms of Annex 1 more generally anchored the "investment" in the domestic sphere. For example, Art 2 referred to investments "in [the Host State's] territory" and Art 5 referred to investments "in the territory of any State Party".

192 As for limb (c) of the definition of "investment" (see [181] above), the Kingdom submitted that this was confined to contractual claims which could be converted into a fixed amount of money, which clearly did not describe the ability to submit claims to the SADC Tribunal.

193 The Kingdom also sought to distinguish the cases cited by the defendants:

(a) In *ATA v Jordan*, the definition of "investment" in the Jordan–Turkey BIT was broader than that in Annex 1. ATA's contractual right to domestic arbitration arose under a contract, so there was no question that it was properly characterised as a "right" (rather than a mere benefit). Moreover, although the tribunal referred to the "bundle of rights" analysis in its award, this reference "played no part" in its determination that the right to arbitrate was an investment – rather, the right to arbitration was a "distinct" investment in its own right. Finally, *ATA v Jordan* concerned the protection of a right to *domestic* arbitration arising under *domestic* law (that is, Jordan's law of contract) for breach of *domestic* law (that is, breach of contract), not an international claim for the breach of a multilateral treaty.

(b) As regards *Mondev v USA*, the NAFTA's definition of "investment" was also broader than the definition in Annex 1. Moreover, the tribunal regarded Mondev's lawsuits as "subsisting interests" and did not characterise those subsisting interests as secondary rights to relief or part of a bundle of rights. The claims were brought under the domestic law of Massachusetts in relation to a right to claim before the US courts, rather than for breach of international law before an international court or tribunal.

(c) In *Chevron v Ecuador*, the definition of "investment" was again broader than that under Annex 1 and the tribunal determined that it should be construed broadly. In particular, the definition of investment in Art 1(1)(v) of the US–Ecuador BIT ("any right conferred by law or contract *and* any licences and permits pursuant to law") could be

contrasted with the definition in Annex 1 ("rights conferred by law or under contract, *including* licences to search for, cultivate, extract or exploit natural resources") [emphasis added]. The difference between "and" and "including" suggested that "rights conferred by law" in the US–Ecuador BIT were a general category not limited by the subsequent language of "licences and permits", whereas "rights conferred by law or under contract" in the context of Annex 1 were narrower. As in *Mondev v USA*, the tribunal found that the claimants' lawsuits were "subsisting interests" and served to continue their investment through the entry into force of the BIT, and there was no allusion to the "bundle of rights" analysis or the distinction between primary and secondary rights. Moreover, these interests were rights established by domestic law.

My analysis

The right was not an "investment"

194 The first port of call *per* Art 31 of the VCLT is the wording of the SADC Treaty and related protocols. The definition of "investment" in Annex 1 mirrors the drafting approach adapted by "[a]lmost all BITs", which generally "commences with a wide inclusive phrase and then lists approximately five specific categories of rights" generally including "property, shares, contracts, intellectual property rights, and rights conferred by law" (*McLachlan* at para 6.42). However, the inclusive phrase used in Annex 1 is narrower than what *McLachlan* describes as a typical "investment" definition, which commences with "'investment' means *every kind of asset* ... and in particular, though not exclusively, includes…" [emphasis added] (Art 1(a) of the UK Model BIT (2005, with 2006 amendments) (see *Douglas* at p 559)). The same phrase, "every kind of asset", is used in Art 1(1) of the Germany Model BIT (2005) (*Douglas* at p 539), Art 1(1) of the France Model BIT (2006) (*Douglas* at p 532)

and Art 1(a) of the Netherlands Model BIT (1997) (*Douglas* at p 547), and in other "modern asset-based definitions" generally (Jan Asmus Bischoff & Richard Happ, "The Notion of Investment" in *Bungenberg* at p 500 at para 9). That is not, however, the terminology employed in Annex 1.

195 The precise terms adopted in the definition of "investment" in Annex 1, *ie*, the "purchase, acquisition or establishment of productive and portfolio investment assets", make the definition more restrictive than "every kind of asset". I agree with the Kingdom's submissions on the words "productive" and "portfolio" (see [190] above). The words "productive and portfolio … assets" emphasise the economic value of the investment. This is borne out by the examples enumerated at (a)–(e), which describe tangible and intangible property, claims with a "financial value" and rights such as "licences to search for, cultivate, extract or exploit natural resources". The defendants' secondary right to refer disputes to the SADC Tribunal is not such a right.

196 Moreover, the textual context of Annex 1 indicates that a right to bring a claim for compensation before the SADC Tribunal does not amount to an "investment". Article 5 of Annex 1, captioned "INVESTMENT PROTECTION", states:

> Investments shall not be nationalised or expropriated *in the territory of any State Party* except for a public purpose, under due process of law, on a non-discriminatory basis and subject to the payment of prompt, adequate and effective compensation.
>
> [emphasis added]

The article suggests that the "investments" which Annex 1 seeks to protect are such as can be expropriated "in the territory of" a State. Similarly, Art 2(1) of Annex 1 requires each host State to promote investments "in its territory". Article 10 of Annex 1 requires investors to abide by the host State's laws and

policies. The secondary right to refer disputes to the SADC Tribunal does not, however, arise in the Kingdom's territory and is not regulated by the Kingdom's domestic laws.

197 The textual context thus reinforces the ordinary meaning of the definition of "investment" in Annex 1 in indicating that the object and purpose of the regime in Annex 1 was to protect investments *made in the territory* of the host State and/or *arising under the laws* of the host State. The regime in Annex 1 functions by regulating and harmonising individual States' treatment of investments made within their respective territories. It does this by imposing obligations constraining what a Member State may or may not do with respect to investments under its control or influence.

198 There is good reason for this. As a general rule, investment treaty protection is accorded to an investor to protect against acts of a State in expropriating investments made within that State. Accordingly, the prevailing view is that the investment must be made within the territory of the host State or comprise rights arising under its laws; "capital must be committed or expended in exchange for rights over property either factually or legally sited in the host state" (*Douglas* at p 55). Zachary Douglas, "Property, Investment and the Scope of Investment Protection Obligations" in *The Foundations of International Investment Law: Bringing Theory into Practice* (Zachary Douglas, Joost Pauwelyn & Jorge E Viñuales eds) (Oxford University Press, 2014) ("*Douglas, Pauwelyn & Viñuales*") states at p 373:

> Another important feature of the conception of an investment at the jurisdictional stage is that a territorial link to the host state should be manifest. … *The jurisdiction or power to enforce national laws and regulations is granted to states by international law on a territorial basis.* Contracting states parties must, in other words, enforce their national laws and regulations consistently with the substantive obligations of protection in respect of investments within the territory of the

> host state. Sometimes this territorial link is expressly referenced in the gateway provisions of the investment treaty or in the formulation of certain obligations. But the link need not be made explicit: *the whole architecture of an investment treaty rests upon the imposition of constraints upon the exercise of territorial jurisdiction by the contracting states parties.*
>
> [emphasis added]

If the right or property in question is located outside the host State, it would generally be safe from expropriation by the host State. Furthermore, States generally have no extraterritorial enforcement jurisdiction and are thus unable to protect rights or property located outside the host State. As stated in Michael Waibel, "Investment Arbitration: Jurisdiction and Admissibility" in *Bungenberg* at pp 1248–1249, paras 144–145:

> 144 It is a characteristic feature of 'investment' … that the investment be made in the territory of the ICSID State. Only in such cases does the investment fall directly under the control of the host State's legislative, executive and judicial power and requires the protection afforded by the Convention. In keeping with principles of jurisdiction in international law, *States cannot reasonably be expected to protect investments outside their territorial jurisdiction, unless they have expressly undertaken such duties of extending investment protection extraterritorially.*
>
> 145 … With respect to intangible rights, the jurisdictional criterion is met if the rules of private international law locate the right in the territory of the host State.
>
> [emphasis added]

199 The proposition that investments must be sited in the host State is reinforced by the fact that domestic law governs the existence and scope of rights or property purportedly comprising the investment. For example, in order to succeed in the expropriation dispute, the defendants would have had to show that the leases had been validly created and conferred under the domestic laws of the Kingdom. But whether that property or right (if it exists) is recognised as an "investment" for the purposes of investment protection under a treaty will

depend on the construction of the treaty. This is reinforced by various sources. *Douglas* explains at p 72:

> … [I]t is the municipal law of the host state that determines whether a particular right *in rem* exists, the scope of that right, and in whom it vests. It is the investment treaty, however, that supplies the classification of an investment and thus prescribes whether the right *in rem* recognised by the municipal law is subject to the regime of substantive protection in the investment treaty. …

200 Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009) ("*Newcombe & Paradell*") states at para 2.11:

> … [W]hether a particular right, interest or asset held in the territory of a state party to an [international investment agreement ("IIA")] is an investment protected by the IIA is a matter for the IAA not municipal law; *but in order for a particular asset to be able to qualify as an investment under the IIA, it must first exist and such existence is owed to the law of the territory in which such asset is allegedly held.* Thus, while IIAs designate which assets are to be considered investments for the purposes of the treaty … the preliminary question as to whether one of these types of investments exists is a matter primarily for the municipal law of the host state, not international law.
>
> [emphasis added]

201 *McLachlan* observes at para 6.113 that "[t]he typical definition of an investment found in a BIT requires that the status of the asset claimed to be an investment must be considered under the host State's domestic property law" (see further UNCTAD, *UNCTAD Series on Issues in International Investment Agreements II: Expropriation – a sequel* (United Nations, 2012) at p 22 and *EnCana Corporation v Republic of Ecuador*, LCIA Case No UN3481, Award, 3 February 2006 at [184]).

202 These passages all recognise, implicitly or explicitly, that an "investment" will usually comprise property in the territory of the host State or

rights arising under its domestic law. While these views are no substitute for the wording of Annex 1's definition of "investment", they represent the prevailing view in the broader context of investment treaty law and cohere with Annex 1's focus on a territorial nexus to the host State. The definition of "investment" in Annex 1 is relatively narrow as far as such asset-based definitions go, and cannot to my mind be interpreted to encompass a right (*ie*, the right to submit disputes to the SADC Tribunal) falling so wide of this paradigm. I note, moreover, that the PCA Tribunal's finding that the defendants' right constituted an investment was predominantly based on the "bundle of rights" reasoning, which I address below, rather than a direct interpretation of the definition of "investment" in Annex 1.

203 This does not mean that a right arising under international law, like the defendants', can never be an "investment". It is always open to the State to internalise such a right in its domestic legal system (for example by enshrining it in a contract with the investor) or to expressly define it as an investment under the terms of the treaty. In this case, however, it was not contended by either the Kingdom or the defendants that the secondary right to refer disputes to the SADC Tribunal was one which arose or existed under the Kingdom's national law, and the right was not one which fell within the terms of the definition of "investment" in Annex 1.

204 In their written submissions, the defendants sought to bring the secondary right under limb (c) of the definition of "investment" in Art 1(2) of Annex 1, *ie*, "claims to money or to any performance under contract having a financial value, and loans". The phrasing of limb (c) is susceptible to four possible interpretations:

(a) claims to money *simpliciter*, and claims to performance under a contract (which claim to performance has a financial value);

(b) claims to money *simpliciter*, and claims to performance under a contract (which contract has a financial value);

(c) claims under a contract, to money or to performance (which contract has a financial value); or

(d) claims under a contract, to money or to performance (which claims have a financial value).

205 It is obvious that a claim to money has a financial value, and a claim to money made under contract can only be made under a contract with a financial value. Options (c) and (d) are thus redundant and can be rejected. They appear to find support from *Poštová banka, A.S. and ISTROKAPITAL SE v The Hellenic Republic*, ICSID Case No ARB/13/8, Award, 9 April 2015, in which the tribunal considered the definition of "claims to money or to any performance under contract having a financial value" and stated at [343] that "the investment consists of a claim to money, or a claim to performance, under a contract having a financial value" and therefore "the claim to money must arise under a contractual relationship". The Kingdom adopted this interpretation. However, no textual analysis was given in that award and I find it difficult to align myself with that conclusion.

206 Between options (a) and (b), I prefer option (a). It appears that limb (c) of the definition is intended to embrace any claims that can be monetarily quantified – on the one hand claims to money, and on the other hand claims to performance having a financial value. This interpretation is supported by UNCTAD, *International Investment Agreements: Key Issues*, vol I (2004)

("*UNCTAD Key Issues*"), which interprets the same phrase "claims to money or to any performance under contract having a financial value" (at p 119) to mean "claims to money *and* claims under a contract having a financial value" (at p 120) [emphasis added]. Many obligations may arise under a contract with a financial value, but only those *obligations* which themselves have a financial value can constitute a productive or portfolio "asset".

207 *Douglas*' exposition of the phrase "claims to money which has been used to create economic value" or "claims to any performance having an economic value" at pp 226–227 is instructive:

> *The common denominator for all these enumerated rights is an entitlement to a liquidated sum.* Even in respect of a 'right to performance having economic value', it is the value represented by that performance that is the economic interest in question that may form the basis of an investment. It is certainly true that these rights can originate as contractual rights, but in order to qualify as an investment they must be more than rights *in personam* against a contractual counterparty. *To be an 'asset', the right must transmute into an entitlement to a liquidated sum and thus constitute a debt in some form.* For that transmutation to occur, the right must have been adjudicated in accordance with its proper law so that the monetary value of the right has been ascertained. Only at that point can a 'right to performance having economic value', for instance, qualify as an investment. This means that in practice such rights must be evidenced in a court judgment or arbitral award.
>
> [emphasis added]

208 Douglas takes the view that contractual rights may only constitute an investment for jurisdictional purposes if they can be properly characterised as *choses* in action. To the extent that an investment treaty refers to a "right to performance", "this must be read as a right to performance in respect of the transfer of money" (Douglas, "Property, Investment, the Scope of Investment Protection Obligations" in *Douglas, Pauwelyn & Viñuales* at p 383). There is support elsewhere for a less restrictive view that interprets the phrase "claims

to money or to any performance under contract having a financial value" as including "contractual rights for the performance of services" (see, *eg*, *Mytilineos Holdings SA v The State Union of Serbia & Montenegro and the Republic of Serbia*, Partial Award on Jurisdiction, 8 September 2006 at [109] and *UNCTAD Key Issues* at p 120). Nevertheless, the test for an "investment" in Annex 1 is whether it involves the purchase, acquisition or establishment of a productive or portfolio investment asset. Regardless of whether a claim to money or to performance is restricted to *choses* in action or otherwise, a right to refer disputes to the SADC Tribunal clearly does not fall within this category. It is not a claim, much less a claim to money or to performance with financial value, it does not arise under contract, and it is certainly not a *chose* in action (let alone a *chose* in action arising under the Kingdom's domestic law).

209 During oral submissions, counsel for the defendants invited the court to consider whether the right to seek compensation from the SADC Tribunal could fall within limb (e) of the definition of "investment", *ie*, "rights conferred by law or under contract". I do not think this can be read to include a right to dispute resolution in the SADC Tribunal. For one, applying the principle of *ejusdem generis*, the illustrations given ("licences to search for, cultivate, extract or exploit natural resources") point to rights directly related to the core investment activity (here, the exploitation of the areas under the Mining Leases), rather than the means by which a dispute arising from the Mining Leases would be resolved. Moreover, it follows from what I have said at [196]–[202] above that "rights conferred by law or under contract" must be understood as rights conferred by *domestic* law, rather than international law.

210 Nor do the three cases cited by the defendants assist them. The definitions of "investment" in each of these cases were significantly different from that in Annex 1. In the case of *Mondev v USA*, Art 1139 of the NAFTA

defined "investment", under Art 1139(h), as including "interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory" (see *Mondev v USA* at [80]). Annex 1 does not have an analogous provision – it is worded not in terms of "interests arising" from the core investment but "productive and portfolio investment assets".

211 In the case of *ATA v Jordan*, Art 1(2)(a) of the Jordan–Turkey BIT stated:

> The term "investment", in conformity with the hosting Party's laws and regulations, shall include *every kind of asset* in particular, but not exclusively:
>
> > …
> >
> > (ii) returns reinvested, claims to money or any other rights to legitimate performance having financial value related to an investment,
> >
> > …
>
> [emphasis added]

212 The tribunal found at [117] that the right to arbitration was a distinct investment. However:

> (a) First, the definition of "investment" was worded much more broadly ("every kind of asset") than in the present case.
>
> (b) Secondly, the right to arbitration arose under domestic law, being enshrined in the contract between ATA and APC and therefore recognised as binding under Jordanian contract law.
>
> (c) Thirdly, under limb (ii) of the definition of "investment" in the Jordan–Turkey BIT, the rights to performance need not arise "under contract". That is a requirement in limb (c) of the definition in Annex 1.

(d) Fourthly, the tribunal did not explain its decision beyond remarking that the right to arbitration could "hardly be considered as something other than a 'right … to legitimate performance having financial value related to an investment'" (at [117]). However, it is not clear whether a right to arbitration can indeed be said to be a right "to legitimate performance having financial value".

213 In the case of *Chevron v Ecuador*, Art I(1)(a) of the US–Ecuador BIT stated:

> "investment" means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes:
>
> > …
> >
> > (iii) a claim to money or a claim to performance having economic value, and associated with an investment;
> >
> > …
> >
> > (v) any right conferred by law or contract, and any licenses and permits pursuant to law;

214 The tribunal found that the claimants' lawsuits continued the original investment. However:

(a) First, the definition of "investment" was broader than that in Annex 1, encompassing "every kind of investment".

(b) Secondly, the claim to money or performance need not arise under contract, as long as it was "associated with an investment".

(c) Thirdly, the lawsuits, unlike the defendants' right to submit disputes to the SADC Tribunal in this case, were clearly a claim to money.

(d) Fourthly, Art I(3) of the BIT provided that "[a]ny alteration of the form in which assets are invested or reinvested shall not affect their character as investment". The tribunal thus took the view (at [180]) that the lawsuits "concern[ed] the liquidation and settlement of claims relating to the investment and, therefore, form[ed] part of that investment", and that the wording of the BIT suggested that "[o]nce an investment is established, it continues to exist and be protected until its ultimate 'disposal' has been completed – that is, until it has been wound up" (at [183]). The tribunal did not say that the lawsuits were a distinct investment, but that they had "continued [the] original investment through the entry into force of the BIT and to the date of commencement of [the] arbitration" (at [184]). Annex 1, on the other hand, does not contain any provision equivalent to Art I(3).

215 The three cases are thus not analogous and do not avail the defendants.

Bundle of rights

216 Although the defendants' secondary right did not constitute a distinct investment under the definition in Art 1(2) of Annex 1, could it nevertheless be part of the "bundle of rights" created by the Mining Leases? I am of the view that it could not. *Newcombe & Paradell* gives an idea at p 282 of what rights might be comprised in such a bundle:

> … Normally an investment consists of a bundle of rights, both tangible and intangible. These might include leases of property, licenses and permits, contracts, inventory and other assets. …

217 In this case, I do not think that the right is sufficiently connected with the defendants' core investment (*ie*, the Mining Leases) to be considered part of the corresponding bundle of rights. The defendants' secondary right did not

derive from the provisions of the Mining Leases themselves. The defendants' first application instituting proceedings in the SADC Tribunal on 12 June 2009 stated that the proceedings were instituted "[b]y virtue of Article 15 of the [Tribunal Protocol] established by Article 9 read with Article 16 of the SADC Treaty". Their second application on 25 January 2011 (see [34] above) stated that the proceedings were instituted "[b]y virtue of Article 18 of the [Tribunal Protocol] established by Article 9 read with Article 16 of the [SADC] Treaty". The alleged secondary right therefore arose under the SADC Treaty (which entered into force in 1993) and the Tribunal Protocol (which entered into force in 2001), much later than the Mining Leases themselves (which were granted in 1988). The "bundle of rights" analysis relied upon by the majority is therefore inappropriate: *the conferral of this "secondary right" was not reciprocal with the defendants' contractual obligations under the Mining Leases, but arose much later.* At the point in time when the defendants acquired the Mining Leases, they did not have the advantage of any treaty protections. The right of recourse to the SADC Tribunal was not given to the defendants (or other investors) in response to, in exchange for or in recognition of their investment activities in the Kingdom.

218 Reciprocity is one of the identifying features of an investment treaty. *Douglas* explains at p 135 that a fundamental difference between investment treaties and human rights treaties is that the former require individuals to "undertake certain positive steps" and "acquire an investment" in order to benefit from treaty protections. This is reflected in the definition of "investment" in Annex 1, which refers to the "purchase, acquisition or establishment" of assets in the host State. These words indicate that some agency and initiative is required on the investor's part in making the investment. *Douglas* continues at pp 135–136:

> 273. … [T]he most common investment treaty operates on the basis of a *quid pro quo* with potential third party beneficiaries. If the national of one contracting state has invested its capital in the economy of another contracting state, then that contracting state which has benefited from this inflow of private capital shall … consent to arbitration proceedings at the suit of the foreign national with respect to disputes arising out of the investment. *The host state's undertaking of substantive and procedural investment protection may well have influenced the foreign national's decision to invest in the host state by reducing sovereign risk to an acceptable level.* … [T]he protection is only operative once the foreign national has satisfied its part of the *quid pro quo* by making an investment in the host state.
>
> …
>
> 275. This notion of a *quid pro quo* is fundamental to the architecture of an investment treaty and cannot but impact upon the principles governing the tribunal's power to adjudge the merits of an investment dispute.
>
> [emphasis in original omitted; emphasis added]

219 The right to refer disputes to the SADC Tribunal, on the other hand, was not a right *acquired* by the defendants as part of their investment, but one *conferred* by the SADC Treaty and protocols after their investment had been expropriated.

220 Indeed, the bundle of rights analysis may accommodate causes of action arising from the alleged expropriation of the investment (*eg*, the contractual claims in *Mondev v USA* and *Chevron v Ecuador*). Such causes of action would embody or continue the original investment and would thereby inherit protection *qua* investment under the treaty. In this context, however, the cause of action arising from expropriation of the Mining Leases was the SADC claim, which falls outside the PCA Tribunal's jurisdiction *ratione temporis* by virtue of Art 28(4) of Annex 1.

Defeasible benefit or advantage

221 For completeness, I shall address the Kingdom's two suggestions that the ability to refer disputes to the SADC Tribunal was (i) a "benefit" or "advantage" falling short of a "right" and (ii) "defeasible" and "ephemeral" (see [190] above).

222 Regarding the first suggestion, it is true that the host State's consent is required for arbitration of a dispute. In the context of investment treaty arbitration, the host State's consent is found in the fact of its ratification of the investment treaty, and constitutes a unilateral offer to arbitrate, which may be accepted by the investor by commencing arbitral proceedings (see, *eg*, *Douglas* at p 360; Waibel's chapter in *Bungenberg* (see [198] above) at p 1224, para 43; and *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction, 8 February 2005 at [198]).

223 In the present case, the Kingdom's ratification of the SADC Treaty and Tribunal Protocol itself constituted the requisite consent. This is put beyond doubt by Art 15(3) of the Tribunal Protocol, which states, "Where a dispute is referred to the Tribunal by any party the consent of other parties to the dispute shall not be required."

224 The fact that a BIT may confer a "right" (as opposed to what the Kingdom termed a mere "ability") upon an investor to commence proceedings against the host State before an international tribunal was recognised by the English Court of Appeal in *Republic of Ecuador v Occidental Exploration and Production Co* [2005] EWCA Civ 1116 at [19]:

> That treaties may in modern international law give rise to direct rights in favour of individuals is well established, particularly where the treaty provides a dispute resolution mechanism capable of being operated by such individuals acting on their

> own behalf and without their national state's involvement or even consent. …

225 *Oppenheim's International Law*, *Volume I: Peace* (Robert Jennings & Arthur Watts eds) (Longman Group UK Limited, 9th Ed, 1992) ("*Oppenheim*") at p 847, para 375 put the matter this way:

> States can … and occasionally do, confer upon individuals, whether their own subjects or aliens, international rights *stricto sensu*, ie rights which they acquire without the intervention of municipal legislation and which they can enforce in their own name before international tribunals.

226 The view that these rights are wielded by individuals directly, rather than derived from diplomatic protection by their States of origin, has also received support in *McLachlan* at para 3.124 and Zachary Douglas, "The Hybrid Foundations of Investment Treaty Arbitration" (2003) 74 British Yearbook of International Law 151 ("*Hybrid Foundations*") at p 184.

227 I therefore disagree with the Kingdom's characterisation of the secondary right to refer disputes to the SADC Tribunal as a mere "advantage" or "benefit". Nor do I agree with the Kingdom's assertion that the defendants' ability to submit a claim to the SADC Tribunal was not an investment because it was defeasible and "of ephemeral value only". The Kingdom emphasised the fact that it lacked enforcement jurisdiction or control over the SADC Tribunal, so that even if a dispute were to be referred to the SADC Tribunal, there was a chance that the Tribunal would not hear it due to the decisions of other Member States. The Kingdom did not substantiate the link it drew between the duration or certainty of the right and its qualification as an "investment". The key point, in my view, is not whether the right is "ephemeral" but whether it is factually or legally sited within the host State, therefore qualifying as an investment as defined in Annex 1, which I have concluded it is not.

Investment arising before Annex 1's entry into force

228 The Kingdom originally took the position that an asset existing before Annex 1's entry into force could not constitute an "investment" within the meaning of Annex 1. However, this argument was not pursued in the Kingdom's written submissions or oral submissions and appears to have been abandoned. In any event, it is clear that Annex 1 is not confined to investments arising after its entry into force: the jurisdiction *ratione temporis* of the tribunal is delimited by Art 28(4), which relates to the timing of the *dispute* rather than the timing of the *investment*. It does not matter whether the investment arose before or after Annex 1's entry into force, as long as the dispute arose thereafter. If the SADC Member States had intended to protect only those investments arising after Annex 1's entry into force, they would have expressly provided so, and that would have *a fortiori* excluded pre-existing disputes. In light of Art 28(4), it goes without saying that pre-existing investments may be protected under Art 28(1). A provision expressly extending Annex 1's application to pre-existing investments is not required to achieve that result (*Nordzucker AG v The Republic of Poland*, Partial Award, 10 December 2008 at [113(vi)]; *Douglas* at p 340; Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2nd Ed, 2012) ("*Dolzer & Schreuer*") at p 41). However, in light of the foregoing analysis, the defendants' right to submit disputes to the SADC Tribunal was not an "investment" for other reasons. I should add that it is entirely open to States to specifically provide that treaty protection only extends to investments arising after the entry into force of the treaty. However, that was not the case here.

Third objection: whether the investment was "admitted"

PCA Tribunal's findings

229 The majority of the PCA Tribunal found that the defendants' purported investment had been admitted. It took the view, relying on the bundle of rights argument, that it sufficed for the *Mining Leases* to have been admitted, even though the investment in question was the defendants' right to refer disputes to the SADC Tribunal. The PCA Tribunal was unpersuaded that the "'investment' created by the unheard [SADC] claim require[d] a separate admission". Rather, the SADC claim was "part and parcel of the original investment created by the [M]ining [L]eases", and it was the Mining Leases that therefore had to be admitted (Award at [7.104]).

230 The Mining Leases did not require admission through any special admission procedure: it sufficed for the Kingdom to have accepted or confirmed the Mining Leases (at [7.105]). To support these propositions, the majority relied on *Desert Line Projects LLC v The Republic of Yemen*, ICSID Case No ARB/05/17, Award, 6 February 2008 ("*Desert Line v Yemen*") and *Churchill Mining Plc v Republic of Indonesia*, ICSID Case No ARB/12/14 and 12/40, Decision on Jurisdiction, 24 February 2014 ("*Churchill Mining v Indonesia*") (at [7.105]–[7.106]). The majority then went on to enumerate (at [7.110]) the acts by which the Kingdom was taken to have "confirmed, authorised and accepted the Mining Leases". In particular, the Mining Leases had been "issued, signed and approved by top officials of the [Kingdom] after a rigorous application process over the course of two years"; approved by key Ministries; executed by the Commissioner of Mines and not objected by the Attorney General; registered by the Registrar of Deeds in Maseru; and granted by the King on the advice of the Military Council. Moreover, the Kingdom seemed to acknowledge the validity of the Mining Leases for three years after they were

granted, by "seeking to acquire an interest in [Swissbourgh] as lease holder, accepting sales tax on revenue from mining and rental payments for the leased areas, receiving progress reports on mining operations under the Leases, introducing [Swissbourgh] as the mining lease holder; and sending numerous letters requiring [Swissbourgh] to perform various obligations under the Leases", as well as registering the Tributing Agreements in 1989 and 1990.

231 The majority did not give its reasons for finding that the admission need not occur after Annex 1's entry into force. Its analysis of this issue (at [7.129]–[7.136] of the Award) was entirely focused on whether Art 28(1) could apply to pre-existing investments, rather than whether such investments needed to be *admitted* following Annex 1's entry into force.

232 Similar to the second jurisdictional objection, Justice Nienaber did not deal with this issue in his Dissenting Opinion.

Parties' submissions

233 The defendants adopted the majority's reasoning, submitting that the Mining Leases (and by extension the right to refer the dispute to the SADC Tribunal) had been admitted *de facto* prior to the entry into force of Annex 1. They relied on *Desert Line v Yemen* and *H&H Enterprises Investments, Inc v Arab Republic of Egypt*, ICSID Case No ARB/09/15, The Tribunal's Decision on Respondent's Objections to Jurisdiction, 5 June 2012 ("*H&H Enterprises v Egypt*") for the proposition that an investment need only be admitted *de facto* at the time of its initiation in order to benefit from treaty protection.

234 The defendants also submitted that an investment need be "admitted" only once, at the time the investment was made, rather than during the entire operation of the project (citing *Churchill Mining v Indonesia*, *Fraport AG*

Frankfurt Airport Services Worldwide v Republic of the Philippines, ICSID Case No ARB/03/25, Award, 16 August 2007 ("*Fraport v The Philippines*") and *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010. These were cases in which, like the present, the investments had been made prior to the relevant treaty's entry into force.

235 The Kingdom denied that either the defendants' right to claim before the SADC Tribunal or the rights and shares in the Mining Leases had been "admitted". It submitted that Art 28(1) required the investment to be admitted specifically for the purposes of Annex 1. This was a "pre-condition" of the Kingdom's consent to international arbitration. Mere acceptance or confirmation of the investment would only amount to "admission" if the State intended the acceptance or confirmation to "result [in] the investment benefiting from the treaty protections". Alternatively, *de facto* admission might occur where the host State endorsed an investment after Annex 1 came into force, knowing that the investor reasonably expected the treaty protections currently in force to apply. That was not the case here.

236 In the Kingdom's view, every investor assumed the risk that the legal regime governing the protection of foreign investments might change over time. An investment would therefore not normally benefit from the protection of whatever future laws subsequently came into force unless that protection had been specifically negotiated by the investor. In this regard, the Kingdom referred to the "well-established principle that, in the absence of a specifically negotiated agreement (whether in the form of a stabilisation clause or otherwise), an investor has no right to assume that the host State's legal regime will remain static". There was no evidence in this case that the defendants' investment was intended to benefit from future protection under international

law not yet in force at the time the investment was made, or that the Kingdom had represented or consented to it so benefiting.

My analysis

237 As noted earlier, the majority's view that the secondary right was admitted as part of the defendants' broader investment (the Mining Leases) seems to follow from its "bundle of rights" analysis, which I have considered and rejected above. The acts alleged to constitute *de facto* admission of the Mining Leases (see [230] above), which occurred between 1988 and 1991, could not have extended to the secondary right to refer the dispute to the SADC Tribunal, which only arose with the SADC Treaty in 1993 at the earliest. The only way for the secondary right to have been admitted was for it to have been admitted specifically. The ostensible legal validity and governmental endorsement of the Mining Leases are therefore not relevant.

238 But how does one go about determining whether a right to submit a dispute to an international forum like the SADC Tribunal, conferred by an international treaty protocol, is an investment "admitted" by a signatory State? The very question illustrates the awkwardness of characterising such a right to relief as an "investment" in the first place for the purpose of Art 28(1): "investments", as noted at [198] above, are generally conceived of as rights arising under the laws of the host State. The cases cited by the parties shed no light on "admission" of an "investment" arising under international laws or treaties because they all predictably deal with investments arising under domestic laws. There is no room for signatories of the SADC Treaty and Tribunal Protocol to choose whether to "admit" an investor's right to refer disputes to the SADC Tribunal, since this right arose by operation of the SADC Treaty and Tribunal Protocol and is not subject to additional implementation or

derogation by Member States under their respective domestic laws. Nor can it be argued that the act of ratification itself constitutes the "admission"; if this were so, Annex 1 would not need to further specify admission as its own and separate requirement. Nor are Member States able to "admit" individual claims on a case-by-case basis, as Art 15(3) of the Tribunal Protocol does away with the need for the host State's consent where an investor refers the dispute to the SADC Tribunal.

The meaning of "admission"

239 An analysis of the Investment Protocol and other investment treaty awards and treatises which have considered the concept of admission shows that admission is a matter of compliance with the host State's domestic laws and regulations. In my view, the introduction of the requirement of admission in Art 28(1) is significant.

240 The concept of admission was absent from the SADC Treaty and was only introduced in Annex 1, which entered into force in April 2010. It features in three places in Annex 1, including Art 28(1):

> **ARTICLE 1**
>
> **DEFINITIONS**
>
> …
>
> 2. In this Annex, unless the context otherwise requires:
>
> "investor" means a person that has been *admitted* to make or has made an investment;
>
> …
>
> **ARTICLE 2**
>
> **PROMOTION AND ADMISSION OF INVESTMENTS**
>
> 1. Each State Party shall promote investments in its territory, and *admit* such investments in accordance with its laws and regulations.

> …
>
> **ARTICLE 28**
>
> **SETTLEMENT OF INVESTMENT DISPUTES**
>
> 1. Disputes between an investor and a State Party concerning an obligation of the latter in relation to an *admitted* investment of the former, which have not been amicably settled, and after exhausting local remedies shall, after a period of six (6) months from written notification of a claim, be submitted to international arbitration if either party to the dispute so wishes.
>
> …
>
> [emphasis added]

241 Annex 1 approaches the concept of admission somewhat unusually. Unlike some BITs (see, *eg*, *Churchill Mining v Indonesia* at [285]; *Desert Line v Yemen* at [92], *Fraport v The Philippines* at [282]–[283] and *H&H Enterprises v Egypt* at [46]), Annex 1 does not make "admission" part of the definition of an "investment" or a condition for the application of the treaty. The requirement of "admission" is absent from the substantive treaty protections in Annex 1, *eg*, Art 6 ("Investments and investors shall enjoy fair and equitable treatment"), Art 7 ("State Parties may in accordance with their respective domestic legislation grant preferential treatment to qualifying investments") and Art 9 ("Each State Party shall ensure that investors are allowed facilities in relation to repatriation of investments"). Instead, admission is a gateway or threshold to the specific treaty protection of recourse to arbitration under Art 28(1). Moreover, an "investor" is not defined *exclusively* as someone who has been "admitted" to make an investment, but can also include someone who "has made" one.

242 The fact that Art 28(1) requires an investment to be "admitted", when it is not part of the definition of "investment" or required elsewhere in Annex 1, seems to suggest that it is a threshold requirement for recourse to arbitration specifically. In other words, rights and property which would otherwise fall within the definition of "investment" for the purposes of other treaty protections

must fulfil some additional criterion in order to be arbitrable under Art 28(1). On the other hand, Art 2(1) seems to contemplate that every investment must be "admitted" in accordance with the State's laws and regulations. On this view, admission is not specific to Art 28(1) but a general requirement.

243 I do not have to elect between these two interpretations. What is clear, and suffices for these purposes, is that Art 2(1) gives content to the "admission" requirement in Art 28(1). In other words, an investment must be admitted "in accordance with [the host State's] laws and regulations" in order to qualify for recourse to arbitration under Art 28(1). As to the meaning of "in accordance with its laws and regulations" in Art 2(1), the phrase is one which has been analysed repeatedly in the investment treaty context. In *Desert Line v Yemen*, Art 1(1) of the relevant BIT required the investment to be "accepted, by the host Party, as an investment according to its laws and regulations, and for which an investment certificate is issued". The tribunal observed at [104]:

> In State practice in the BIT area, the phrase "according to its laws and regulations" is quite familiar. Moreover, it has been well traversed by arbitral precedents, notably *Inceysa* (*Inceysa v. Republic of EI Salvador*, ICSID Case No. ARB/03/26, 2 August 2006) and *Fraport* (*Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, ICSID Case No. ARB/03/2S, 16 August 2007) which make clear that such references are intended to ensure the legality of the investment by excluding investments made in breach of fundamental principles of the host State's law, e.g. by fraudulent misrepresentations or the dissimulation of true ownership. …

244 The tribunal in *Desert Line v Yemen* also cited, at [113], the 2007 edition of *McLachlan* at p 181:

> In many investment treaties the definition of 'investment' includes a requirement that the categories of assets admitted as *'investments' must be made 'in accordance with the laws and regulations of the said party'*. The plain meaning of this phrase is that investments which would be illegal upon the territory of the host State are disqualified from the protection of the BIT.

> Attempts by respondent States to broaden the matters encompassed by this phrase have failed.
>
> [emphasis added]

245 Moreover, the term "admission" is understood as referring to the right of foreign investors to make their investment in the host State *at the start of the investment*. This is supported by *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriential Republic of Uruguay*, ICSID Case No ARB/10/7, Decision on Jurisdiction, 2 July 2013, which was cited to me by the Kingdom. The arbitration there was brought under the Agreement between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of Investments (7 October 1988) (entered into force 22 April 1991). Article 2(1) of this BIT strongly resembles Art 2(1) of Annex 1 in the present case and states, "Each Contracting Party shall in its territory promote as far as possible investments by investors of the other Contracting Party and admit such investments in accordance with its law." At [169], the tribunal stated:

> As the ordinary meaning of the word indicates, "admission" is the act by which each State, having verified the conformity of the proposed investments with internal legislation, allows them to be made in its territory, thus accepting that they are protected investments for purposes of the BIT. …

246 *Dolzer & Schreuer* helpfully elaborate at p 88:

> According to general usage, the right of 'admission' of foreign investment has been distinguished from the right of 'establishment'. P Juillard uses the terms 'freedom of investment' and 'freedom of establishment'. Generally speaking, the right of 'admission' concerns the right of entry of the investment in principle, whereas the right of 'establishment' pertains to the conditions under which the investor is allowed to carry out its business during the period of the investment. …
>
> Typical issues of admission concern the definition of relevant economic sectors and geographic regions, the requirement of registration or of a licence, and the legal structure of an

> admissible investment (eg the type and seat of corporation, joint venture, restrictions of ownership). In contrast, the right of establishment is concerned with issues such as expansion of the investment, payment of taxes, or transfer of funds. An overlap may exist in important areas such as capital or performance requirements. …

247 The authors explain the import of a provision like Art 2(1) at p 89:

> … A typical [admission] clause… reads: 'Each Contracting State shall in its territory promote as far as possible investments by investors of the other Contracting State and admit such investments in accordance with its legislation.'
>
> An admission clause of this type means that the host state is under no obligation to revise its domestic laws of admission after ratification of the bilateral investment treaty (BIT). … Also, the host state retains the freedom to revise its laws on admission after the investment treaty has entered into force.

248 The authors add at p 93:

> The rules on admission may … *limit the right of the investor to invoke the dispute settlement clause of a treaty in cases where the investor ignores the rules on admission.* Whenever a clause 'in accordance with the laws of the host state' is contained in a treaty, it may be understood to imply that investments made in violation of national laws are not covered by the treaty. Therefore, the words 'in accordance with the laws' relate not just to the laws on admission and establishment but also to other rules of the domestic legal order, including those relating to corruption. ...
>
> [emphasis added]

That is the effect of the requirement of "admission" in Art 28(1) of Annex 1.

249 The same is reiterated in Jeswald W Salacuse, *The Law of Investment Treaties* (Oxford University Press, 2nd Ed, 2015) ("*Salacuse*") at p 187:

> In general, the inclusion of the qualification 'in accordance with the laws and regulations of the host State' in the definition of 'investment' refers to the *validity of the investment and is designed to prevent the treaty from protecting investments that were not made in compliance with the host state's national legislation.*
>
> [emphasis added]

250 The foregoing analysis shows that:

(a) The rules of "admission" in a bilateral or multilateral investment treaty are, simply put, the aggregate of the domestic rules and laws imposed by the host State as a precondition for permitting or facilitating foreign investment. Such rules need not include any special procedure for the admission of investments in particular or for the purposes of the treaty specifically, although this is possible. For example, Indonesia's BITs with the UK, Australia and Chile require admission in accordance with Indonesia's Foreign Capital Investment Law No 1 of 1967 and any law amending or replacing it. In this case, however, the Kingdom could not identify any particular procedure for "admission" and I understand Art 2(1) of Annex 1 to simply require compliance with the Kingdom's applicable domestic laws. (See also *Desert Line v Yemen* at [98]–[116], where the tribunal took the view that a requirement of "an investment certificate" did not require an actual certificate, given the absence of any recognised procedure for issuing any such certificates.)

(b) The analysis of whether an investment has been "admitted" will usually require the tribunal to examine whether the investment was originally made in compliance with the laws of the host State at its commencement. An investment that was validly and legally made at the point of its commencement generally need not be separately or subsequently "admitted" for the purposes of the treaty specifically.

(c) The purpose of the admission requirement is to prevent investments that are unauthorised by the host State from benefiting from treaty protections. In the case of Art 28(1) of Annex 1, the requirement of "admission" prevents a would-be investor from making an unauthorised and illegal investment in the host State and then referring any quarrel with the host State to the SADC Tribunal under Art 28(1), thereby leapfrogging the host State's own laws and internal legal processes.

251 All this reinforces my earlier conclusion that "investment", for the purposes of Annex 1, is meant to encompass rights or property acquired in the host State and arising under its domestic laws. The defendants' right to refer disputes to the SADC Tribunal does not fall within this category and is not an "investment", nor was it "admitted" as that term is ordinarily understood, since it was not susceptible to admission in accordance with the Kingdom's laws.

Whether the Mining Leases were admitted

252 Although it carries no consequences for the analysis, I agree with the majority's view that the Mining Leases themselves were admitted. This is borne out by the internal procedures undergone by the Kingdom's officials and authorities prior to the grant of the Mining Leases, the grant and registration of the Mining Leases and the Kingdom's apparent recognition of the Mining Leases in the years immediately following their grant (see [230] above). Although it may well be that the Mining Leases were technically invalid (as was found as regards the Rampai Lease), a host State which has for some time tolerated a legal situation is thereafter precluded from later insisting, against the investor, that "the situation was unlawful from the beginning" (*Dolzer & Schreuer* at p 94, citing *Desert Line v Yemen* at [97]–[123]; see also *H&H*

Enterprises v Egypt at [54]). Nevertheless, the admission of the Mining Leases does not serve as admission of the defendants' right to submit disputes to the SADC Tribunal, which did not form any part of the bundle of rights comprising the Mining Leases.

Fourth objection: whether there was an "obligation in relation to" an admitted investment

PCA Tribunal's findings

253 The majority's analysis was brief. The majority identified the following obligations relating to the defendants' "right to seek relief from the SADC Tribunal for expropriation" (Award at [7.163]–[7.164]):

> (a) the obligation to not withdraw the Kingdom's consent to, or otherwise interfere with, the SADC Tribunal's jurisdiction under Arts 14 and 15 of the Tribunal Protocol in respect of the defendants' part-heard case;
>
> (b) the obligation to accord fair and equitable treatment to the defendants under Art 6 of Annex 1;
>
> (c) the obligation to refrain from taking any measure likely to jeopardise the sustenance of human rights, democracy and the rule of law under Arts 4(c) and 6(1) of the SADC Treaty; and
>
> (d) the obligation to safeguard the defendants' right of access to competent courts, tribunals and authorities under Art 27 of Annex 1.

254 As for the fact that the shuttering of the SADC Tribunal was attributable to a collective decision by the SADC Member States, the majority considered that there was "no basis for dismissing a claim purely because it involves – in

part – State actions taken at an international organisation" (at [7.168]). In any event, the wrongdoing lay not only in decisions taken by the SADC Summit but "involve[d] actions taken by [the Kingdom] individually" (at [7.168]).

The Dissenting Opinion

255 Justice Nienaber found that even if he were to accept the characterisation of the dispute as a distinct one, the shuttering dispute was not a dispute "concerning an obligation of [the Kingdom] in relation to" the defendants' investment. Rather, it was "a general dispute about the legality of SADC's policy decision to partially disband the SADC Tribunal and restrict its jurisdiction and not a dispute which *per se* was about the [defendants'] investments" (Dissenting Opinion at [3.1]).

256 The resolution to shutter the SADC Tribunal was not concerned with any aspect (say, the validity or scope) of the defendants' investment, but had been adopted at Zimbabwe's bidding in light of the problems created for it by the award issued by the SADC Tribunal in the *Campbell v Zimbabwe* case (see [33] above). Justice Nienaber noted that this general policy decision had merely caught the defendants' investment "in the cross-fire" and was not otherwise related to it (Dissenting Opinion at [3.2]).

Parties' submissions

257 The Kingdom noted that the words "obligation of the latter in relation to the admitted investment of the former" were narrower than more standard BIT wording such as "disputes with respect to investments". Since Art 28 was embedded in Annex 1, the "obligation" in question must be an obligation imposed by and arising under Annex 1. The phrase "in relation to" required a legally significant connection between the obligation at issue and the admitted

investment. Moreover, since the obligation must have related to an admitted investment of the investor, it could not be an obligation between States *inter se*.

258 Specifically, the obligation in Art 28(1) of Annex 1 referred to an obligation of the host State not to exercise its enforcement jurisdiction to the detriment of the investor and its investment. The Kingdom's enforcement jurisdiction was limited to the extent of its territory, and there was no evidence that the Investment Protocol was intended to restrain the Kingdom's acts "on the international plane" (*ie*, its acts within the SADC).

259 Based on these principles, the Kingdom disputed each of the four putative obligations identified by the PCA Tribunal as follows:

(a) Articles 4 and 6 of the SADC Treaty gave rise only to obligations between Member States *inter se*, and not obligations owed by States to individual investors.

(b) Articles 14 and 15 of the Tribunal Protocol did not confer any right on the defendants or any obligation on the SADC Member States. They merely established the competence of the SADC Tribunal in general terms. Alternatively, these articles only gave rise to obligations between Member States *inter se*.

(c) Articles 6 and 27 of Annex 1 could not be relied on because the defendants did not have an admitted investment.

260 The defendants disputed that the "obligations" envisaged in Art 28(1) of Annex 1 were limited to obligations imposed by Annex 1. There were three planks to this argument:

(a) There was no such restriction stated in Art 28(1), although other Annexes to the Investment Protocol contained such a restriction.

(b) Since the purpose of Annex 1 was to encourage investment, Art 28(1) should be interpreted broadly to include all obligations (not merely those arising under Annex 1) as long as they could be said to relate to the protected investment. This was supported by *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004 ("*SGS v The Philippines*") at [115]–[117], which I reproduce below (at [267]).

(c) The SADC Treaty, Tribunal Protocol and Investment Protocol are "closely related and must be interpreted and applied as a whole". In international law, a protocol "has the same legal characteristics as a treaty" (citing UN, Treaty Section of the Office of Legal Affairs, *Treaty Handbook* (Rev Ed, 2012) at p 69). Article 28(1) could therefore include obligations arising under the SADC Treaty, Tribunal Protocol and Investment Protocol, and not solely those arising under Annex 1.

261 In response to the Kingdom's argument that the PCA Tribunal could not hold it liable for its acts in the SADC Summit, the defendants counter-argued that:

(a) Nothing in Art 28 of Annex 1 limited the PCA Tribunal's jurisdiction to a State's breaches of obligations within its own territory.

(b) Whether the Kingdom's role in the shuttering of the SADC Tribunal breached any of its obligations was "primarily an issue of

liability" and not jurisdiction (citing the Award at [7.166]). It was hence beyond this court's review.

(c) The defendants' claim did not depend on attributing liability for the SADC Summit's acts to the Kingdom, but rather targeted the Kingdom's "own participation in the SADC decision and its own failure to ensure that the SADC Tribunal or another neutral international forum could complete the [d]efendants' part-heard SADC Tribunal Claim". The Kingdom could, for example, have sought a savings clause to enable the SADC claim to be resolved by the SADC Tribunal or in an alternative forum. Not only did it not do so, but it even refused the defendants' proposal for the SADC Tribunal claim to be resolved by way of arbitration under the auspices of the PCA (see [36] above).

(d) There was nothing in the SADC Treaty, Tribunal Protocol or Investment Protocol, or in international law, to preclude the PCA Tribunal from taking into account the Kingdom's conduct within the body of the SADC Summit. The ICJ decision of *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v Greece)* [2011] ICJ 644 ("*Macedonia v Greece*") confirmed that a State may bear responsibility for its own conduct within an international organisation. Moreover, where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act (citing Art 47(1) of the International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, UN Doc A/56/83 (2001)). In this regard, Mr Justice Pillay, the last-serving President of the SADC Tribunal, had given expert evidence in the arbitration that "[e]ach individual SADC Member State, including [the Kingdom], is culpable

for supporting the SADC Summit's decisions" in violation of their individual obligations under Arts 4(c) and 6(1) of the SADC Treaty (*ie*, to uphold the rule of law).

My analysis

262 It has already been established that the dispute, in order to comply with Art 28(4) of Annex 1, must be characterised as the shuttering dispute rather than the expropriation dispute. The question is whether the shuttering dispute concerns any obligations which exist "in relation to" the purported investment, which on the defendants' case was the right to present a claim to the SADC Tribunal. For the avoidance of doubt, this inquiry does not go into the *merits* of the shuttering dispute, *ie*, whether the PCA Tribunal was right or wrong to have found that the Kingdom *violated* the relevant obligations, and the relief that should be ordered if so. Rather, the question here is whether the dispute was one which concerned "obligations" existing "in relation to" the purported investment in the first place, which is a condition for jurisdiction.

263 Under Art 31(1) of the VCLT, the starting point must be the ordinary meaning of the phrase "relating to", but this does not take us very far. Under Art 28(1) it is not the dispute, but the obligation which the dispute concerns, that must relate to the investment. This is an unusual choice of language amongst BITs or multilateral investment treaties, which more commonly restrict their application to disputes "in relation to", "with respect to" or arising "out of" or "in connection with" the investment (*Newcombe & Paradell* at para 9.29; *Salacuse* at p 427; see, *eg*, Art 8 of the France–Argentina BIT 1991; Art 25(1) of the ICSID Convention; Art 10 of the Netherlands–Pakistan BIT 1988; Art 8 of the Slovak–Czech BIT 1992; and Art 9(1) of the Switzerland–Pakistan BIT 1995). A clause allowing all disputes relating to the investment to be referred to

arbitration would "permit a treaty tribunal to exercise jurisdiction over disputes that do not arise out of, or relate to, treaty protections, but concern contractual claims or other claims based on municipal law" (*Newcombe & Paradell* at para 9.29; see also *Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v Argentine Republic*, ICSID Case No ARB/97/3, Decision on Annulment, 3 July 2002 at [55]).

264 On the other hand, the phrase "obligation in relation to an investment" features more commonly in observance-of-undertakings (*pacta sunt servanda*) treaty clauses than in dispute resolution clauses. For example, Art X(2) of the Agreement between the Republic of the Philippines and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments, 31 March 1997 (entered into force 23 April 1999) ("the Swiss–Philippines BIT") states: "Each Contracting Party shall observe any *obligation it has assumed with regard to specific investments* in its territory by investors of the other Contracting Party." [emphasis added] Although Annex 1 has no equivalent provision, its language of "obligation … in relation to an admitted investment" is similar. In *SGS v The Philippines* (see [260(b)] above), the tribunal stated at [121] that for Art X(2) to be applicable, "the host State must have assumed a legal obligation, and it must have been assumed *vis-à-vis* the specific investment—not as a matter of the application of some legal obligation of a general character".

265 The Kingdom also cited *Methanex Corporation v USA*, Partial Award, 7 August 2002. The tribunal had to construe Art 1101(1) of the NAFTA which states: "This Chapter applies to measures adopted or maintained by a Party *relating to*: (a) investors of another Party; (b) investments of investors of another Party in the territory of the Party; and (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party." [emphasis added] The

tribunal interpreted "relating to" in this context as requiring a "legally significant connection between the measure and the investor or the investment" (at [139]).

266 I disagree with the Kingdom's submission that the "obligation" must arise under Annex 1. As the defendants argued, it would be inconsistent with the wording of the Investment Protocol to read such a restriction into Art 28(1) of Annex 1, especially since such a restriction is conspicuously absent from Annex 1 but present elsewhere (*eg*, Art 7(2) of Annex 3, which refers to "any dispute or difference arising from the interpretation, application or implementation of this Annex"). This can be contrasted with, for example, Art 8 of the UK–Venezuela BIT 1995 ("[d]isputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former") and Art 1116 of the NAFTA ("[a]n investor … may submit to arbitration under this Section a claim that another Party has breached an obligation under … Section A or Article 1503(2) … or Article 1502(3)(a)").

267 Instead, the phrase "obligation … in relation to an admitted investment" in Art 28(1) is similar to Art X(2) of the Swiss–Philippines BIT, which reads, "Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party." This was discussed at some length in *SGS v The Philippines* at [115]–[117]:

> 115. … The term "any obligation" is capable of applying to obligations arising under national law, e.g. those arising from a contract; indeed, it would normally be under its own law that a host State would assume obligations "with regard to specific investments in its territory by investors of the other Contracting Party". Interpreting the actual text of Article X(2), it would appear to say, and to say clearly, that each Contracting Party shall observe any legal obligation it has assumed, or will in the

> future assume, with regard to specific investments covered by the BIT. Article X(2) was adopted within the framework of the BIT, and has to be construed as intended to be effective within that framework.
>
> 116. The object and purpose of the BIT supports an effective interpretation of Article X(2). The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended "to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other". It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.
>
> 117. Moreover it will often be the case that a host State assumes obligations with regard to specific investments at the time of entry, including investments entered into on the basis of contracts with separate entities. … [I]f commitments made by the State towards specific investments do involve binding obligations or commitments under the applicable law, it seems entirely consistent with the object and purpose of the BIT to hold that they are incorporated and brought within the framework of the BIT by Article X(2).

268 The object and purpose of the Investment Protocol and Annex 1 thereto are similar: to create "a favourable investment climate within SADC with the aim of promoting and attracting investment in the Region" (Art 2(2)(a) of the Investment Protocol) and institute "effective policies on investment protection and promotion" (Preamble to Annex 1). This would be inconsistent with implying a restriction as to the source of obligations which would satisfy Art 28(1). However, I agree that the obligation must be an obligation owed by the Kingdom to the investor (rather than to other SADC Member States). This is the only sensible interpretation of Art 28(1), which is limited to investor-State disputes (and not State-State disputes).

269 However, I do not think that any of the four obligations accepted by the majority (see [253] above) are obligations which exist "in relation to" the "admitted investment" in question. This is again in part because the defendants' secondary right to refer disputes to the SADC Tribunal falls outside the

paradigm of "investments" contemplated by Annex 1. As noted earlier, this regime establishes substantive obligations on the part of Member States in order to protect investments in the hope that this will "[create] a favourable investment climate within SADC" and attract foreign investment (Art 2(2)(a) of the Investment Protocol). The defendants' purported "investment" (being the right to refer disputes to the SADC Tribunal), on the other hand, *is itself a treaty protection arising under the SADC Treaty and Tribunal Protocol* and accorded *inter alia* to investors. It can be described as a "protection" (see *McLachlan* at para 3.01) because it gives investors the assurance of referring disputes to an international body which promises a greater degree of independence and impartiality than domestic courts. However, it is, with respect, contrived and unnatural to describe the aforementioned obligations as obligations existing "in relation to" the purported investment, which is itself another protection, rather than an investment, arising under the SADC Treaty and the Tribunal Protocol. It is a circular argument. The difficulty with the argument is illustrated in [272(c)].

270 In fact, one might say that it is the other way around: the right to refer disputes to the SADC Tribunal encompasses such disputes as those that might arise from the breach of treaty obligations. When the Tribunal Protocol and the accompanying Rules of Procedure came into force in 2001, they created a mechanism to refer disputes between States and persons to the SADC Tribunal. The content of this procedural right was coloured by substantive obligations such as those owed under the SADC Treaty and protocols then in force, and subsequently other protocols later enacted (including the Investment Protocol, which came into force in 2010). If a dispute were to arise in which an investor alleged that a Member State had breached substantive obligations owing under the SADC Treaty and protocols, that investor would have been entitled to refer the dispute to the SADC Tribunal pursuant to Arts 14 and 15 of the Tribunal

Protocol. It is circular to construe the very right to refer such disputes to the SADC Tribunal as itself an "investment" which could in turn be the subject of obligations arising under the SADC Treaty and protocols. I do not believe that Art 28(1) was intended to apply in such a manner.

271 I now address the obligations specifically identified by the majority. First, Arts 14 and 15 of the Tribunal Protocol can be ruled out as the dispute does not "concern" them. They state:

> ARTICLE 14
>
> **BASIS OF JURISDICTION**
>
> The Tribunal shall have jurisdiction over all disputes and all applications referred to it in accordance with the Treaty and this Protocol which relate to:
>
> (a) the interpretation and application of the Treaty;
>
> (b) the interpretation, application or validity of the Protocols, all subsidiary instruments adopted within the framework of the [SADC], and acts of the institutions of the [SADC];
>
> (c) all matters specifically provided for in any other agreements that States may conclude among themselves or within the community and which confer jurisdiction on the Tribunal.
>
> ARTICLE 15
>
> **SCOPE OF JURISDICTION**
>
> 1. The Tribunal shall have jurisdiction over disputes between States, and between natural or legal persons and States.
>
> 2. No natural or legal person shall bring an action against a State unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction.
>
> 3. Where a dispute is referred to the Tribunal by any party the consent of other parties to the dispute shall not be required.

272 With the utmost respect, I do not agree with the majority's view that Arts 14 and 15 create an "obligation to not … interfere with, the SADC Tribunal's jurisdiction" (Award at [7.163]), which is what the shuttering dispute concerns, for the following reasons.

(a) Generally, the Tribunal Protocol serves to prescribe the "composition, powers, functions, procedures and other related matters governing the Tribunal" (Art 16(2) of the SADC Treaty), rather than establish substantive rights and obligations in relation to SADC Member States. Articles 14 and 15 delimit the scope of the SADC Tribunal's jurisdiction. They do not expressly create obligations – unlike, for example, Art 5 of Annex 1 (the obligation not to nationalise or expropriate the investment), Art 6(1) of Annex 1 (the obligation of fair and equitable treatment) or Art 9 of Annex 1 (the obligation to allow investors facilities in relation to the repatriation of investments and returns).

(b) In any event, Arts 14 and 15 presuppose the existence of the SADC Tribunal and serve only to delimit or circumscribe its jurisdiction. Even if they are interpreted as obligation-creating, they can, at best, give rise to an obligation on the Kingdom's part to submit to the SADC Tribunal's jurisdiction. For example, Douglas states in *Hybrid Foundations* at p 184 that the procedural obligation to submit to investor-State arbitration upon the filing of a notice of claim by a qualified investor "is owed directly to the investor". Articles 14 and 15 certainly cannot, however, give rise to a transcendent obligation to protect or defend the very existence of the SADC Tribunal. In fact, Art 35 of the SADC treaty enables the SADC Tribunal to be dissolved by a

resolution supported by three-quarters of all the members of the SADC Summit.

(c) Even if the obligation were characterised as suggested in (b) for the purposes of Art 28(1), that would result in a tautologous formulation of the dispute. The Kingdom's obligation (*ie*, to submit to the jurisdiction of the SADC Tribunal) would not exist "in relation to" the defendants' investment (their right to submit disputes to the SADC Tribunal); it would *be* the investment. In other words, the 'obligation' and the 'investment' would be essentially one and the same, the former merely being the corresponding duty of the latter right. This is clearly not how Art 28(1) of Annex 1 is intended to operate: the obligation must relate to something separate and discrete from itself, for example, an investment in the form of property acquired through contract with the host State or loans taken by the host State. The obligation cannot be the investment.

273 Secondly, I do not think Arts 4(c) and 6(1) of the SADC Treaty create obligations owed by the Kingdom to the defendants "in relation to" their investment. These articles read:

> ARTICLE 4
>
> **<u>PRINCIPLES</u>**
>
> SADC and its Member States shall act in accordance with the following principles:
>
> …
>
> (c) human rights, democracy and the rule of law;
>
> …
>
> ARTICLE 6

> **<u>GENERAL UNDERTAKINGS</u>**
>
> 1. Member States undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty.
>
> …

274 The "general undertaking" to promote the rule of law is, in my view, too general and abstract to have given rise to an obligation "in relation to" an admitted investment. Articles 4(c) and 6(1) make no reference to "investments" at all, and to consider them as having given rise to obligations "in relation to" individual investments would be to take such a broad interpretation of "in relation to" as to render it nugatory. To borrow the language of *SGS v The Philippines* (see [264] above), the obligation to promote the rule of law is a "legal obligation of a general character" rather than an obligation assumed *vis-à-vis* the defendants' investment.

275 The remaining two options, Arts 6 and 27 of Annex 1, seem the most likely candidates for the purposes of Art 28(1). The articles state:

> **ARTICLE 6**
>
> **INVESTORS OF THE THIRD STATE**
>
> 1. Investments and investors shall enjoy fair and equitable treatment in the territory of any State Party.
>
> 2. Treatment referred to in paragraph 1 shall be no less favourable than that granted to investors of the third State.
>
> …
>
> **ARTICLE 27**
>
> **ACCESS TO COURTS AND TRIBUNALS**
>
> State Parties shall ensure that investors have the right of access to the courts, judicial and administrative tribunals, and other authorities competent under the laws of the Host State for redress of their grievances in relation to any matter concerning any investment including judicial review of measures relating

> to expropriation or nationalization and determination of compensation in the event of expropriation or nationalisation.

276 I accept that these obligations were borne "in relation to" the Mining Leases, but the defendants have not characterised their investment thus. Instead they have chosen to characterise their "investment" as the secondary right to refer the dispute to the SADC Tribunal. For the reasons stated at [194]–[220] above, I do not think this can be characterised as an "investment" at all. In fact, Art 6 reiterates the requirement of a territorial link between the investment and the host State, which is not the case here. I have also already explained at [269]–[270] above the difficulties with conceptualising treaty obligations as existing "in relation to" the defendants' right to submit disputes to the SADC Tribunal.

277 As for the Kingdom's argument that it could not be held liable for its participation in the acts of the SADC Summit on an international plane, this is not a question of jurisdiction but of liability. I pause only to note that *Macedonia v Greece*, which the defendants cited to suggest that the Kingdom could be held responsible for its conduct within the SADC Summit (see [261(d)] above), does not apply to the present facts. *Macedonia v Greece* was a dispute between sovereigns, in which Macedonia alleged that Greece had violated an Interim Accord expressly restricting its right to object to Macedonia's membership in any international organisation. There is no such express undertaking in the present investor-State dispute and the facts are not analogous. Moreover, there appears to be tension between the Kingdom's position that Aquilian relief is available and its position that its sovereign acts within the SADC Summit are immune from oversight. However, this point was not argued before me by either party and was therefore not one which I felt compelled to explore. I have therefore analysed the fifth jurisdictional objection purely from the perspective of whether Aquilian relief is available and without reference to the tension.

Fifth objection: whether the defendants exhausted local remedies

278 Article 28(1) of Annex 1 states that disputes may only be submitted to international arbitration "after exhausting local remedies". It follows that a dispute in respect of which local remedies have not been exhausted is a dispute not falling within the terms of the submission to arbitration for the purposes of Art 34(2)(*a*)(iii) of the Model Law.

PCA Tribunal's findings

279 The majority clarified that the question was whether the defendants had exhausted local remedies in respect of "the shuttering of the SADC Tribunal and the consequent termination of [the defendants'] part-heard SADC claim" (Award at [7.224]). The defendants were not required to have exhausted local remedies in respect of the expropriation dispute.

280 It was common ground between the parties that the defendants had not pursued any local remedies in relation to the shuttering dispute. The question was therefore whether any such local remedies existed which were "reasonably available and … capable of providing effective redress for the claim at hand" and not "futile or illusory" (Award at [7.225]–[7.226]).

281 The majority noted that the shuttering of the SADC Tribunal had violated the defendants' "international law right to have their claim heard by the SADC tribunal" (at [7.229]). The "primary or direct remedy" for this violation was, straightforwardly, to provide the defendants with an opportunity to have their case heard (at [7.228]). The only way to achieve this was to make "an order directing the Parties to establish a new international tribunal under the same conditions as the SADC Tribunal to hear [the defendants'] original claim for expropriation" (at [7.226]). Since the Kingdom's domestic courts did not have

power to order such a remedy, no local remedy was available (at [7.229]); the defendants therefore satisfied the requirement of exhausting local remedies.

282 The majority rejected the Kingdom's argument that the defendants should have pursued an Aquilian action for the shuttering of the SADC Tribunal. This was not a satisfactory remedy because all that the defendants would receive was monetary compensation relating to "damage caused by the loss of opportunity to bring a claim before the [SADC] tribunal" – this was not a "direct or primary remedy for the underlying claim". It would not provide the defendants with an "opportunity … to have their case heard" and hence could not lead to "effective redress" for the expropriation of the Mining Leases (at [7.228]).

The Dissenting Opinion

283 Justice Nienaber identified the "ultimate remedy" sought by the defendants as compensation for the loss of their mining rights (Dissenting Opinion at [4.4]). The question was whether any local remedies had existed for this claim in 2012, when the arbitration proceedings were commenced. He identified two such remedies:

> (a) An Aquilian action for pure economic loss, *ie*, an action for "patrimonial loss not attributable to any physical injury to person or damage to property but nevertheless resulting from the [Kingdom's] alleged wrongful (i.e. unlawful) and culpable conduct" (Dissenting Opinion at [4.14]). This delictual action had been "vigorously developed" in recent times by the South African Supreme Court of Appeal and would have been available in the Kingdom (at [4.15]). While the South African decisions did not bind the Kingdom's courts, they would nevertheless have a "strong persuasive effect" as both common

law systems are based on Roman-Dutch law (at [4.12]). The Kingdom's Court of Appeal had in fact recognised the existence of "a claim for pure economic loss" in the case of *Mpota Moiloa v Raohang Banna Le Basali* [2009] LSCA 20 ("*Moiloa v Raohang*") at [10]. Such a claim would result in "the very damages claimed by the [defendants] for the expropriation of the [M]ining [L]eases and for being deprived of the opportunity of recovering that loss by reason of the shuttering of the SADC Tribunal" (at [4.34]).

(b) The defendants could have pursued pending actions for compensation in the Kingdom's domestic courts, which the defendants had either withdrawn or failed to pursue to their conclusion. Justice Nienaber referred to *Van Zyl and others v Government of RSA and others* [2007] SCA 109 (RSA) ("*Van Zyl v South Africa*") (the defendants' application for diplomatic protection from South Africa), which made it clear that "as a matter of fact and law all available remedies have not been exhausted in Lesotho" (Dissenting Opinion at [4.37]).

284 In Justice Nienaber's view, the majority's approach of considering whether the Kingdom's courts could have ordered the same injunctive relief as an international tribunal (*ie*, the constitution of a new tribunal to hear the SADC claim) put the horse before the cart. The question of whether local remedies had been exhausted was logically prior to the question of what relief an international tribunal ought to order, as the latter question presupposed that the tribunal had jurisdiction (at [4.22]).

285 Finally, Justice Nienaber rejected any notion that the Kingdom's domestic courts would be biased against the defendants or would not judge

fairly, given their readiness to be "critical and dismissive of the actions of [their] own government even during the earlier stages of the … proceedings" (at [4.29] (fn)).

Parties' submissions

286 The Kingdom criticised the majority's analysis regarding the "primary [or] direct remedy" for the defendants' claim. This test had no basis in international law. Moreover, the Kingdom pointed out that the defendants had not sought the constitution of a new international tribunal to hear their original claim before the SADC Tribunal – in fact they had opposed it (Award at [9.19]). Instead, the defendants had sought a declaratory order, which they would then rely on to access the real remedy sought (monetary compensation for the allegedly unlawful deprivation of their rights under the Mining Leases). Moreover, the majority had found that an Aquilian action was dissatisfactory because it "could not provide compensation for the underlying dispute concerning the Mining Leases" (Award at [7.228]). On this reasoning, the majority ought therefore to have considered the existence of local remedies capable of yielding compensation for the expropriation dispute, but did not do so.

287 The Kingdom asserted that what was required by way of exhaustion of local remedies was well-established as a matter of international law. The proper test was not whether the municipal system could award the exact same remedies as an international tribunal, but whether the municipal system was reasonably capable of providing remedies which were "available and effective". In this regard, the following remedies were available in relation to the shuttering dispute:

(a) First, an Aquilian action for the lost opportunity to bring a claim before the SADC Tribunal. This was a tort claim that would have required the defendants to show that they had suffered damage (including financial loss) caused by wrongful and intentional or negligent conduct on the Kingdom's part. This was made out on the defendants' case: the Kingdom had allegedly participated in the shuttering of the SADC Tribunal with the knowledge and intent of ridding itself of the defendants' claim, causing them to suffer the loss of a valuable claim which would have resulted in their obtaining an award of sizeable damages. In terms of relief, a domestic court would be able to award the defendants whatever relief they would have been able to obtain before the SADC Tribunal, including monetary compensation for the expropriation of their mining rights, to the full extent recoverable.

(b) Secondly, a constitutional or public law claim in relation to the Kingdom's involvement in the shuttering of the SADC Tribunal. The defendants could thereby have sought to compel the Kingdom to provide an alternative forum for resolution of the SADC claim. The Kingdom referred to the pending case of *The Law Society of South Africa v President of the Republic of South Africa and Others*, Case No 20382/15, commenced in March 2015 in the High Court of South Africa, Gauteng Division, Pretoria, in which the Law Society of South Africa brought an action against the President, the Minister of Justice and the Minister of International Relations and Co-operation of South Africa regarding the shuttering of the SADC Tribunal. The Law Society's challenge (which has not been determined) was based on the right of access to courts and other tribunals and fora protected by the South African Constitution. The Kingdom pointed out that ss 4(1)(h) and 12(8)

of the Kingdom's Constitution likewise enshrine a right to a fair determination of civil rights and obligations.

288 The Kingdom also submitted that by constituting a new tribunal to hear the SADC claim, the majority effectively asserted jurisdiction over the expropriation dispute. The defendants should therefore also have been required to exhaust local remedies *vis-à-vis* the expropriation dispute. In this regard, the local remedies that were available and unexhausted were as follows:

(a) The various proceedings before the Kingdom's courts for damages in respect of the expropriation of the Mining Leases, which were formally still pending. As the South African High Court had held in *Van Zyl and others v Government of RSA and others* [2005] ZAGPHC 70 (RSA) at [75], the determination of invalidity of the Rampai lease was not *res judicata* in respect of the other four leases and did not mitigate the necessity of pursuing those proceedings to conclusion. It was irrelevant, even if true, that the other four leases had come into existence under the exact same conditions as the Rampai lease. The question was not the defendants' likelihood of success, but whether there were unexhausted local remedies.

(b) A potential new action based on deliberate or negligent misrepresentation as to the validity of the Rampai lease (which action would have been unaffected by any invalidity of the leases).

289 The defendants agreed that the local remedies must be "available and effective" and not "futile [or] illusory". The existence of local remedies in respect of the expropriation dispute was irrelevant, being a matter for determination by the new tribunal ordered to be constituted by the PCA Tribunal. In any event, no remedies existed for the expropriation dispute, since

the Rampai lease decision set a precedent for the other four mining leases. As regards the shuttering dispute, the mooted remedies were both futile and illusory:

> (a) The Aquilian action would have been "utterly futile" as it could not yield the full measure of compensation for the lost Mining Leases. The South African authorities did not show that such compensation would be possible and were distinguishable on their facts. Moreover, a judgment obtained from the Kingdom's domestic courts would not be as effective as an international arbitral award which "could be enforced in other countries". It would not even be susceptible to enforcement under the Kingdom's own laws in light of s 5 of the Government Proceedings and Contracts Act (Act 4 of 1965) ("the GPCA").
>
> (b) According to the defendants, the Kingdom had always intended to dispense with the defendants without compensation. They said it was "neither reasonable nor logical" to expect the defendants to seek recourse from the domestic courts, implying that they could not be relied upon to decide impartially.

290 The Kingdom denied that its domestic laws prevented the execution of judgments obtained against the Government of Lesotho; this argument was based on a misreading of the GPCA. The question in this case was not whether the Government might be the subject of forced execution, but whether it would in fact comply with any judgment made against it by the domestic courts. There could be no doubt that it would do so given its compliance with past decisions of the domestic courts which were favourable to the defendants.

My analysis

291 Article 28(1) of Annex 1 provides that investor-State disputes which have not been amicably settled may, "after exhausting local remedies", be submitted to international arbitration. Accepting that the dispute in question is the shuttering dispute, the question is whether the defendants had exhausted all available local remedies for the shuttering dispute. My view is that they did not.

General principles

292 The principle that local or domestic remedies must be exhausted before international proceedings may be instituted derives from the international law on diplomatic protection (see Chittharanjan Felix Amerasinghe, *Local Remedies in International Law* (Cambridge University Press, 2nd Ed, 2004) ("*Amerasinghe*") at p 3). The principle is part of customary international law on diplomatic protection (*Case Concerning Elettronica Sicula S.p.A. (ELSI) (USA v Italy)* [1989] ICJ 15 ("the *ELSI* case") at [50]; *Interhandel Case (Switzerland v USA) (Preliminary Objections*) [1959] ICJ 6 ("*Interhandel*") at 27). However, it has been invoked before international tribunals outside the field of diplomatic protection. In particular, the principle has been applied by human rights tribunals which are established by treaties which incorporate the principle (see, *eg*, Art 35(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5, which applies to claims before the European Court of Human Rights).

293 The rule that domestic remedies must be exhausted gives a State an opportunity to redress the wrong that has occurred within its own legal order before being called to account for its actions on the international plane, thereby according respect to the State's sovereignty (*The Loewen Group, Inc and Raymond L Loewen v United States of America,* ICSID Case No ARB(AF)/98/3,

Award, 26 June 2003 at [156]; *Interhandel* at 27; Malcolm N Shaw, *International Law* (Cambridge University Press, 7th Ed, 2014) ("*Shaw*") at p 596; *Amerasinghe* at p 17). The rule also serves practical purposes. Often it is more suitable and convenient for local courts to conduct the initial inquiries into the matter (*Brownlie* at p 711; *Oppenheim* at p 524, n 5). Requiring recourse to domestic remedies also reduces the number of international claims that might be brought, particularly the proliferation of small claims on the level of diplomatic protection (*Shaw* at p 596; *Brownlie* at p 711).

294 The principle of exhaustion of local remedies is rarely encountered in BITs, which "almost always waive the exhaustion of local remedies rule, allowing aggrieved investors to take their claim straight to arbitration" (*Brownlie* at p 716). However, Article 28(1) of Annex 1 explicitly requires local remedies to be exhausted. I will hence proceed on the basis that Art 28(1) transposes the customary international law doctrine of exhaustion of local remedies in the field of diplomatic protection into Annex 1. It was not contended that the exhaustion of local remedies had a different meaning in the context of Art 28(1) than in the context of diplomatic protection; on the contrary, the parties referenced judgments and commentary on the customary international law doctrine in their submissions.

295 I therefore now turn to the customary international law doctrine of exhaustion of local remedies. Two aspects of the doctrine are pertinent here. First, what are the "local remedies" which must be exhausted? Secondly, what constitutes exhaustion?

(1) Local remedies

296 In 2006, the International Law Commission ("the ILC") published its Draft articles on Diplomatic Protection ("the Draft articles"). Article 14(2) of the Draft articles states:

> *Article 14. Exhaustion of local remedies*
>
> …
>
> 2. "Local remedies" means *legal remedies* which are *open to the injured person before the judicial or administrative courts or bodies*, whether ordinary or special, of the State alleged to be responsible for causing the injury.
>
> [emphasis added]

297 Article 15 of the Draft articles states:

> *Article 15. Exceptions to the local remedies rule*
>
> Local remedies do not need to be exhausted where:
>
> (a) there are *no reasonably available local remedies to provide effective redress*, or the *local remedies provide no reasonable possibility of such redress*;
>
> …
>
> [emphasis added]

298 I accept Arts 14 and 15 of the Draft articles as broadly declaratory of customary international law. Articles 14 and 15 purport to codify the customary international law doctrine of exhaustion of local remedies (Report of the International Law Commission on the work of its fifty-eighth session, *Draft articles on Diplomatic Protection with commentaries*, reprinted in *Yearbook of the International Law Commission*, *2006*, vol II, Part Two, UN Doc A/CN.4/SER.A/2006/Add.1 (Part 2) ("*Yearbook of the International Law Commission, 2006*") at p 44). Moreover, authoritative treatises such as *Brownlie* and *Shaw* treat Arts 14 and 15 as reflective of customary international law (*Brownlie* at pp 713–714; *Shaw* at p 596).

299 The meaning of the phrase "local remedies" in Art 14 must be read in the light of the exceptions in Art 15 of the Draft articles (see *Yearbook of the International Law Commission*, *2006* at p 44). For present purposes, the only relevant exception is that stated in Art 15(a) of the Draft articles. In my judgment, Arts 14(2) and Art 15(a) disclose two characteristics of the local remedies to which the exhaustion of local remedies principle applies.

> (a) First, they must be accessible or available to the foreign national. This is implicit in the language of Art 14(2) ("open to an injured person") and Art 15(a) and appears to be well-established (see *Amerasinghe* at pp 181–182).
>
> (b) Secondly, they must provide effective redress. This is reflected in Art 15(a).

300 The twin elements of availability and effectiveness are reiterated in the cases (see, *eg*, *ST-AD GmbH (Germany) v The Republic of Bulgaria*, Award on Jurisdiction, 18 July 2013 at [365].) In relation to the effectiveness requirement, the ILC noted that three formulations of the test were found in the authorities. On the strictest version, only local remedies which were "obviously futile" need not be exhausted. On the least stringent test, remedies with "no reasonable prospect of success" need not be exhausted. The ILC rejected these two options in favour of the third, which it understood as a middle ground (*Yearbook of the International Law Commission*, *2006* at p 47). Under the third test, there is no need to exhaust local remedies if there is "no reasonable possibility of effective redress". This latter test derives from Judge Lauterpacht's separate opinion in *Case of Certain Norwegian Loans (France v Norway)* [1957] ICJ 9 at 39–40.

301 Article 15(a) of the Draft articles thus embodies the two elements of availability and effectiveness, both of which must be viewed through the prism

of what is reasonable. *Brownlie* summarises the two elements in these terms: "an effective remedy must be available 'as a matter of reasonable possibility'" (at p 713).

302 The ILC noted that the threshold set by Art 15(a) reflected judicial decisions on the exhaustion of local remedies (*Yearbook of the International Law Commission, 2006* at p 47). These decisions have held that there is no need to exhaust local remedies in, amongst others, the following scenarios:

(a) the local court is unable to grant the relief sought – whether because it lacks jurisdiction over the dispute in question, is bound by statute or lacks the competence to grant an appropriate or adequate remedy (*The Panvezys-Saldutiskis Railway Case (Estonia v Lithuania)* [1939] PCIJ (ser A/B) No 764 ("the *Panvezys-Saldutiskis Railway* case") at 18; *Claim of Finnish Shipowners Against Great Britain in respect of the Use of Certain Finnish Vessels During the War (Finland v UK)* (1934) 3 RIAA 1479 ("*Finnish Ships Arbitration*") at 1497);

(b) a point of law which could have been taken on appeal has previously been decided by the highest court in a manner adverse to the foreign national, or there is a consistent and well-established line of precedents adverse to the foreign national (the *Panvezys-Saldutiskis Railway* case at 18; *Finnish Ships Arbitration* at 1495);

(c) the only issue on appeal would be one of fact and the higher courts lack the power to review findings of fact (*Finnish Ships Arbitration* at 1535; *The Ambatielos Claim (Greece, United Kingdom of Great Britain and Northern Ireland)* 12 RIAA 83 at 119); and

(d) the local courts are notoriously lacking in independence or there is evidence that the courts are subservient to the executive (*Robert E Brown (United States) v Great Britain* (1923) 6 RIAA 120 at 129).

303 Importantly, it seems that if there is doubt as to whether an effective local remedy is available due to the absence of judicial precedent on the point, an international tribunal should not lightly conclude that there is no such remedy. The following authorities support this proposition:

(a) In the *Panvezys-Saldutiskis Railway* case, Estonia argued that there was no effective remedy because the Lithuanian courts would not take jurisdiction over an act of State. The Permanent Court of International Justice rejected this argument on the basis that there was no Lithuanian court decision on the point. The Court recognised that "whether or not the Lithuanian courts [had] jurisdiction to entertain a particular suit depend[ed] on Lithuanian law" and was a matter "on which the Lithuanian courts alone [could] pronounce a final decision" (at 19). It took the position that until it had been "clearly shown" that the Lithuanian courts had no jurisdiction to entertain the putative suit, it could not accept Estonia's argument that Lithuanian law afforded no means of redress (at 19).

(b) *Amerasinghe* also supports this proposition in discussing the *Case Concerning the Barcelona Traction, Light and Power Company, Limited* [1970] ICJ 3. In that case, the Spanish Government contended that, where there was doubt as to whether a given remedy could offer a chance of success, that point should be submitted to the local courts without an assumption being made that the remedy was ineffective. The Belgian Government argued that, in such a case, the test of efficacy

depended on the expressions of opinion by commentators on the law. *Amerasinghe* asserts at p 191 that "the better view seems to be that of the Spanish government": the mere absence of a *jurisprudence constante* on the futility of a remedy is insufficient to displace the duty to resort to the remedy, even if the prevailing consensus among commentators is that the remedy is futile (at pp 206–208).

(c) *Amerasinghe* also states at p 204 that "it must be quite clear according to the law of the host or respondent state that the remedy in question is inapplicable to the claimant's case".

(d) *Brownlie* observes at p 713 that "the local law may be uncertain and an international tribunal should show caution in drawing conclusions on the non-availability of a local remedy".

(2) Exhaustion

304 In the *ELSI* case, the ICJ remarked at [59] as follows:

> … [T]he local remedies rule does not, indeed cannot, require that a claim be presented to the municipal courts in a form, and with arguments, suited to an international tribunal, applying different law to different parties: for an international claim to be admissible, it is sufficient if *the essence of the claim has been brought before the competent tribunals* and *pursued as far as permitted by local law and procedures*, and without success.
>
> [emphasis added]

The passage identifies two elements of the exhaustion requirement. First, the foreign national must raise the basic arguments that he intends to raise in international proceedings in the local proceedings. Secondly, the foreign national must secure a final decision on the matter. If local law permits an appeal to the highest court, the foreign national must appeal or, at the least, apply for leave to appeal (*Yearbook of the International Law Commission, 2006* at p 45).

Application to OS 492

305 The majority correctly noted that whether local remedies have been exhausted must be evaluated with reference to the *shuttering dispute*, not the expropriation dispute. The Kingdom's proceedings in the domestic courts regarding the Mining Leases are thus not relevant, either as remedies which have already been exhausted or as remedies which have not been pursued to completion. For this reason *Van Zyl v South Africa* (see [283(b)] above) is also irrelevant, since it deals entirely with the expropriation dispute. The key question therefore is whether there are local remedies that address the termination of the defendants' right to refer the expropriation dispute to the SADC Tribunal, which the defendants have not resorted to.

306 I disagree with the majority that the defendants exhausted local remedies. In particular, it is clear that the Kingdom's domestic courts recognise an Aquilian action. What is perhaps less clear or even unclear is whether such an action is available in a case such this. Having said that, there is insufficient material before me to draw the conclusion that such an action would be unavailable or ineffective. I therefore find that this is a remedy which ought to have been pursued by the defendants in order to satisfy the local remedies requirement in Art 28(1) of Annex 1.

307 First, the case of *Moiloa v Raohang* (see [283(a)] above), cited by Justice Nienaber (himself a retired Judge of the Supreme Court of Appeal of South Africa), shows that the Kingdom recognises claims for pure economic loss, although the facts of that case were different. The cause of action was theft of the respondent's brick-making machine. The Court of Appeal held at [10], "A delictual claim founded on *dolus* will entitle the claimant to recover a pure economic loss he or she may have suffered." It cited two South African

authorities on Aquilian liability for this proposition: *Minister of Finance and Others v Gore NO* [2006] SCA 97 (RSA) ("*Gore NO*") at [81]–[90] and *Mediterranean Shipping Co (Pty) Ltd v Tebe Trading (Pty) Ltd* 2008 (6) SA 595 (SCA) ("*Mediterranean Shipping*") at [14]. The Kingdom also referred to a South African treatise, J Neethling, J M Potgieter & P J Visser, *Law of Delict* (LexisNexis, 7th Ed, 2015) ("*Law of Delict*") at pp 305–308, which states that "the Aquilian action is in principle available to claim damages for pure economic loss" provided that the wrongdoer's conduct "compl[ies] with the general delictual requirements". These requirements include wrongfulness and fault (*Mediterranean Shipping* at [14]). The treatise states that "a general duty to prevent pure economic loss for other persons does not exist" but "it must be determined in each case whether, according to the circumstances, there was a legal duty to avoid pure economic loss". This determination requires the court to exercise "a value judgment embracing all relevant facts and involving considerations of policy" (*Law of Delict* at pp 307–308).

308 It is clear that, under South African law, an Aquilian action can give rise to liability for pure economic loss. For example, in *Trustees for the Time Being of Two Oceans Aquarium Trust v Kantey & Templer* [2005] ZASCA 109, the trustees brought a delictual action for the loss of revenue resulting from the temporary closure of the Two Oceans Aquarium, due to certain defects in the aquarium's tanks for which the respondent engineering company was responsible. The Supreme Court of Appeal stated at [10] that whether pure economic loss was actionable "depend[ed] on the existence of a legal duty". Whether such a duty existed was "a matter for judicial determination" based on the test of whether "public or legal policy considerations require[d] that such conduct, if negligent, is actionable; that legal liability for the resulting damages should follow" (at [12]). This case and others (see *Country Cloud Trading CC v MEC, Department of Infrastructure Development* [2013] ZASCA 161;

Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd [2008] ZASCA 134) support the recognition of an Aquilian action in South Africa. They make it clear that "in cases of pure economic loss the question will always be whether considerations of public or legal policy dictate that delictual liability should be extended to loss resulting from the conduct at issue" (*Gore NO* at [87]). I accept the Kingdom's submission that there is some reason to believe that its courts would likely take a similar approach.

309 On the other hand, the defendants were unable to persuade me that an Aquilian action was unavailable. Notably, *the defendants did not assert that such an action was unavailable or did not suit the facts of the present case*. They simply submitted that the South African decisions were all "distinguishable on the facts and far from analogous to any case that the [d]efendants could have theoretically brought" on the facts of the present case. I agree that the decisions cited above are factually distinguishable from the present case and it might well take a significant extension of the cases for the Kingdom's courts to admit the defendants' claim for loss of opportunity arising from the Government's acts on an international plane. However, as I have said at [303] above, the mere absence of judicial authority showing that the remedy would be available does not justify concluding that it is unavailable. By analogy with the *Panvezys-Saldutiskis* case (see [302(a)] above), whether or not the Kingdom's courts would recognise an Aquilian action in these factual circumstances is a matter of Lesotho law. If the Kingdom's existing case law does not show whether their courts would or would not recognise it, it would be premature for me to infer that they would not, unless that is clearly proven. There must first be some evidence positively demonstrating that the remedy is ineffective – for example, a consistent and well-established line of precedents adverse to the complainant (see [302(b)] above). But the defendants have not cited any authorities or sources to show, for example, that there are elements of an Aquilian action that are not made out

even assuming that each of the defendants' contentions is true, or that the Kingdom's courts have rejected an Aquilian claim or declined jurisdiction in other cases factually similar to this. The defendants' submissions amount to nothing more than a bare assertion. No expert testimony was led by the defendants before the PCA Tribunal on this issue.

310 I note that in the *ELSI* case, the ICJ rejected Italy's contention that the claimants ought to have brought an action in the Italian courts under Art 2043 of the Italian Civil Code despite it being "impossible to deduce … what the attitude of the Italian courts would have been" to such an action (at [62]). However, the case is not analogous to the present one and should not be taken to suggest that ambiguity as to the availability of relief should be determined in the defendants' favour. In the *ELSI* case:

(a) one of the claimants had previously consulted two Italian jurists on the question of local remedies for the purposes of a diplomatic claim, and it did not occur to either of them to refer to Art 2043 even as a possibility (at [62]);

(b) Italy was unable to cite any cases under Art 2043 suggesting its availability in this case, citing only cases on other provisions of the Italian Civil Code (at [62]);

(c) the claimants' trustee in bankruptcy had already commenced an action in the Italian courts which was of the same substance as the claimants' complaint, and the damages awarded therein passed into the pool of realised assets to be distributed amongst ELSI's creditors, including the claimants (at [58] and [60]); and

(d) there was already a great "deal of litigation in the municipal courts" about what was in substance the claim before the ICJ; it was therefore "for Italy to demonstrate that there was nevertheless some local remedy that had not been tried; or at least, not exhausted" (at [59]).

311 In other words, factors (a) and (b) gave some indication that Art 2043 would not yield relief. In fact *Amerasinghe* observes that "the established law worked definitely against [Italy's] contentions" (at p 206). Moreover, various actions had already been commenced in the domestic courts and it would have been unreasonable to deny the claimants' claim in the ICJ simply on the basis that they should have made an attempt under Art 2043 specifically. By contrast, in the present case the defendants have not shown that an Aquilian action would be unavailable on the facts, and they even acknowledge that no steps have been taken in the Kingdom's legal system regarding the shuttering of the SADC Tribunal.

312 I next turn to the question of whether an Aquilian action would provide effective redress. In this regard, the defendants contended that the quantum of compensation in an Aquilian action would be so meagre as to be "utterly futile". They made three submissions under this head.

(a) First, none of the South African precedents cited by the Kingdom "demonstrate[d] that the full measure of compensation sought in the SADC Tribunal Claim would have been available to the [d]efendants". The defendants accepted that an Aquilian action could compensate them for the damage caused by the loss of opportunity to bring a claim before the SADC Tribunal, but submitted that this sum would fall short of the sum which the SADC Tribunal would have awarded as compensation for the Kingdom's expropriation of the Mining Leases. Even if that is

true (which the Kingdom denies), I do not accept that that is the correct standard. It is self-evident that the wrongdoing alleged in this case – *ie*, the defendants' loss of opportunity to have their claim adjudicated by the SADC Tribunal – is addressed by any remedy which compensates for loss of that opportunity. The defendants' approach mistakenly measures the effectiveness of an Aquilian action against the yardstick of compensation for expropriation of the Mining Leases, which is not the subject of the dispute in this case. They conflate the measure of compensation for loss of an opportunity to bring a claim with the compensation in respect of that claim. It is self-evident that the two are not the same. It would seem that the majority fell into the same error by fashioning the remedy as the constitution of a new tribunal to hear the SADC claim on the basis that compensation for loss of a right to bring the claim would not suffice (see [281]–[282] above).

(b) Secondly, the defendants submitted that an Aquilian action was not a remedy that "could have restored [them] to the position they were in before". It was not clear whether the defendants were referring to the position they were in before their Mining Leases were allegedly expropriated or the position they were in before the SADC Tribunal was shuttered. In any event, no authorities were cited to support such a stringent test, which bears greater resemblance to expectation loss in contract law than to the test of effectiveness of relief under the exhaustion of local remedies principle in international law. I therefore see no reason to apply it.

(c) Thirdly, the defendants submitted that any judgment that could have been obtained from the domestic courts "would not have been an acceptable substitute for an arbitral award by an international tribunal

that could be enforced in other countries". However, I fail to see the relevance of enforcement in other countries: if the Lesotho courts were to give judgment for the defendants, the Kingdom would be bound to compensate the defendants pursuant to that judgment. The relief would therefore be effective without having to be enforced in other jurisdictions. In any event, the defendants have erred in comparing the effectiveness of the local remedy against that of an international arbitral award. That is incorrect because a local remedy need not be capable of yielding the exact same relief as the international tribunal was able to award. *Brownlie* explains at p 711 that the complainant's duty is to use "such local procedures as are available to protect interests which correspond as closely as may be and in practical terms with the interests involved in a subsequent international claim". The passage from the *ELSI* case that I cited at [304] above further reinforces that the two regimes cannot be compared.

313 The defendants also submitted that any remedy that might be given in an Aquilian action would be "illusory". In this regard, I cannot accept the defendants' imputation of partiality to the Kingdom's domestic courts. I note that those same courts had found in the defendants' favour during the years in which the Kingdom allegedly expropriated the Mining Leases. For example, the High Court declared the Kingdom's 1992 Revocation Order null and void in 1994; the Court of Appeal affirmed that declaration in 1995; and in 1995 the High Court also granted an order recording the Commissioner of Mines' agreement to set aside the purported cancellation of the Mining Leases in 1991 (see [23] and [25] above). The ineffectiveness of domestic legal proceedings might be inferred where the local courts were "notoriously lacking in independence" (*Yearbook of the International Law Commission*, *2006* at p 47) or where it is "clearly established" that "the supreme judicial tribunal is under

the control of the executive organ whose acts are the subject matter of the complaint" (*Oppenheim* at p 525). No evidence has been produced in this regard. All the defendants have is a mere unsubstantiated suspicion of bias, which does not suffice.

314 I also reject the defendants' submission that the GPCA renders any action in the domestic courts illusory. Although this was a matter of Lesotho law, I did not receive any expert assistance on the correct approach to interpreting the GPCA under the laws of the Kingdom. I have therefore proceeded, and the parties seemed content to submit, on the basis that I could approach the interpretation of the GPCA the same way I would any Singaporean statute.

315 Section 2 of the GPCA permits legal proceedings to be brought against the Government and s 3(1) provides for the Principal Legal Adviser to be the "nominal defendant or respondent" in any such action. Section 5 states:

> No execution or attachment or process in the nature thereof shall be issued against the nominal defendant or respondent in any action or other proceedings against Her Majesty in [Lesotho] or against any property of Her Majesty; but the nominal defendant or respondent may cause to be paid out of the revenues of [Lesotho] such money as may, by a judgment or order of the court, be awarded to the plaintiff, the applicant or the petitioner (as the case may be).

316 The effect of s 5 is to prohibit execution against, or attachment of property of the Crown or of the nominal defendant; it does not prohibit the payment of damages out of the Kingdom's revenues, which is surely the remedy that the defendants seek. The defendants have not discharged the burden of establishing that the courts would either refuse such a remedy or that the Kingdom would refuse to comply with a court judgment requiring it to pay the

defendants. I am therefore unable to conclude that an Aquilian action would not provide effective redress on that basis.

317 Finally, the Kingdom also submitted that it was possible for the defendants to bring a constitutional claim analogous to that sought by the Law Society of South Africa (see [287(b)] above). Unfortunately counsel for the defendants did not address this possibility in either written or oral submissions. However, no Lesotho authorities were cited to me by the Kingdom, and I have doubts whether such a claim would be available. In particular, I note that s 4(1) of the Constitution of the Kingdom limits its application to "every person in Lesotho", and I am not confident that the second to fourth defendants would fall within this category. The JVZF Trust and the Burmilla Trust, the latter of which holds 90% of the shares in Swissbourgh as well as the rights of Swissbourgh and the Tributees against the Kingdom in respect of the Mining Leases, are established under the laws of South Africa, and Mr Van Zyl is a South African national. I shall say no more on this topic.

318 While it is not clear whether the courts would have ruled in the defendants' favour in an Aquilian action, it suffices that this was an avenue open to the defendants that appears to have been capable of affording effective relief. The threshold for concluding that local remedies have been exhausted (due to the unavailability or ineffectiveness of local remedies) has not been crossed. It would therefore not be right to deprive the Kingdom's municipal legal system of any opportunity to address the wrong that the defendants claim they have suffered. The majority's approach was erroneous. As I have said at [312(a)] above, in taking the view that an Aquilian action would be inadequate relief because it might not yield the full measure of compensation sought by the defendants, the majority appears to have treated the dispute at hand as the expropriation dispute. But the true dispute concerns the shuttering of the SADC

Tribunal, not the expropriation of the Mining Leases. Thus the effectiveness of domestic relief must be analysed in terms of whether it adequately addressed the defendants' loss of opportunity to have their claim decided by the SADC Tribunal.

319 I note that there may be some tension between the Kingdom's position (which I agree with at [196] above) that the secondary right to refer disputes to the SADC Tribunal is not one which exists as a matter of Lesotho law, and their position here that the domestic courts would order relief in an Aquilian action brought on the facts of this case. The argument might conceivably be made that if the Lesotho courts were to grant relief in this case, that would imply recognition of the defendants' secondary right to refer the shuttering dispute to the SADC Tribunal. Such recognition might amount to a link between the defendants' secondary right and the Kingdom's domestic legal system. However, no such argument was raised and I do not have to rule on it. It is not necessary for me to find that the defendants would positively succeed in an Aquilian action on these facts; that is a matter for the Lesotho courts to decide. I find simply that there is insufficient evidence to conclude that they would not succeed, and the local remedies requirement is therefore unsatisfied.

Sixth objection: whether the defendants were "investors"

320 Another jurisdictional objection raised by the Kingdom was that Swissbourgh and the Tributees were not capable of qualifying as "investors" for the purposes of Art 28(1) of Annex 1. However, this objection appears to be largely academic. Although the PCA Tribunal found that all nine defendants were capable of being "investors" regardless of whether they were domestic or foreign, it also found that Swissbourgh and the Tributees had assigned their rights to pursue their claims against the Kingdom for its alleged expropriation

of rights under the Mining Leases and Tributing Agreements to the Burmilla Trust. This assignment was not denied by either the defendants or the Kingdom (Award at [7.77]). As a result, the PCA Tribunal found that the second to fourth defendants were "the proper parties to pursue the … claim". Swissbourgh and the Tributees were not "investors" for the purposes of Art 28(1) of Annex 1 and their claims were dismissed. In the Interpretation (see [52] above), the PCA Tribunal further clarified that it only had jurisdiction over the second to fourth defendants and could not make (and had not made) any order *vis-à-vis* Swissbourgh and the Tributees. There was hence no basis on which I could set aside the Award for excess of jurisdiction *ratione personae*.

321 The defendants, on the other hand, sought to persuade me that the PCA Tribunal had erred in finding that it lacked jurisdiction over Swissbourgh and the Tributees. But the defendants had not applied to set the Award aside, either in whole or in part, and it was not clear what remedy they had in mind. Although parties did not address me on this point, I have doubts whether this court has jurisdiction to review that ruling or set the Award (or that part of the Award pertaining to lack of jurisdiction over Swissbourgh and the Tributees) aside on that ground at the *defendants' instance*, for the following reasons:

(a) The court's jurisdiction to set aside an arbitral award derives from either s 10 or s 24 of the IAA, or Art 34 of the Model Law. The limbs in s 24 are not made out, leaving s 10 of the IAA and Art 34.

(b) However, the defendants did not bring an application under s 10 of the IAA. While the Kingdom filed OS 492 under s 10(3) of the IAA, it only did so in respect of the PCA Tribunal's *positive* jurisdictional ruling.

(c) Turning to Art 34 of the Model Law, none of the limbs in Art 34 appears to envisage a situation where the arbitral tribunal wrongly found that it *lacked* jurisdiction over a party to the dispute. In particular, Art 34(2)(*a*)(i) is for setting aside a *positive* jurisdictional ruling (*ie*, that the tribunal did have jurisdiction over the parties). It was for this reason that s 10 of the IAA was amended to allow the supervisory court to review a negative jurisdictional ruling.

322 For these reasons, I am not confident that I would have the jurisdiction to order any relief even if I were to disagree with the PCA Tribunal's finding that it lacked jurisdiction over Swissbourgh and the Tributees. Nevertheless, since parties addressed this objection in their submissions, I will give my reasons for my view that Swissbourgh and the Tributees are not "investors" for the purposes of Art 28(1) of Annex 1 and that the PCA Tribunal was right to find that it lacked jurisdiction over them (albeit on different grounds).

PCA Tribunal's findings

323 The PCA Tribunal addressed the three following questions (Award at [7.65]). First, could Swissbourgh and the Tributees be "investors" for the purposes of Art 28(1) given that they were locally incorporated companies? Secondly, were the JVZF Trust and the Burmilla Trust (the third and fourth defendants) "persons" capable of bringing a claim under Art 28(1)? Thirdly, was the Burmilla Trust the only entity with rights which were capable of being the subject of a claim under Art 28(1) of Annex 1?

324 I will only summarise the PCA Tribunal's findings on the first question, since that is the crux of the parties' disagreement in OS 492. The PCA Tribunal found that Art 28(1) was available to both local and foreign investors. The term "investor" was defined in Art 1(2) of Annex 1 as "a person who has been

admitted to make or has made an investment", without distinguishing between local and foreign persons. "Person" was in turn defined as "a natural person or a company", and "company" was in turn defined as "any entity constituted or organised under the applicable laws of any State…". These definitions drew no distinction between the host State and other States and the PCA Tribunal refused to imply "an additional requirement" into the Investment Protocol (at [7.71]). While it was "unusual to find an investment treaty that applies to both foreign and domestic investors alike" since most investment treaties expressly excluded domestic investors from bringing claims against their own government, no such provision was found in the SADC Treaty and Investment Protocol (at [7.68]). Swissbourgh and the Tributees thus fell within the plain reading of the definition of "investor".

325 The PCA Tribunal also relied on *Mike Campbell (Pvt) Limited and William Michael Campbell v The Republic of Zimbabwe*, SADC(T) Case No 2/2007, [2008] SADCT 2 ("*Mike Campbell*"), a ruling in the *Campbell v Zimbabwe* case in which the SADC Tribunal confirmed that a domestic entity could bring a case against its own government under Art 15(1) of the Tribunal Protocol (Award at [7.69]). Although this case did not involve the Investment Protocol specifically, the SADC Member States would have made it amply clear had they intended jurisdiction to differ between the Tribunal Protocol and the Investment Protocol.

Parties' submissions

326 The Kingdom disagreed with the PCA Tribunal's finding that Swissbourgh and the Tributees were capable of qualifying as "investors" for the purposes of Art 28(1), as they were incorporated under the laws of the Kingdom. The PCA Tribunal had erred by overemphasising the express wording of

Annex 1 at the expense of the context of Art 28(1) and the object and purpose of the Investment Protocol. The Kingdom described the PCA Tribunal's finding that Annex 1 applied to domestic investors as "unprecedented" and a "departure from well-established principles of international law". Other multilateral treaties like the NAFTA, the Central American Free Trade Agreement (2004) 43 ILM 514 ("the CAFTA") and the Energy Charter Treaty (17 December 1994) 2080 UNTS 95 (entered into force 16 April 1998) ("the ECT") applied only to foreign investors. In this regard, the Kingdom cited *Bayview Irrigation District et al v United Mexican States*, ICSID Case No ARB(AF)/05/1, Award, 19 June 2007. In rejecting a claim by US nationals who had made an investment in the US but alleged that this investment was being adversely affected by measures taken by Mexico, the tribunal stated at [95]–[96]:

> 95. If, however, the NAFTA were intended to have such a significant effect one would expect to find very clear indications of it in the *travaux préparatoires*. There are no such clear indications, in the *travaux préparatoires* or elsewhere …
>
> 96. While NAFTA Article 1139 defines the term "investment" it does not define "foreign investment". Similarly, NAFTA Chapter XI is named "Investment", not "Foreign Investment". However, this Tribunal considers that NAFTA Chapter XI in fact refers to "foreign investment" and that it regulates "foreign investors" and "investments of foreign investors of another Party". The ordinary meaning of the text of the relevant provisions of Chapter Eleven is that they are concerned with *foreign* investment, not domestic investments. …

327 The Kingdom also identified various features of Annex 1 which revealed that its scope related to *foreign* investors and *foreign* investment. I include these where relevant at [331] below.

328 The Kingdom also submitted that the effect of extending Annex 1 to domestic investors would be to introduce "an additional tier to the judicial system of each SADC State", which would be "extraordinary and entirely inconsistent with the scope of protection in both bilateral and multilateral

investment treaties". If that had been the Member States' intention, they would surely have incorporated express words to that effect.

329 Finally, the Kingdom criticised the PCA Tribunal's reliance on *Mike Campbell* (see [325] above), which had been decided in the materially different context of Art 15 of the Tribunal Protocol. This could not be compared to Art 28 of Annex 1. *Mike Campbell* concerned a claim brought by a Zimbabwean national against Zimbabwe for breach of the obligation to respect human rights under Art 4 of the SADC Treaty. The Kingdom pointed out that human rights obligations apply to nationals and aliens without distinction. By contrast, in the Kingdom's words, the "appropriate starting point [in an investment treaty] is that there is an important distinction (as a matter of general international law) between the status and treatment of nationals and aliens".

My analysis

330 I agree that the definitions of "investor", "person" and "company" in Art 1 of Annex 1 do not expressly exclude Lesotho nationals or companies from being investors. However, the meaning to be attributed to the term "investors" is to be ascertained with reference to the ordinary meaning of that term *in its context and in the light of the object and purpose of Annex 1* (and more broadly the Investment Protocol and the SADC Treaty) (*cf* [95] above). Obviously, having the *travaux préparatoires* before me would have been of significant assistance in this regard. In my view, the context of Annex 1's discussion of investment, together with the object and purpose of Annex 1, the Investment Protocol and the SADC Treaty, strongly indicate that Annex 1 is intended to attract and protect *foreign* investors within each host State.

331 The obvious purpose of the Investment Protocol is to incentivise investment by providing various protections to investors; the SADC Member

States would hardly need to resort to a regional multilateral treaty to incentivise investments by their own nationals. In this regard, Annex 1 bears numerous indications of its orientation towards foreign investments, including the following.

(a) The Preamble to Annex 1 generally reflects a concern that the SADC region *as a whole* does not receive sufficient investment. The Preamble notes "the low levels of investment into the SADC", recommends greater regional cooperation to "enhance the attractiveness of the Region as [an] investment destination", notes that "without effective policies on investment protection and promotion, the Region will continue to be marginalised in terms of investment inflows", and expresses a desire to be guided by the Investment Protocol "in the facilitation and stimulation of investment flows … into the Region". These phrases show that the purpose of Annex 1 is not to incentivise nationals to invest *in their own States* but to make the region *as a whole* more desirable to external investors.

(b) This is reinforced by Arts 19 and 23 of Annex 1. Article 19 requires Member States to "pursue harmonisation with the objective of developing the region into a SADC investment zone". Article 23 creates certain obligations on Member States *vis-à-vis* their Investment Promotion Agencies, defined in Art 1 as agencies which, *inter alia*, "develop a favourable investment image of their countries", "make recommendations for improvements of their countries as investment destinations" and "keep track of all investors entering and leaving the country…". These articles thus give effect to the Preamble's focus on attracting external investors to each SADC Member State.

(c) Article 3 of Annex 1 obliges Member States to support the development of local and regional entrepreneurs, but allows Member States to "place emphasis on industries that … have a favourable effect on attracting foreign direct investment": see Art 3(2) of Annex 1.

(d) Article 9 of Annex 1 provides that each Member State shall "ensure that investors are allowed facilities in relation to repatriation of investments and returns in accordance with the rules and regulations stipulated by the Host State". This is a protection that can only apply to foreign investors.

(e) Article 28(1) of Annex 1 provides for the settlement of investment disputes by "international arbitration" (by either the SADC Tribunal, ICSID or an international arbitrator or *ad hoc* arbitral tribunal, as specified in Art 28(2)). Notably, claims by nationals of the host State are expressly excluded from the scope of the ICSID Convention by Art 25(1) thereof. The fact that only *international* arbitration is provided for, and that ICSID is one of the options, suggests that the types of disputes which Art 28(1) envisages are those which arise between the host State and a foreign investor.

332 This analysis is supported by the requirement of exhaustion of local remedies in Art 28(1) of Annex 1. As I have observed at [293] above, the requirement serves to protect State sovereignty. Without such a requirement, foreign nationals would be free to leapfrog the domestic legal system and take their complaints directly to international entities. The requirement of exhausting local remedies is thus included in Art 28(1) to protect Member States from being held internationally responsible by foreign investors without having an

opportunity to remedy the wrong internally. It reinforces the Investment Protocol's focus on foreign investment.

333 The fact that Annex 1 does not *expressly* confine its terms to foreign investors is not so compelling as to outweigh the clear context, object and purpose of Annex 1. On the contrary, it is difficult to believe that if SADC Member States did intend to confer treaty protections on domestic investors, which would trigger broad-ranging and significant legal consequences (not least the *de facto* creation of a new tier to the judicial system for domestic investors), they would have neglected to provide for and regulate these consequences expressly. That is far less plausible than the alternative, *ie,* the SADC Member States did not intend to trigger such consequences although they did not expressly say so. The definition of "investment" in Annex 1 is one which, if applied to nationals, would invariably include every national who had ever purchased property, acquired company shares or acquired licences to exploit natural resources (amongst others). Extending treaty protections to nationals would constitute a significant intrusion into the sovereignty and freedoms of each Member State. Indeed, it seems quite extraordinary to conclude as such in the absence of clear and explicit language. Construing Annex 1 in such a way contradicts the principle that treaties must be interpreted with due recognition to the interests of the negotiating States and their sovereignty (see [100]–[101] above).

334 In addition, various concepts in Art 28(1) do not easily lend themselves, without modification, to domestic investments. For example, the concept of "admission" is one which relates to the host State granting permission to a foreign investor to invest in the territory of the host State provided it complies with the host State's laws and regulations. In the case of a domestic investor, it is not clear what the process of "admission" would entail: the only relevant laws

and regulations would be domestic laws, for example those pertaining to the purchase of property, acquisition of shares and so on.

335 I disagree with the PCA Tribunal's view that *Mike Campbell* is "persuasive authority" for the proposition that a domestic entity may sue its own government under the Investment Protocol (Award at [7.69]). As the Kingdom pointed out, the respective contexts of the two cases are incomparable. *Mike Campbell* recognised that a national may sue his own State in the SADC Tribunal for breach of *human rights*, which is a breach of Art 4(c) of the SADC Treaty. This recognition must be read in light of (a) the objectives of the SADC Treaty and (b) the jurisdictional conditions of the SADC Tribunal:

(a) The objectives of the SADC Treaty are not confined to the promotion of investments. They include, for example, the alleviation of poverty; the support of the socially disadvantaged; the promotion of shared values through institutions which are democratic, legitimate and effective; and the maintenance of democracy, peace, security and stability (see Art 5 of the SADC Treaty). These are objectives whose success depends significantly upon the relationship between a host State and its own nationals, and not solely its relationship with foreign nationals.

(b) Articles 14 and 15 of the Tribunal Protocol delimit the jurisdiction of the SADC Tribunal. Article 14 specifies broad categories of disputes within the SADC Tribunal's jurisdiction (*eg*, the interpretation and application of the Treaty and all protocols). Article 15 of the Tribunal Protocol gives the SADC Tribunal jurisdiction over disputes between natural persons and States. The SADC Tribunal's jurisdiction is therefore not confined to disputes concerning specific

subject-matter or persons suing in a particular capacity. The SADC Tribunal serves as the general adjudicative body of the SADC, and the breadth of its jurisdiction mirrors the SADC's varied objectives.

336 Article 28(1) of Annex 1, on the other hand, creates a much narrower avenue for submitting a dispute to international arbitration.

(a) First, Art 28(1) resides in Annex 1, which has a far more circumscribed purpose than the overarching SADC Treaty. I have already explained that the wording and provisions of Annex 1 suggest that its aim is to attract foreign investment into each Member State, an objective which bears no relation to the relationship between each host State and its own nationals. It clearly cannot be assumed, for the purposes of comparing *Mike Campbell* to the present case, that the international arbitral body referred to in Art 28(2) shares the same purpose and function as the SADC Tribunal, unless of course the SADC Tribunal is selected as the mode of dispute resolution pursuant to Art 28(2)(*a*). But even then, the SADC Tribunal would have to fulfil this role with regard to the terms of reference of Art 28(1), which is limited to investment disputes only.

(b) Secondly, the right to refer disputes to international arbitration under Art 28(1) is limited exclusively to persons suing in a particular capacity (*ie*, as investors) and to disputes with a specific subject-matter (*ie*, concerning a host State's obligations in relation to an admitted investment).

337 Clearly, the SADC Tribunal and the international arbitral body in Art 28(2) of Annex 1 do not fulfil the same purpose and function, and they have different jurisdictional conditions. As such, *Mike Campbell* cannot be

"persuasive authority" that a national may bring a claim against his own Member State under Art 28(1).

338 For the reasons I have stated above, I do not think that Art 28(1) of Annex 1 was intended to accommodate domestic investors. In reaching this conclusion, I place no weight on the NAFTA, the CAFTA and the ECT. The mere fact that other investment treaties are exclusively concerned with foreign investors, without more, says nothing about the proper interpretation of Annex 1. My conclusion is consistent with the PCA Tribunal's conclusion that it lacked jurisdiction *ratione personae* over Swissbourgh and the Tributees, although its conclusion was based on the assignment of their rights to the Burmilla Trust.

339 In this regard, I note that there is another subsidiary question concerning whether the second to fourth defendants are "investors" for the purposes of Annex 1. The second to fourth defendants did not own the Mining Leases and their only connection to them lies in their ownership of shares in Swissbourgh and the Tributees, from whom the Mining Leases were expropriated. However, the parties did not submit on this before me and it is hence unnecessary for me to consider it.

Conclusion on setting aside

340 In summary, my conclusions on each of the Kingdom's jurisdictional objections are as follows:

(a) The dispute submitted to arbitration was the shuttering dispute, which was within the PCA Tribunal's jurisdiction *ratione temporis* under Art 28(4) of Annex 1.

(b) The defendants' right to submit disputes to the SADC Tribunal was not an "investment" within the meaning of Art 28(1) of Annex 1.

(c) Nor was it "admitted" for the purposes of Art 28(1) of Annex 1.

(d) The shuttering dispute did not concern any obligation of the Kingdom's in relation to the purported investment (*ie*, the defendants' right to submit disputes to the SADC Tribunal).

(e) The defendants failed to exhaust local remedies, in particular, an Aquilian action for financial loss.

(f) Swissbourgh and the Tributees were not "investors" for the purposes of Art 28(1) of Annex 1, and this was consistent with the PCA Tribunal's ruling that it lacked jurisdiction over them, although the PCA Tribunal had come to that view on different grounds.

341 It follows that, in my view, the Award dealt with a dispute not contemplated by and not falling within the terms of the submission to arbitration and thereby fell foul of Art 34(2)(*a*)(iii) of the Model Law. While the court retains a residual discretion not to set aside an award even where grounds under Art 34(2) of the Model Law are made out, this discretion should only be exercised "if no prejudice has been sustained by the aggrieved party" (*CRW Joint Operation* at [100]). That is clearly not the case here because jurisdiction has been wrongly assumed. I therefore set aside the Award in entirety. In the circumstances, there is no need for me to address the Kingdom's arguments for specifically setting aside only the portion of the Award which awarded the costs of the arbitration to the defendants. I allow prayer 2 of the OS only (*ie*, only [53(a)(ii)] above and not [53(a)(i)] or [53(b)]).

342 As the Kingdom has prevailed in OS 492, I award the costs of OS 492 to the Kingdom, to be taxed if not agreed.

343 As I observed earlier, investment treaties are fine-tuned to balance the interests of host States and investors, and it would be ultimately counteractive to a treaty's object and purpose to extend its protections to situations clearly beyond its contemplation. While the defendants are understandably disappointed with the turn their investment has taken, that cannot be cured by doing violence to a dispute resolution provision in the treaty. The defendants' difficulties in establishing jurisdiction stem from the fact that their true investment – the Mining Leases – was made before Annex 1's entry into force. The remarks of the tribunal in *Lucchetti v Peru* at [61] are apt in these circumstances:

> Lucchetti may therefore consider it a harsh result that its effort at obtaining an international remedy is brought to a halt before the merits of its contentions are even examined. Such a conclusion, however, would not be warranted in light of the fact that Lucchetti did not have an *a priori* entitlement to this international forum. It cannot say that it made its investment in reliance on the BIT, for the simple reason that the treaty did not exist until years after Lucchetti had acquired the site, built its factory, and was well into the second year of full production. It cannot conceivably contend that it invested in reliance on the existence of this international remedy.

Costs of the arbitral proceedings

344 That leaves the question of the costs of the arbitration. Two questions arise. The first is whether the court has jurisdiction to make an order as to the costs of the arbitration. The second question is, if so, what costs order would be appropriate. The Kingdom submitted that the PCA Tribunal was *functus officio* as regards the question of liability for costs and urged me to award the costs of both the arbitration and of OS 492 in its favour. The defendants did not explicitly dispute that I had jurisdiction to do so but submitted that if I were to

set aside the Award, I ought to leave the question of allocation of the costs of the arbitration to the PCA Tribunal, which was better-placed to deal with that question.

345 There is doubt as to whether I am able to remit the question of costs in the arbitration to the PCA Tribunal. The PCA Tribunal would appear to be *functus officio*, having issued a final and binding award in respect of the matters submitted to it (s 19B of the IAA; see also *AKN and another v ALC and others and other appeals* [2016] 1 SLR 966 ("*AKN v ALC*") at [18]). Article 34(4) of the Model Law, which exhaustively sets out the court's power of remission, "does not empower the court to remit any matter *after* setting aside an award" [emphasis in original] (*AKN v ALC* at [22]).

346 However, in the event that I am unable to remit the question of costs in the arbitration to the PCA Tribunal, what would become of the costs in the arbitration? In this regard, I note that s 10(7) of the IAA empowers a High Court Judge who hears an appeal against jurisdiction under that section to make an order of costs in the arbitration. But the Award here is being set aside not under s 10 of the IAA but under Art 34 of the Model Law, which does not confer an equivalent power. In the absence of legislative provision, it would seem that there is certainly an argument that I have no power to make such an order: *Crest Nicholson (Eastern) Limited v Mr and Mrs Western* [2008] EWHC 1325 (TCC) at [54]. In fact, s 10(7) of the IAA was introduced precisely to plug such a lacuna in the context of s 10: see the Law Reform Committee Report at para 31.

347 Assuming that I have jurisdiction to make an order of costs in the arbitration, what should be the quantum? I note that the PCA Tribunal awarded the defendants the costs of the arbitration *as well as the defendants' reasonable legal costs*, which the PCA Tribunal described as a "growing trend in

investment arbitration" (Award at [10.7]). The PCA Tribunal also set this sum off against costs which the defendants had been ordered to pay the Kingdom in domestic proceedings in the courts of Lesotho. These are issues on which the parties did not submit. In the circumstances, I will hear further submissions from the parties on two issues: (a) whether the court has jurisdiction to remit the costs of the arbitration to the PCA Tribunal for assessment or to make an order of the costs of the arbitration itself; and, (b) the quantum of such costs on the assumption the court has jurisdiction.

348 Finally, it leaves me to thank both counsel for their excellent assistance and submissions. Steven Chong J (as he then was) noted in hearing the application for Mr Wordsworth QC's admission that this was a matter that "tick[ed] all four boxes of complexity, difficulty, novelty and precedential value" (*Re Wordsworth, Samuel Sherratt QC* [2016] 5 SLR 179 at [52]). I could not agree more. Counsel's assistance was tremendously helpful to me in navigating the difficult issues I have had to address.

Kannan Ramesh
Judge

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