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Case No: CL-2023-000395

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

IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF A PCA ARBITRATION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/08/2024

Before :

MR JUSTICE FOXTON

- -

Between :

REPUBLIC OF KOREA	**Claimant**
- and -	
ELLIOTT ASSOCIATES, LP	**Defendant**

- -
- -

Samuel Wordsworth KC, Peter Webster and Richard Hoyle (instructed by **Arnold & Porter Kaye Scholer (UK) LLP**) for **the Claimant**
Constantine Partasides KC and **Georgios Petrochilos KC** (of **Three Crowns LLP**) and **Andrew Stafford KC** and **Richard Clarke** (of **Kobre & Kim (UK) LLP**) for **the Defendant**

Hearing dates: **23 and 24 July 2024**
Draft judgment circulated to parties: **25 July 2024**

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Approved Judgment

This judgment was handed down remotely at 2pm on 01 August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE FOXTON

Mr Justice Foxton :

1. This is an application by the Claimant (**"Korea"**) under s.67 of Arbitration Act 1996 (**"the 1996 Act"**) to set aside a final award dated 20 June 2023 (**"the Award"**) rendered in an arbitration between Korea and Elliott Associates, LP (**"EALP"**).

2. The Award was rendered in an arbitration commenced by EALP against Korea under the auspices of Article 11.16 and following of the USA-Korea Free Trade Agreement ("**the Treaty"**). This forms part of Chapter 11, which in many ways can be seen as containing a form of bilateral investment treaty (**"BIT"**), albeit concluded and taking effect as part of a treaty with a wider subject-matter.

A Brief Introduction to the Dispute

3. EALP is a US investment fund which acquired a 7.12% share in a company in the Samsung group, Samsung C&T Corporation (**"SC&T"**). SC&T was the subject of a proposed merger with another company in the Samsung group, Cheil Industries Inc (**"Cheil"**). EALP opposed the merger for a variety of reasons, both as to its motivation and the proposed manner of execution.

4. Another shareholder in SC&T was the National Pension Fund of Korea (**"NPF"**), which was managed by the National Pension Service (**"NPS"**). The NPF held 11.94% of SC&T's shares and 4.61% of the shares in Cheil, as well as other minority shareholdings in companies within the Samsung group.

5. The terms of the proposed merger were announced by SC&T and Cheil on 26 May 2015, and the shareholders' vote was to take place on 17 July 2015. EALP brought legal proceedings before the Korean courts in an attempt to prevent the merger proceeding, but without success. The merger was approved at an Extraordinary General Meeting on 17 July 2015. The merger was supported by 69.53% of shareholder votes, including shares voted by the NPS on behalf of the NPF. The requisite majority to pass the resolution would not have been obtained if the NPS had not voted in favour.

6. EALP contended that the circumstances in which the resolution was passed and in which the NPS came to vote in favour of it involved breaches of the Treaty. In particular, EALP alleged that the office of the President of Korea (referred to as "**the Blue House"**) and the Ministry of Health and Welfare ("**the Ministry"**) improperly interfered to ensure that the NPS cast its votes in favour of the merger. EALP alleged that by the actions of the Blue House, the Ministry and the NPS, Korea had breached the minimum standard of treatment and national treatment standards of the Treaty.

7. For its part, Korea contended that the arbitral tribunal lacked jurisdiction under the arbitration provisions in Chapter 11 of the Treaty. Article 11.1(1) of the Treaty provides:

> "SCOPE AND COVERAGE
>
> 1. This Chapter applies to measures adopted or maintained by a Party relating to:
>
> (a) investors of the other Party;

(b) covered investments; and

(c) with respect to Articles 11.8 and 11.10, all investments in the territory of the Party."

(Article 11.1(1)(c) provides protection, in certain circumstances, for investments owned by nationals of non-Contracting States).

8. Article 1.4 of the Treaty, which contains a list of Definitions, defines "measure" as including "any law, regulation, procedure, requirement, or practice."

9. Article 11.1(3) provides:

> "3. For purposes of this Chapter, measures adopted or maintained by a Party means measures adopted or maintained by (a) central, regional, or local governments and authorities; and (b) non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities."

10. So far as relevant for present purposes, Korea advanced the following objections to the tribunal's jurisdiction which it maintains before the court:

i) there was no relevant "measure";

ii) there was no measure "adopted or maintained" by Korea; and

iii) the measure did not "relate to" EALP or its investment.

The Award

11. The tribunal treated these three challenges as matters going to its jurisdiction, but rejected them.

12. As to whether there had been a "measure", the tribunal held as follows:

i) The Article 1.4 definition was not exhaustive.

ii) The term "measure" is used in the Treaty to refer not only to regulatory and administrative action but also State conduct (relying in this context on uses of the word "measure" elsewhere in the Treaty, in particular in Articles 2.13, 13.14 and Annex 11-B) (Award, [351]). The tribunal held that the term "measure" extends to "any 'measures adopted or maintained' by the Respondent, in the broad sense of the term 'measures', including a 'practice' or 'an action or a series of actions' by the Respondent and other forms of 'government action', including acts or omissions" (Award, [352]).

iii) That covered the conduct of the Blue House and the Ministry in seeking to influence the NPS's merger vote (Award, [354]). The tribunal deferred its consideration of whether the NPS's vote was itself a "measure" to that part of the Award which considered whether any measure was adopted or maintained by Korea.

13. As to whether there had been a measure adopted or maintained by Korea, the tribunal held as follows:

    i) In ordinary circumstances, the NPS's conduct in voting the shares would qualify as commercial conduct (Award, [623]).

    ii) However, the NPS had not acted independently and for commercial purposes, but at the direction of the Ministry effectively as an instrument of the Ministry in implementing government policy (ibid).

    iii) As a result the NPS's conduct "in connection with the vote" qualified as an exercise of governmental authority (ibid).

    iv) Since the NPS's vote "qualifies as an exercise of governmental authority under the Treaty, it also necessarily qualifies as a 'measure' within the meaning of the Treaty" ([626]).

    v) The NPS was not a *de jure* organ of the State under Korean law, but it was "functionally and financially closely linked to, and effectively part of, the Korean State" ([444]).

    vi) The financial and functional links of the NPS with the Korean state made it a *de facto* organ of the state whose conduct is attributable to Korea ([445]).

14. On the final issue, the majority of the tribunal (Mr Garibaldi and Dr Heiskanen) found that the measures which they had held to be established did "relate to" EALP or its investment:

    i) They noted the parties' agreement that the words "relating to" required "a legally significant connection" between the measure and EALP and its investment (Award, [356]).

    ii) They found that the term "relating to" must be interpreted in the light of their conclusion as to the broad meaning of the phrase "measure" (Award, [357]).

    iii) The ordinary meaning of the word "relates to" was narrower than phrases such as "affected by". It did not extend to "any adverse impact on an investor or a covered investment", but a measure "'related to' an investor or an investment under the Treaty if it is reasonably foreseeable at the time the measure in question was adopted or maintained that it may adversely affect an investor of the other Party or a covered investment, as the case may be" ([Award, [359]).

    iv) That test was satisfied. The adverse effect of Korea's intervention in the NPS vote was reasonably foreseeable and the Blue House, the Ministry and the NPS knew that EALP opposed the merger.

15. The third arbitrator, Mr Thomas KC, produced a separate opinion (**"SO"**) on the "relating to" challenge. He was not persuaded that the broad meaning accorded to the word "measure" influenced the interpretation of the phrase "relating to" (SO, [28]) or that there was no requirement of privity or immediacy between the state and the investor when the dispute arose (ibid). He held that a closer form of connection was required than "the may adversely affect test" (SO, [54]). However, he found as follows:

i) There was no record of any intention on Korea's part to oppose the merger until after EALP announced it had acquired a 7.12% stake in SC&T and intended to oppose the merger (SO, [57]).

ii) It was the "unexpected emergence" of EALP's opposition to the merger which "galvanized the Administration into providing 'decisive assistance' to the Merger" (SO, [58]).

iii) EALP has "through the proof of the convictions of the former President and Mr Lee been able to demonstrate that the Korean courts found that after the Merger, the then-President's support for the Merger was rewarded by undue benefits" (SO, [70]).

iv) In these circumstances, measures relating to the voting of the NPF's shares by the NPS did "relate to" EALP's investment (SO, [71]).

16. Having satisfied itself that it had jurisdiction, the tribunal concluded as follows on the merits:

i) There had been a breach of the Minimum Standard of Treatment Obligation in Article 11.4 of the Treaty.

ii) The claim for breach of the National Treatment Obligation in Article 11.5 of the Treaty was dismissed because the NPS vote on the merger fell within an exception for measures with respect to the "disposition of equity interests".

iii) It rejected the argument that EALP had to prove that Korea caused the NPS to breach the Treaty (i.e. that the NPS would have voted differently but for Korea's conduct) because the tribunal had found that the conduct of the NPS was attributable to Korea (Award, [814]).

iv) The tribunal awarded damages in the amount of US$48,490,428 after correcting an error in relation to the treatment of tax (Decision on Requests for Correction and Interpretation of the Award, 1 September 2023). That reflected an assessment of the difference in the Fair Market Value of EALP's shareholding in SC&T if there had been no merger, and the value realised for the shareholding in the post-merger environment (Award, [919]).

The VCLT

17. It was common ground before the tribunal and before me that the Treaty is to be interpreted in accordance with the principles set out in the Vienna Convention on the Law of Treaties 1969 ("**VCLT"**).

18. Article 31 of the VCLT, which reflects customary international law, provides:

> "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

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

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties."

19. Article 32 of the VCLT establishes when recourse can be had to "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."

20. The Court of Appeal in *MSC Mediterranean Shipping Co SA v Stolt Tank Containers BV* [2023] EWCA Civ 1007, [2024] 1 All ER (Comm) 364 at [61] summarised the task imposed by Articles 31-32 as being:

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

"Context" for Article 31 purposes can include "any structure or scheme underlying a provision or the treaty as a whole" (Gardiner *Treaty Interpretation* 2nd (2015), [4.2.23]).

21. On the application of Article 32 of the VCLT, I was referred to the decision of the Supreme Court in *JTI Polska sp. Z o.o and others v Jakubowski* [2023] UKSC 19, a decision on the proper interpretation of the Convention on the Contract for the International Carriage of Goods by Road 1956. At [34]-[36], Lord Hamblen stated:

> "34 It is not possible to be categorical about what documents may properly be regarded as comprising preparatory work or travaux préparatoires but they are most likely to be part of the formal record of the Convention rather than expressions of opinion or policy made during the process leading to treaty

> agreement. Examples include official explanatory reports, agreed conference minutes, published proceedings of conferences and earlier drafts of the treaty.
>
> 35. The documents need to demonstrate the common intention or understanding of the parties to the treaty, not those of third parties or of the drafters …
>
> 36. A number of the documents sought to be relied upon by the appellants reflect opinions of expert bodies, such as the 1948 preliminary study of the International Institute for the Unification of Private Law and the Bureau International des Transports par Autocar et Camion and the 1949 Explanatory Note produced by a committee of experts from the International Institute for the Unification of Private Law, the International Road Transport Union and the International Chamber of Commerce. Others set out the results of consultations which were produced to assist the parties to the CMR, such as the 1950 Note by the Secretariat of the Inland Transport Committee of the UN Economic Commission for Europe ("the Inland Transport Committee"), reporting back to the Working Party dealing with Legal Questions on a specialist consultation. Others reflect the intentions of only some of the parties, such as a 1955 communication from the Swiss Government to the Secretariat of the Inland Transport Committee, which includes a short addendum from the French Government. *It is doubtful that documents of this nature can be of any assistance in identifying a common intention or understanding of the parties*."

(emphasis added).

22. It has also been suggested that the jurisdictional provisions in investment treaties are to be interpreted neither liberally (i.e. pro-investor) nor restrictively (i.e. pro-State): e.g. *Swissbourgh v Lesotho* [2018] SGCA 81 at [61]-[63]. By way of an apparent counter to that proposition, Mr Wordsworth KC referred me to *ICS Inspection and Control Services Limited v Argentina* PCA Case No 2010-9 Award on Jurisdiction 10 February 2012 (Dupuy, Bernardez, Lalonde), [280]-[281] where the tribunal noted that:

> "Moreover, a State's consent to arbitration shall not be presumed in the face of ambiguity. Consent to the jurisdiction of a judicial or quasi-judicial body under international law is either proven or not according to the general rules of international law governing the interpretation of treaties. The burden of proof for the issue of consent falls squarely on a given claimant who invokes it against a given respondent. Where a claimant fails to prove consent with sufficient certainty, jurisdiction will be declined.
>
> This principle follows from the lack of a default forum for the presentation of claims under international law. Whereas the inherent jurisdiction or hermetic division of competence over claims before general courts is a common feature of municipal judicial systems, the default position under public international law is the absence of a forum before which to present claims. The absence of a forum before which to present valid substantive claims is thus a normal state of affairs in the international sphere. A finding of no jurisdiction should not therefore be treated as a defect in a treaty scheme that runs counter to its object and purpose in providing for substantive investment protection."

23. However, I am satisfied that the statement in *Swissbourgh* represents the approach I should adopt, being consistent with the VCLT, and even-handed. I note that an argument by a state that a dispute resolution provisions to which it has consented in a treaty should be construed narrowly was rejected in *Methanex Corporation v United States of America*, Partial Award (Preliminary Award on Jurisdiction and Admissibility) 7 August 2002, [105], where the tribunal favoured an interpretation of the words used "in good faith in accordance with their ordinary meaning (in accordance with Article 31(1) of the Vienna Convention), without any one-sided doctrinal advantage built in to their text to disadvantage procedurally an investor seeking arbitral relief." A similar observation was made in *Mondev International Ltd v USA* ICSID Case No ARB(AF)/99/2, Award of 11 October 2002 (Stephen, Crawford, Schwebel), [43].

Do Korea's Challenges go to the Substantive Jurisdiction of the Tribunal?

Introduction

24. Section 67 of the 1996 Act provides a means of challenging any award of an arbitral tribunal seated in England and Wales "as to its substantive jurisdiction", or to seek an order declaring that an award of a tribunal on the merits is of no effect "in whole or in part because the tribunal did not have substantive jurisdiction". Such a challenge has been held to involve a *de novo* hearing rather than simply a review of the arbitral tribunal's decision of the kind which the Court of Appeal might undertake of a first instance judgment.

25. The concept of "substantive jurisdiction" has been held to be defined for the purposes of s.67 by s.30 of the 1996 Act, which, when recognising the power of the tribunal to rule on its substantive jurisdiction, defines that concept as embracing:

    i) "whether there is a valid arbitration agreement";

    ii) "whether a tribunal is properly constituted"; and

    iii) "what matters have been submitted to arbitration in accordance with the arbitration agreement".

    (see *Czech Republic v Diag Human SE and Mr Stava* [2024] EWHC 503 (Comm), [131] – "***Diag*"**).

26. The threshold question which arises is whether the three issues raised by Korea are properly categorised as raising issues as to the tribunal's jurisdiction for s.67 purposes. Unless that decision is resolved in Korea's favour, its s.67 challenge must fail. For that reason I heard this issue as a preliminary issue at the hearing.

27. In *Diag* at [38]-[40], I stated:

> "Jurisdictional objections in investment treaty arbitrations usually fall into three broad categories:
>
> (i) whether the claimant satisfies the nationality requirements for protection under the treaty

> (ii) whether the subject-matter of the claim falls within the scope of the offer to arbitrate contained in the treaty; and
>
> (iii) whether the claim satisfies any temporal limitations of the offer to arbitrate contained in the treaty.
>
> In a context in which legal Latin has not fallen out of fashion, these are usually referred to as the requirements of ratione personae, ratione materiae and ratione temporis.
>
> In addition to objections as to the arbitral tribunal's jurisdiction, issues can arise as to a particular claim's admissibility. The distinction between these two types of objection to an arbitral tribunal's consideration of a claim has been explained variously as a distinction between the legal power of a tribunal to hear a case (a jurisdictional issue) and the appropriateness of the claim for adjudication (an admissibility issue)."

28. It was common ground before the tribunal that these objections, if valid, deprived the tribunal of jurisdiction to adjudicate on the merits of the dispute and order relief. However, it would be wrong to assume that the dividing line between issues of jurisdiction and the merits is drawn at the same point before an investor-state tribunal applying international law as it is before an English court applying an English statute. In particular, the most significant feature of establishing a s.30 issue of substantive jurisdiction – the ability to re-argue on a de novo basis before a municipal court issues relating to the application of an international law treaty, and to set aside or declare of no effect the determination of an international tribunal – raises distinct issues of *national* policy for the English court, which are not engaged in a meaningful way before the tribunal. To take one example, the significance of distinctions between issues of jurisdiction, standing and admissibility before an investment treaty arbitration (**"ITA"**) tribunal are minimal, and ITA tribunals will often refer to them compendiously. Before a court under s.67 of the 1996 Act, they are everything.

29. Having referred to the definition of substantive jurisdiction in s.30(1) of the 1996 Act in *Diag* at [132]-[133], I stated:

> "The ambit of these concepts is (relatively) clear, with section 30(1)(a) and (c) between them raising issues of the existence of the arbitration agreement, whether the dispute falls within the scope of the arbitration agreement and whether the dispute falls within the scope of a particular reference to arbitration (albeit it is possible to find decisions placing the second of those considerations in both section 30(1)(a) and (c)).
>
> In the investment treaty context, with increasing spillover to commercial arbitration, the debate as to what is, and is not, jurisdictional is often conducted by reference to two other concepts—'standing' and 'admissibility'. I am not entirely persuaded of the utility of those concepts in a dispute about the application of section 67, where the court is ultimately faced with a binary decision of whether the challenge brought falls within section 30(1) or not. It is not surprising that, particularly when issues under sections 67 or 101-103 of the 1996 Act arise in the context of investment treaty arbitrations, the court's decision should be informed by investment treaty arbitration jurisprudence which does use that terminology, nor

> that lawyers who specialise in that area of practice deploy that material on applications under the 1996 Act. However, some caution is required when applying that jurisprudence to a domestic arbitration statue. Investment treaty arbitration decisions use the concepts of jurisdiction, standing and admissibility, but not all investment treaty arbitration awards are susceptible to review by a supervisory court on jurisdictional grounds (cf section 3(2) of the Arbitration (International Investment Disputes) Act 1996 and Articles 53 and 54 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 18 March 1965)."

30. While the consequences of a finding that the parties had not agreed to arbitrate a particular dispute are less draconian when the court refuses enforcement on the basis of s. 103(2)(a), (b) or (c) of the 1996 Act, the English courts have recognised an equivalence between the issues raised by s.30(1)(a) and (c), and these grounds for resisting enforcement (see *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [26]). In any event, when attempts are made to enforce ITA awards against a state, the first issue which invariably confronts the court in this jurisdiction is whether the state has sovereign immunity under the State Immunity Act 1978, which in turn depends on whether the award creditor can establish that the state "has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration" for the purposes of s.9(1) of the State Immunity Act 1978. For that reason, decisions of the English court in its role as a court of enforcement are also relevant.

31. The issue of whether Korea's challenge raises issues which are jurisdictional for s.67 purposes requires an analysis of the applicable English case law, and the application of that case law to the issues before the court, having regard to the way in which the three issues raised by Korea arise within Chapter 11 of the Treaty.

Decisions of the English Courts

32. In *Gold Reserve v Bolivarian Republic of Venezuela* [2016] EWHC 153 (Comm), the issue of whether there was an agreement to arbitrate the dispute which was the subject of the award arose when a plea of state immunity was raised in response to an attempt to enforce an award made under a BIT. Teare J noted of the BIT that "only an 'investor' may submit a claim to arbitration" ([15]). "Investor" was defined as someone with the requisite nationality "who makes the investment". The issue in that case, therefore, was whether the claimants were an offeree of the standing offer to arbitrate investment disputes in the BIT, which required them (on the terms of the BIT) to be someone who made the investment.

33. In *PAO Tatneft v Ukraine* [2018] EWHC 1797 (Comm), the issue arose once again when a plea of state immunity was raised as an answer to an attempt to enforce an arbitral award. Butcher J had, in that context, to consider whether a number of issues went to the existence of an agreement to arbitrate the disputes which resulted in the award (which he referred to by the shorthand of "jurisdictional") and he reached the following conclusions:

    i) The issue of whether a particular obligation was owed because of a "Most Favoured Nations" clause was not jurisdictional. Noting the broad words of the arbitration offer, "any dispute between the contracting party and the investor of

the other contracting party which may arise in connection with the investment", he held that the "question of whether Ukraine owed Tatneft a duty of fair and equitable treatment is a 'dispute' 'in connection with' the investments", noting "one type of dispute which it agreed to arbitrate was as to what protections were conferred by the BIT" ([48]-[50]). At [51] he continued:

> "Indeed, the logic of Ukraine's case here would seem to be that any dispute as to the interpretation of the protections afforded by the terms of the BIT is jurisdictional. In any such case it could be said that, as Ukraine had not—on its case—agreed to confer a particular protection, then it had not agreed to arbitrate claims alleging a breach of the obligation to provide that protection. I consider that such a result would be contrary, not only to the terms of article 9, but to the broad intention behind bilateral investment treaties."

ii) The issue of whether the claimants had made an investment at all. In that case, the offer to arbitrate in Article 9 referred to "disputes between one contracting party and an investor of the other contracting party, arising in connection with investments". In those circumstances, it was conceded that the existence of an investment went to jurisdiction ([63]).

iii) Whether the offer to arbitrate was limited to disputes arising after the claimant had made a protected investment. Butcher J held that the offer to arbitrate was subject to a temporal limitation by reference to whether the investment was acquired before the alleged breach, with the result that this was a jurisdictional requirement ([87]).

iv) Finally, the Judge considered the argument that the claim involved an abuse of right because, in effect, the asset had been acquired in anticipation of a dispute and to gain the protection of the BIT for that dispute when it arose. He held that this did not raise an issue of jurisdiction ([99]), testing the argument by asking whether it was possible to read into the offer to arbitrate a limitation that "it did not extend to abusive claims" ([100]). He held that the offer to arbitrate would naturally be understood as extending to a dispute as to whether a claim was abusive, a view reinforced by the fact-intensive and the protean nature of the legal principle in play ([101]).

34. Before continuing with the review of the English authorities, it is convenient at this point to consider the decision of the Singapore Court of Appeal in *Swissbourgh Diamond Mines (Pty) Ltd v Kingdom of Lesotho* [2018] SGCA 81. This was a challenge brought before a supervisory rather than an enforcement court, in which Lesotho sought to set aside the award under Article 34(2)(a)(iii) of the Model Law as given effect by the Singapore International Arbitration Act on the basis that the award dealt with a dispute not contemplated by and not falling with the submission to arbitration:

i) The arbitration agreement was said to arise from Article 28 of Annex 1 of a treaty entered into by member states of the Southern African Development Community which provided that "disputes between an investor and a State Party concerning an obligation of the latter in relation to an admitted investment" could be submitted to international arbitration.

ii) That provision was expressed not to apply to "a dispute which arose before the entry into force of this Annex", which it was common ground created a jurisdictional objection ([35]).

iii) At [93], the Singapore Court of Appeal said that Article 28 created three key jurisdictional requirements: there must be an "investment"; it had to have a territorial nexus with the host state; and the dispute must concern that investment.

Those jurisdictional requirements are a common feature of ITA awards under BITs.

35. In *Korea v Dayyani* [2019] EWHC 3580 (Comm), a challenge was brought to an award under the Iran-Korea BIT pursuant to s.67 of the 1996 Act. The s.67 challenge was brought on the basis that (i) the arbitral claimant had not made an investment into the territory of Korea for the purposes of the BIT; (ii) as a result the claimant was not an investor; (iii) Dayyani did not have standing to bring a claim in respect of the investment because it did not own the assets; and (iv) the acts complained of were not attributable to Korea. Further:

i) The offer to arbitrate in Article 12 of the BIT provided for "any legal dispute arising directly out of an investment between an investor of one Contracting Party and the Other Contracting Party" to be referred to arbitration.

ii) Both parties and the judge proceeded on the basis that the question of whether the claimant had made an investment and was an investor went to jurisdiction, as these terms formed part of the offer to arbitrate ([27]).

iii) The Judge held that the manner in which Dayyani held an interest in the investment was not jurisdictional ([83]-[84]), any issue of whether the investment is owned directly or indirectly by the claimant being at best a matter of admissibility.

iv) The issue of attribution did not raise an issue of jurisdiction, the offer to arbitrate being wide enough to "embrace a dispute about whether particular acts are or are not attributable to the host Contracting Party" ([87]). At [89] he observed:

> "I would regard it as both surprising and highly inconvenient if issues as to attribution were regarded as jurisdictional. Such issues are a commonplace in investment arbitrations, and are often both factually and legally complicated. If they were matters which were automatically jurisdictional it would involve the municipal courts of the seat resolving issues which are integral to the merits of many claims under bilateral investment treaties."

36. Finally, in *Diag*, the dispute resolution clause in the BIT extended to "disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party". In this context:

i) There was no dispute that the issue of whether an investor had made an investment was jurisdictional.

ii) Ultimately, there was no dispute that the issue of whether the claimant held the requisite nationality (and therefore constituted an "investor" for the purpose of the offer to arbitrate) raised a jurisdictional issue (see *Diag*, [153]).

iii) There was an issue whether an investor of qualifying nationality who had made an investment was unable to claim because it had transferred its ownership or control of that investment away before some of the breaches took place. I held that provided an investor of protected nationality had made a protected investment, any requirement of ownership or control at the date of breach was not a limit on the Czech Republic's offer to arbitrate and hence went to the merits rather than jurisdiction.

iv) At [142], I held that s.67 reflected "a requirement that *these parties* must have agreed to arbitrate *this dispute*" and that "challenges which raise those same issues in the investment treaty context will be jurisdictional for section 30(1) purposes, those raising different issues will not." I also noted that "in resolving that question of interpretation, it is helpful to consider the nature of the issue, and issues which are not 'hard-edged', but involve the application of principles which have weight and permit of a range of responses rather than all or nothing effect are less likely to be jurisdictional."

v) At [146], I concluded that there was "nothing in Article 9 which limits the offer to arbitrate to breaches which occur at the date when the investor still owns the investments they made (albeit it is easy to see how this would be relevant to the investor's standing to complain about the breaches and to the question of loss)", stating:

> "It is important to recall that Article 9 refers to '*disputes* with respect to investments'. If the question is asked whether the dispute between Mr Stava and the Czech Republic as to his continuing ownership of the investments from June 2011 onwards (such that he has standing to claim for breaches of the Investment Treaty impacting on those investments) is a dispute 'with respect to investments', the answer, in my view, is clearly yes. The contrary argument requires the court to read into Article 9 a limitation which is not expressly stated, something the applicable principles of interpretation make a challenging task."

37. The principles to be drawn from those authorities are as follows:

i) Issues which define those to whom the offer to arbitrate is made (which will generally be an offer to "investors", which in turn is likely to require someone to have made an investment) will be jurisdictional for s.67 purposes, raising a core jurisdictional issue, namely whether the parties have agreed to arbitrate.

ii) Similarly, where the scope of the offer to arbitrate is limited to disputes of a particular kind – e.g. "with respect to investments" – the making of an investment and a link between the dispute and the investment are also likely to be jurisdictional, raising another core jurisdictional issue, namely what disputes have the parties agreed to arbitrate.

iii) Where there is no express limitation in the offer to arbitrate (including, for that purpose, those which arise from the use within the offer to arbitrate of defined terms), there is likely to be a greater challenge in persuading the court that the offer to arbitrate is limited beyond its express terms. That simply reflects the application of the VCLT principles of interpretation to the arbitration offer in a treaty.

iv) Where an issue involves the application of protean legal concepts in a highly fact sensitive context, it may be more difficult in the absence of express language in the offer to arbitrate to establish that the issue is jurisdictional in nature. However, if that is the effect of the language used in the treaty when interpreted in accordance with VCLT principles, the complexity or sensitivity of the task is neither here nor there.

v) Where determination of the issue said to be jurisdictional would require the supervisory court to determine issues which are integral to the merits, that in itself may suggest that the issue is not jurisdictional in the s.30 sense, as this would involve a municipal court and potentially enforcement courts determining issues which are the natural domain of the arbitral tribunal.

The Interpretation of the Treaty

38. Like a BIT, Chapter 11 of the Treaty contains a combination of substantive provisions and dispute resolution provisions of a kind which, in a municipal law context at least, would be described as procedural.

39. Chapter 11 is divided into three sections:

i) Section A, headed "Investment".

ii) Section B, headed "Investor State Dispute Settlement".

iii) Section C, which contains definitions.

40. Section A is principally concerned with the substantive protections afforded by the Treaty:

i) Section A includes Article 11.1(1), which I have quoted at [7] above, and which identifies what "this Chapter applies to …". While Korea can argue that the offer to arbitrate in Article 11.16 forms part of Chapter 11, the argument that Article 11.1(1) places limits on the scope of the offer to arbitrate is inherently less compelling than the position where reliance is placed on the express terms of the offer to arbitrate for the purposes of establishing a jurisdictional limitation.

ii) Article 11.2 addresses the relationship between Chapter 11 and other Chapters (Article 11.2(1)), and the application (or non-application) of Chapter 11 to particular types of measure (Article 11.2(2) and (3)). Once again, they are concerned with the substantive provisions of Chapter 11.

iii) The remainder of Section A sets out the substantive protections afforded by the Treaty in respect of investments.

41. Mr Wordsworth KC referred to the fact that Article 11.1(1) provides that "*this Chapter* applies to ….", not "this Section", as is seen in other Articles of the Treaty. However, given its appearance in a Section which is otherwise concerned with substantive provisions, I accept Mr Partasides KC's submission that Article 11.1(1) (which is itself substantive in content) can be read as defining the scope of the substantive provisions of Chapter 11. Further:

    i) So interpreted, the concepts of "scope" and "coverage" still make sense, defining the types of investor, investment and state action against which substantive protection is given.

    ii) The Treaty comprises a series of Chapters with distinct subject-matters. Many, but far from all, of the Chapters have a "scope and coverage" clause at or near the beginning of the Chapter. Where there is such a clause, it sometimes appears before the first Section heading (Chapters 2 and 14) and some Chapters have a "scope and coverage" or "scope" clause but are not divided into Sections (Chapters 3, 8, 9, 12, 13 and 17). Chapter 11 is the only Chapter where the "scope and content" clause appears under a particular Section heading, and the only chapter with such an apparently clear divide between substantive provisions (Section A) and procedural provisions (Section B).

    iii) The use of "scope and coverage" clauses within the Treaty suggests that their principal role is to differentiate the subject-matter of the separate Chapters, which would be achieved by a reading of Article 11.1(1) as applying to the substantive investment protections offered. That analysis is supported by a commentary on *US International Investment Agreements* by Kenneth J Vandevelde to which I was referred, published in 2009. At [4.10], Professor Vandervelde noted that the new US Model BIT introduced in 2004 adopted the concept of a "scope and coverage" clause from the North American Free Trade Agreement (**"NAFTA"**), replacing the words "this Chapter" with "this Treaty". He stated:

        > "A general provision on scope … had been introduced in NAFTA, largely the result of the fact that NAFTA contained more than 20 chapters that potentially could impose inconsistent obligations with respect to the same transaction. Thus the investment chapter contained a provision defining its scope in relation to that of the other Chapters."

    iv) The suggestion that the "scope and coverage" section at the start of a Chapter is intended to create a pre-condition of the application of every provision in that Chapter does not sit easily with other provisions: for example it is difficult to interpret Article 8.1 ("this Chapter applies to all sanitary and phytosanitary measures of a Party that may, directly or indirectly, affect trade between the Parties") as a pre-condition to the obligation in Article 8.3 to establish a Committee on Sanitary and Phytosanitary Matters. The same point can be made about the relationship of Article 9.2 with Articles 9.3, 9.6, 9.8 and 9.9; and Article 12.1 and Article 12.5. To expand that last point, Article 12.1 states that Chapter 12 applies to "measures adopted or maintained by a Party affecting cross-border trade in services". Article 12.5 places an obligation on both states not to require a service supplier of the other party to maintain a representative office in its territory. It would not seem a natural reading of Article 12.5 that a

state *could* impose such a requirement unless it could be shown that the decision to do so would affect cross-border trade in services.

v) To provide one last example, Article 14.1 has a scope and coverage provision for "this Chapter" which applies it, *inter alia*, to "measures affecting trade". The question of whether or not a particular measure affects trade is a staple of competition litigation. Article 14.19 requires the Parties to ensure that enterprises can have recourse to telecommunications regulatory bodies and judicial review to resolve disputes regarding a Party's measures in Articles 14.2 to 14.12. I accept that Article 14.19 is different in character to Article 11.16, because it does not involve an offer by a state to submit to the jurisdiction of a private dispute resolution tribunal. However, it seems unlikely that the right to access such bodies is subject to the jurisdictional bar of showing that there has been a measure affecting trade: ordinarily that would be one of the very disputes which the relevant regulatory or judicial body would have to decide.

vi) While these last two points can only bear limited weight, they are an important reminder that a "scope and coverage" provision may not always have the effect of creating threshold bars to the operation of every provision in a Chapter.

42. In contrast to Section A, Section B has an avowedly "procedural" character.

43. Article 11.15 provides that in the event of an "investment dispute" the parties should seek to resolve it through consultation and negotiation. Somewhat surprisingly, the expression "investment dispute" is not defined. However, there are definitions in Section C which help fill out its meaning as I explain below. On the face of things, an "investment dispute" would include a dispute as to whether the matters in Article 11.1(1) are satisfied.

44. Article 11.16 is the crucial article for present purposes. Article 11.6(1) provides:

> "1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation
>
> (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim
>
> (i) that the respondent has breached
>
> (A) an obligation under Section A,
>
> (B) an investment authorization, or
>
> (C) an investment agreement; and
>
> (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and
>
> (b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim

> (i) that the respondent has breached
>
> (A) an obligation under Section A,
>
> (B) an investment authorization, or
>
> (C) an investment agreement; and
>
> (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach,
>
> provided that a claimant may submit pursuant to subparagraph (a)(i)(C) or (b)(i)(C) a claim for breach of an investment agreement only if the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement."

45. There are a number of noticeable features of this Article:

i) The distinction between Section A (dealing with substantive protections) and Section B (dealing with dispute resolution) is reinforced by the language of Article 11.16: there is a reference to "arbitration under this Section" (i.e. Section B) of a claim (*inter alia*) "for breach of an obligation under Section A".

ii) The word "claimant" is defined as "an investor of a Party that is party to an investment dispute with the other Party." That limits the scope of the offer to arbitrate to an "investor". An "Investor of a Party" is defined as:

> "a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality."

iii) An investment is defined as "every asset that an investor owns or controls, directly or indirectly, that meets the characteristics of an investment including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk…".

iv) The effect of the definition of "the claimant" therefore is to limit the offer to arbitrate to claimants who meet a nationality requirement and made an investment (with Article 11.16(1)(b) making it clear that a claim can be brought by so-called indirect claimants who own or control a legal entity incorporated in the host state). The words "investment dispute" require some form of nexus between the dispute and the investment. Article 11.16, therefore, contains matters which, in many BITs, are jurisdictional, and it cannot be said to be lacking in "jurisdictional fibre" such that it is necessary to look elsewhere in the Chapter.

v) In addition, the proviso to Article 11.16(1) contains an express limitation on the ability to submit a claim for breach of an investment agreement.

vi) Subject to the possible argument on Article 11.17 to which I will shortly turn, there is nothing in Section B which suggests that there is a further limit in the scope of the offer to arbitrate (as opposed to the scope of the protection afforded by Chapter 11). On the contrary, the subject-matter limitation in Article 11.16 depends on what the claimant is asserting ("a claim that the respondent has breached …." a relevant obligation in relation to its investment). As Mr Partasides KC submitted, a claim for breach of an obligation under Section A will necessarily involve a claim that the requirements of Article 11.1(1) are satisfied.

46. Further, the right to arbitrate created by Section B is not limited to claims for breach of obligations arising under Section A, extending to claims for breach of an "investment authorization" or "an investment agreement". I regard this as highly significant:

i) An "investment authorization" is defined as "an authorization that the foreign investment authority of a Party grants to a covered investment or an investor of the other Party".

ii) An "investment agreement means a written agreement between a national authority of a Party and a covered investment or an investor of the other Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor: (a) with respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution, or sale; (b) to supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunications; or (c) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines, that are not for the exclusive or predominant use and benefit of the government."

iii) The effect of Mr Wordsworth KC's submission – which he did not shy away from – is that a claim for breach of "investment agreement" (which ordinarily would be understood as extending to the failure to fulfil *any* promise made in that agreement) could only be arbitrated under Article 11.16 if the claimant could also satisfy Article 11.1. However, the ordinary meaning of the words in Article 11.16(1)(a)(i)(C) and (b)(i)(C) is that the Contracting Parties were offering to arbitrate *all* claims for breach of the Investment Agreement. Mr Wordsworth KC's submission would also involve disputes under the same investment agreement being determined in two different fora, however closely related they might be, if one satisfied the requirements of Article 11.1(1) and one did not, albeit I accept considerations of that kind are of very little moment in the present context.

iv) That would also be the case where the foreign investment authority of a state breached an investment authorization – only breaches meeting the Article 11.1(1) requirements could be arbitrated under the Treaty, even though Article 11.16(1)(a)(i)(B) and (b)(i)(B) would suggest that a claimed breach of an investment authorization can be arbitrated.

v) In both of these cases, the question of whether Article 11.1(1) was satisfied would often overlap with the issues of the breach of the investment agreement or the authorisation, making those issues jurisdictional on Korea's construction and permitting re-litigation before a supervisory court by an unsuccessful party. This is a more acute example of the extent to which the issues raised by Article 11.1(1) can overlap with what would ordinarily be understood as "merits" issues, an issue which I discuss further at [50]-[52] below.

vi) Finally, Article 11.22 identifies which law is to be applied in resolving disputes referred to arbitration under Article 11.16. Where a claim is submitted for breach of an obligation in Section A, the tribunal is to decide the dispute in accordance with "this Agreement and applicable rules of international law". By contrast, for claims submitted under Article 11.16(1)(a)(i)(B) or (C), or Article 11.16(1)(b)(i)(B) or (C), the tribunal is to apply the law specified in the agreement or authorization or "as the disputing parties may otherwise agree", with a default choice of "the law of the respondent" and "such rules of international law as may be applicable". However, on Korea's construction, it would also be necessary to apply "this Agreement" and international law, which governs Article 11.1(1), whenever an arbitration is commenced under Article 11.16(1)(a)(i)(B) or (C), or Article 11.16(1)(b)(i)(B) or (C), to determine if the tribunal had jurisdiction.

47. Article 11.17 in Section B addresses "the Consent of Each Party to Arbitration" and provides:

> "1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement.
>
> 2. The consent under paragraph 1 and the submission of a claim to arbitration under this Section shall satisfy the requirements of: (a) Chapter II (Jurisdiction of the Centre) of the ICSID Convention and the ICSID Additional Facility Rules for written consent of the parties to the dispute; and (b) Article II of the New York Convention for an 'agreement in writing.'"

48. Understandably, Mr Wordsworth KC placed some emphasis on the words "in accordance with this Agreement". However, the weight those words can carry is, in my assessment, limited:

i) The expression "this Agreement" is used in the Treaty to refer to the Treaty in its entirety. While I accept that its appearance in Article 11.17 provides some support for the view that the limitation on the Contracting Party's consent to arbitrate is not only to be found in Section B, its very generality lessens the force of that argument.

ii) The words "in accordance with this Agreement" can naturally be read as a reference to consent to arbitrate (only) in accordance with the mechanisms for arbitration provided for in the Treaty, and when the Treaty procedural preconditions for commencing arbitration are satisfied. Article 11.16 is replete with references to "submitting a claim" or similar language: not simply in the arbitration offer in Article 11.16(1), but in the requirement for written notice

"before submitting any claim"; the need for six months to elapse from the events which are the subject of the claim before "the claimant may submit a claim"; and in the identification of the institutions to which a claim may be submitted: ICSID, the ICSID Additional Facility Rules, under the UNCITRAL Arbitration Rules or any other institution "as agreed".

iii) When, therefore, Article 11.17 provides for consent "*to the submission of a claim* to arbitration under this Section **in accordance with this Agreement**", the emboldened words can readily be interpreted as a reference to the procedural restrictions on submitting a claim. While in other contexts, Korea was keen to stress similarities between the Treaty and NAFTA, I would note that the equivalent paragraph in NAFTA, Article 1122, states "each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement."

iv) The absence in Article 11.17 of any reference to any of Article 11.1(1), Section A or even Chapter 11, in a clause defining the limits of state consent to arbitrate, tells to some extent against the suggestion that Article 11.1(1) limits the scope of the Article 11.16 offer to arbitrate and the state's consent to arbitrate.

49. Article 11.18 sets out "conditions and limitations of consent". This includes a time limit (Article 11.18(1)); the need for investor acceptance of arbitration in writing; and a waiver of the other dispute resolution rights (Article 11.18(2)). Once again, however, the fact that Article 11.18 seeks to define the limits to state consent to arbitrate, and does not refer to Article11.1(1), weighs against Korea's submission that Article 11.1(1) creates a limit on the offer to arbitrate.

The nature of the issues which Article 11.1(1) can engage

50. I accept Mr Wordsworth KC's submission that the nature of the issues which the supervisory court might be required to determine if a particular issue is jurisdictional cannot of itself be determinative of the question of whether a particular issue is or is not jurisdictional. However, I am persuaded that if a particular issue is integrated to a significant extent into the merits of a dispute, that weighs to some extent against according it a jurisdictional characterisation.

51. As I have stated, Article 11.1(1) raises three issues: whether there has been a measure; whether it has been adopted or maintained by a Party; and whether it relates to the claimant's investment. In this case:

i) The issue of whether there has been a "measure" involves not simply the interpretation of that term, but potentially the issue of whether there was a series of acts of individuals "in the Blue House", the Ministry and/or the NPS which can be so characterised. In the case of the alleged acts of those "in the Blue House", this is said to turn on the character and content of conversations involving individuals at a high level in the Korean Government. In the case of the NPS, it involves a debate as to whether it was acting independently and in its own commercial interests or under the direction and instruction or as an instrument of the Ministry (including the degree of any influence applied), and whether it manipulated certain outputs as a result.

ii) The issue of whether any measure "related to" EALP's investment involves, at least, what the foreseeable harmful effects of particular conduct were at the time it took place, and possibly the extent to which a measure or measures were targeted at and intended to harm EALP and/or involved corrupt actions.

iii) The issue of whether any measure was adopted or maintained by Korea raises issues of state responsibility for the acts of an entity which was not a de jure state organ which are a standard feature of merits arguments in investor state dispute settlement and in this case involves argument as to whether, in this particular context, the NPS was acting under government control or direction.

52. It will be apparent that these issues engage questions which are closely connected with the merits of EALP's complaints.

Decisions of ITA tribunals

53. Korea relied extensively on decisions reached by ITA tribunals sitting under the arbitration regime established by the NAFTA. I accept that a number of ITA awards in this context have treated the equivalent provision in Article 1101(1) as jurisdictional in nature.

54. In *Methanex Corporation v United States of America*, Partial Award (Preliminary Award on Jurisdiction and Admissibility) 7 August 2002 (Rowley, Christopher, Veeder, with Mr Wordsworth as tribunal legal secretary), the tribunal had to consider challenges of jurisdiction and admissibility. At [106], the tribunal found that its "power to rule on the USA's challenges necessarily derives from Chapter 11" the scheme of which was described as follows:

> "(i) Article 1101(1): This is the gateway leading to the dispute resolution provisions of Chapter 11. Hence the powers of the Tribunal can only come into legal existence if the requirements of Article 1101(1) are met;
>
> (ii) Articles 1116-1117: If Chapter 11 applies, an investor of a NAFTA Party has the right to submit a claim to arbitration in accordance with Articles 1116-1117."

55. At [120], the tribunal stated that "in order to establish the necessary consent to arbitration, it is sufficient to show (i) that Chapter 11 applies in the first place, i.e. that the requirements of Article 1101 are met; and (ii) that a claim has been brought by a claimant investor in accordance with Articles 1116 or 1117 …. Where these requirements are met by claimant, Article 1122 is satisfied *and the NAFTA Party's consent to arbitration is established"* (emphasis added).

56. At [121], the tribunal continued: "in order to establish its jurisdiction, a tribunal must be satisfied that Chapter 11 does indeed apply … This means that it must, interpret, definitively, Article 1101(1) and decide whether, on the facts alleged by the claimant, Chapter 11 applies."

57. I accept that this (highly respected) tribunal adopted an interpretation of NAFTA which analysed the requirements of Article 1101(1) – the equivalent of Article 11.1(1) – as

conditions of the states' consent to arbitrate. However, an important feature of the *Methanex* decision should be noted:

i) The Partial Award was delivered at a stage when the tribunal was unable to determine any issues of disputed fact ([110]).

ii) It was common ground that, at the jurisdictional phase, Methanex was not obliged to prove its factual case, merely make credible allegations, i.e. those which were not incredible, frivolous or vexatious ([112]).

iii) By contrast, any legal issues as to the correct interpretation of NAFTA on which the issue of jurisdiction turned had to be definitively determined ([121]).

iv) It will be immediately apparent that this involves a concept of "jurisdiction" which is meaningfully different from that contained in s.30 of the 1996 Act, in which jurisdictional facts as well as jurisdictional legal arguments must be definitively determined.

58. There was a second jurisdictional award in *Methanex* as part of a rolled-up jurisdiction and merits hearing: Final Award of the Tribunal on Jurisdiction and Merits 3 August 2005 (Rowley, Reisman, Veeder with Mr Wordsworth once again the tribunal legal secretary) after Methanex had amended its claim. The tribunal made a finding on the evidential record on the balance of probabilities that the "relating to" requirement of Article 1101 was not met in relation to the amended case, with the result that the USA succeeded on its jurisdictional challenge, and would have succeeded on the merits (Part IV- Chapter E - Pages 8-9, [18], [22]).

59. The same analysis of Article 1101 was adopted by another distinguished tribunal in *Bayview Irrigation District et al v United Mexican States* ICSID Case No ARB(AF)/05/01, Award of 19 June 2007 (Lowe, Gomez-Palacio, Meese). At [84], the tribunal quoted Article 1101 of NAFTA, before stating at [85]:

> "The role of Article 1101 in determining the scope of the jurisdiction of tribunals established to hear Chapter Eleven claims is clear from the title of the Article. It defines the 'scope and coverage' of the entirety of Chapter Eleven, including both the scope and coverage of the substantive protections accorded to investors and investments by Chapter Eleven Section A and the scope of the rights to submit disputes to arbitration under Chapter Eleven Section B."

60. I was referred to other NAFTA Awards to similar effect, including *The Canadian Cattlemen for Fair Trade v USA* Award on Jurisdiction, 28 January 2008 (Böckstiegel, Bacchus, Low). In that award, the tribunal described Article 11 as "a key article in terms of the entire Chapter's scope and coverage" ([118]), quoting the *Methanex* tribunal. In that arbitration, Article 1101 was relied upon to identify jurisdictional requirements relating to the nationality of investors and the making of investments in the territory of the Party whose measure was in issue. Those are jurisdictional requirements which might well have been derived directly from Articles 1116 and Article 1117 (they certainly can from Article 11.16 of the Treaty). However, that was not the approach which the tribunal adopted.

61. *Grand River Enterprises v USA* Award 12 January 2011 (Nariman, Anaya, Crook) was another case in which the issue was whether the claimant had made an investment in the territory in issue, and in which the tribunal derived this as a jurisdictional contract from Article 1101. At [76]-[77], the tribunal stated:

> "As other NAFTA tribunals have noted, NAFTA's Article 1101 defines the field of application of NAFTA's Chapter 11, and operates as a 'gateway' to NAFTA arbitration.
>
> Thus, a NAFTA tribunal only has jurisdiction regarding (1) 'measures' (2) 'adopted or maintained by a Party.' Further, these measures must (3) 'relate to' either (4) 'investors of another Party' or (5) 'investments of investors of another Party in the territory of the Party'."

62. I was also referred to *Apotex Inc v USA* Award on Jurisdiction and Admissibility, 14 June 2013 (Smith, Davidson, Landau). This was another case in which the jurisdictional issue was whether the claimant was an "investor" and whether it had made an "investment", jurisdictional requirements which the tribunal derived from Article 1101 of NAFTA.

63. I accept that these decisions adopt the same interpretation of Article 1101 of NAFTA which Korea asks me to adopt for Article 11.1(1) of the Treaty. The consistent views of distinguished international arbitral tribunals have given me considerable pause for thought. However, I have not been persuaded that I should adopt the interpretation which commended itself to them:

i) There does not appear to have been any argument before those tribunals that Article 1101 did not condition the state's consent to arbitrate, still less the close textual analysis which has featured in this application.

ii) In some of the awards, there were alternative routes to deriving the intuitively jurisdictional requirements of the nationality of the investor and the making of an investment.

iii) I have been unable to identify any practical difference which would follow from a determination that Article 1101 conditioned the offer to arbitrate (so as to be jurisdictional in the sense of s.30 of the 1996 Act) or operated as a pre-condition to claiming merits protection under Chapter 11 of NAFTA (which would not be jurisdictional in the required sense).

iv) I note that the tribunal in *Resolute Forest Products Inc v Canada* PCA Case No 2016-13, Decision on Jurisdiction and Admissibility (Crawford, Cass, Levesque), [222] observed that "Article 1101's limits are not very clear and it is not a substitute for the specific requirements of the other provisions of Chapter 11", an observation scarcely supportive of Article 1101 providing a jurisdictional bar in the s.30 sense.

v) There is no equivalent within NAFTA of Article 11.16(1)(a)(i)(B) and (C) and (b)(i)(B) and (C). Rather Articles 1116 and 1117 of NAFTA provide for arbitration only in respect of obligations arising under NAFTA: Section A of Chapter 11 or Articles 1503(2) and (3)(a) which cross refer to Chapter 11. Nor

does the counterparty to Article 1122 in NAFTA – Article 1131 – contain any equivalent to those parts of Article 1122 on which I have relied. Those constitute significant differences between the two texts.

64. The same points cannot be made of two awards under the Treaty. The first is *Mason Capital LP v Republic of Korea* Final Award of 11 April 2024 (Sachs, Gloster, Mayer). In that case, both parties appear to have treated the requirements of Article 11.1(1) as raising issues of jurisdiction and admissibility and as going to jurisdiction ([289]):

    i) At, e.g., [373], the tribunal treated Article 11.1(1) as a "jurisdictional filter that puts a limit on the vast amount of consequences which State conduct can have on investors or investments and for which investors can hold the State accountable under the Treaty". The tribunal did not address the issue of whether Article 11.1(1) conditioned the offer to arbitrate (perhaps because nothing turned on its characterisation). However, the description of Article 11.1 as putting a limit on State exposure could be seen as imposing a threshold to relief on the merits, rather than a condition of the consent to arbitrate.

    ii) Like the *Methanex* tribunal in its Partial Award, the tribunal in *Mason* adopted an approach to the factual issues underlying the Article 11.1(1) issue which differed fundamentally from the treatment of jurisdictional issues for the purposes of s.30. The tribunal concluded that issues of causation were "reserved for the merits", it being sufficient "at the jurisdictional stage … to show that the effect of the measure on the investment was not merely tangential or coincidental" ([374]), for which it would ordinarily be appropriate to accept "*pro tem* the facts as alleged" ([376]).

    iii) As the substantive protections accorded by Section A are also conditioned by Article 11.1(1), it would appear that the same issues might fall to be determined by reference to a different factual base as part of the jurisdiction and merits enquiries (in contrast to the approach taken to Article 1101 of NAFTA in the second *Methanex* award). While there may be no difficulties with such a state of affairs to the extent that ITA is treated as a "closed system" of dispute resolution, it once again suggests that caution is required before transposing the classification of an issue as jurisdictional within that system to the s.30 sphere.

65. Finally, there are the Award and the SO. The Award described Korea's Article 11.1(1) objections as "objections to jurisdiction and admissibility" ([309]), The tribunal referred to the issues being relevant to jurisdiction without analysis (e.g. [352], [360], [361]), and there does not appear to have been any argument on the issue. Mr Thomas KC referred to the first *Methanex* award and its reference to Article 1101 of NAFTA as a "gateway", and described the "relating to" issue as a "key jurisdictional issue" and "central to a tribunal's determination of its jurisdiction" (SO, [1], [4]).

66. In the absence of argument on the point, which was without practical consequence, the awards on the Treaty are of limited assistance in the s.67 context.

The NAFTA Awards as supplementary material under Article 32 of the VCLT

67. Encouraged by an enquiry from the court, Korea sought to rely on the NAFTA awards which preceded the conclusion of the Treaty not simply for their explanatory power,

but as "supplementary means of interpretation" including as part of "the circumstances of [the Treaty's] conclusion". Mr Wordsworth KC also relied in this context upon a 2006 commentary - *Investment Disputes under NAFTA: an Annotated Guide to Chapter 11* by Meg Kinnear, Andrea Bjorklund and John Hannaford published by Kluwer Law International in 2006, which discusses Article 1101 of NAFTA as a jurisdictional requirement, but without analysing the issue.

68. There are a number of difficulties with this argument, which probably explain why it only entered the case as a result of an untutored observation from the court:

i) The present enquiry is not about the meaning of a particular word or term, but the interpretation of multiple related provisions in the Treaty,

ii) The only material to which I was taken which had been produced before the Treaty was signed on 30 June 2007 were the *Methanex* and *Bayview* decisions and the commentary which I suspect references the *Methanex* decisions. While I accept the decisions in the *Methanex* arbitration are likely to have been in public circulation by then, it is far from clear that the *Bayview* award was (the award being sent to the parties, who did not include the USA, on 19 June 2007), and it seems improbable that it was available to inform the drafting process. I note that negotiations of the Treaty are reported by the Foreign Trade Information System to have been concluded on 1 April 2007 (when the US Government informed Congress of its intent to sign), with the draft text being released on 24 May 2007.

iii) In oral argument Mr Wordsworth KC referred to *Mondev International Ltd v USA* ICSID Case No ARB(AF)/99/2 (Award of 11 October 2002) (Stephen, Crawford, Schwebel). However, that decision does not reference Article 1101, the jurisdiction argument being conducted by reference to Article 1122 which contained a statement of consent to arbitrate.

iv) The interpretation adopted:

a) by one tribunal;

b) in a dispute involving one state;

c) of a different treaty, to which Korea was not a party and which was materially different in its terms; and

d) where there does not appear to have been argument on this issue;

cannot realistically be said to establish a "meaning generally ascribed to [a] term by the broader international community of States" or represent a "surrounding circumstance" of a kind which can meaningfully inform the interpretation of the Treaty or be said to reveal the Parties' shared understanding of its terms. Nor can a short commentary, even assuming it does more than report the view of the *Methanex* tribunal.

Conclusion

69. I have come to the clear view that the requirements in Article 11.1(1) do not constitute a limitation to the offer to arbitrate in Article 11.16, and, accordingly, that the issues which Korea seeks to raise by reference to Article 11.1(1) are not jurisdictional for the purposes of ss.30(1) and 67 of the 1996 Act:

    i) The matters in Article 11.1(1) do not identify the recipients of the offer to arbitrate. They must, therefore, be said to represent a subject-matter limitation of the offer to arbitrate.

    ii) Article 11.1(1) appears in Section A in which context it is more naturally to be read as dealing with the substantive content of the obligations owed to investors of the other Contracting Party, not issues of dispute resolution which are addressed in Section B.

    iii) There are subject-matter limitations on the offer to arbitrate in Section B which clearly sets out limits on the scope of the offer to arbitrate, both in the definitions used in Article 11.16 and in Article 18. However, Section B does not refer to Article 11.1(1) as such a limitation. On the contrary, beyond the definitions of claimant and respondent, the only limitations on the offer are the need for the claim to constitute an "investment dispute" and to allege breach of certain obligations.

    iv) The treatment of claims of breach of an investment authorization and an investment agreement in Article 11.16 are inconsistent with Article 11.1(1) conditioning the offer to arbitrate.

    v) For those reasons, interpreting the Treaty in accordance with Article 31 of the VCLT, I am satisfied that on the plain meaning of the words used, the requirements of Article 11.1(1) do not condition the scope of the offer to arbitrate in Article 11.16.

    vi) Further, the issues raised by Article 11 can be protean, very fact sensitive and integrated into the merits determination of whether there has been a breach of a Section A obligation and what loss it has caused. The object and purpose of the Treaty is more consistent with the parties contemplating the final determination of issues of this kind by an arbitral tribunal applying international law (under Article 11.20), that being the outcome the Contracting Parties "would be expected to desire and … likely to foster the aims of the treaty, because each host state would be expected to want its investors to benefit from an independent arbitral tribunal deciding questions" of that kind (cf *Tatneft,* [100]).

    vii) The various ITA Awards to which I was referred considered the effect of Article 1101 of NAFTA or Article 11.1(1) of the Treaty in a different context, without argument on the point, and, in the case of the NAFTA awards, when considering different treaty language. They do not persuade me that the clear conclusion I have reached by reference to the terms of the Treaty is wrong.

    viii) Even assuming in Mr Wordsworth KC's favour that Article 32 of the VCLT is engaged, I am not persuaded that the *Methanex* awards are admissible in interpreting the Treaty or of assistance in doing so.

70. Finally, although I have not placed particular weight on this factor, I note that Article 11.20 provides for the participation of the Non-Disputing Party (i.e. the state which is not the host state) in any arbitration for the purposes of making submissions "regarding the interpretation of this Agreement" (Article 11.20(4)) and gives the tribunal discretion to permit an *amicus curiae* to make submissions on some of the matters in dispute (Article 11.20(5)). Article 11.23(3) provides that a "decision of the Joint Committee declaring its interpretation of a provision of this Agreement under Article 22.2.3(d) … shall be binding on a tribunal and any decision or award issued by a tribunal must be consistent with that decision." It is not clear how these provisions would operate in the context of a s.67 challenge. While I accept that similar issues might arise in the context of the interpretation of Article 11.16 itself, they are significantly more likely to arise in relation to Article 11.1(1). Here Korea have raised issues as to the meaning of the expression "measure", the circumstances in which conduct will be attributed to a "Party" and the required legal nexus between a measure and an investor all of which are potentially capable, to some degree, of engaging the particular special features of Article 11.16 arbitration referred to in this paragraph. That provides further support for the view I have reached independently of this consideration that the issues raised by Article 11.1(1) cannot be re-opened by an unsuccessful party (be they investor or state) before the supervisory court.

71. That is sufficient to dismiss Korea's s.67 application. However, as I stated at the hearing, I am satisfied that the contrary argument has a real prospect of success and in any event that this is a point of sufficient importance to the determination of challenges to ITA awards brought before the Commercial Court that there is a compelling reason for an appeal to be heard. Accordingly, I have granted permission to appeal under s.67(4) of the 1996 Act.

Should the Court Make Contingent Findings on Korea's Challenges?

72. In these circumstances, the issue arose as to whether I should nonetheless have proceeded to make findings on the matters raised by Korea, in case my characterisation of the issues for s.67 purposes is determined to be incorrect. That was the approach which EALP urged me to adopt, but Korea argued that the court should not engage on what, on this hypothesis, would be an intervention into the domain of the arbitrators unsupported by the 1996 Act (see s.1(1)(c)).

73. I accept that there would be practical benefits in deciding those issues now – both because, if they were all decided in EALP's favour, there might not need to be further consideration of the s.67 issue (unless aspects of my findings on the other issues were also the subject of an appeal), and because, if it is necessary to return to these issues, there will be delay in finally resolving this s.67 challenge.

74. However, I am satisfied that there are compelling reasons for the English court not to pronounce on the Article 11.1(1) issues raised in this case on a contingent basis. The matters raised by the Article 11.1(1) challenge involve complex and sensitive issues relating to events in Korea, including allegations of misconduct at high levels of the Korean Government. They are not issues of a kind which a municipal court should lightly embark upon determining. I have been told by Korea that determining the issues which arise in relation to Article 11.1(1) would require the court to review sensitive and confidential documents, including internal Korean Government documents, personal

text messages and diaries of public officials and documents which have confidential status within Korean criminal proceedings.

75. I am also concerned as to the use which might be made, if I were to endorse Korea's challenge to the tribunal's Article 11.1(1) findings, or reject them, in any steps taken to enforce the Award. I do not think it would be desirable or appropriate for the English court, when it had found that the matters in issue could not properly be raised before it, to offer what would, on this hypothesis, by a hypothetical view of contentious issues of international law and fact. The dangers of the English court offering "advisory opinions" of this kind are well-known (cf. *Stati v Kazakhstan* [2018] EWCA Civ 1896, [53]-[57]).

76. Similar concerns lay behind the decision of the Court of Appeal to order that the judgment of Mr Justice Evans on the substantive merits of a challenge to an arbitral award should be placed in a sealed envelope pending a decision by the House of Lords as to whether it was possible to challenge the award (*Hiscox v Outhwaite (No 2)* [1991] 1 WLR 545, 548-49). While it would be possible for me to follow a similar course, that could involve an appeal proceeding even though (unknown to the parties) I had decided it might be moot, or, if the contingent determination was released to the parties but no further (i) the unsatisfactory position of a final judgment of the court following a hearing which would in large measure have taken place in public not becoming a public document for a lengthy period, if ever; (ii) a real concern of the contents of the ruling becoming known nonetheless; and (iii) the outcome of the court's assessment being clear if an appeal on the jurisdiction issue were to proceed.

77. EALP's point about delay is well-taken. However, it must be viewed in context. The facts which give rise to this claim date from 2015. The arbitration was commenced six years ago. The hearing took place in November 2021, with the Award being issued on 20 June 2023. Against that background, and in circumstances in which there was no suggestion that the court would hear oral evidence on the s.67 application, I do not believe the risk of contingent further delay of the order which could be anticipated here is sufficient to outweigh the significant disadvantages with the court proceeding to make detailed findings on what, on my assessment, are the merits of EALP's claims. To the extent that the Court of Appeal is able to expedite any appeal, and, if necessary, the-then Judge in Charge of the Commercial Court, is able to expedite any further hearings, that delay will be minimised. While neither of these decisions are ultimately matters for me, I should record my own view that if expedition in both contexts is possible, it would be highly desirable.

78. EALP also pointed to the waste of costs if the parties, having come ready to argue these issues, had to come back and argue them later. I accept that there would be some wasted costs if the Court of Appeal overturns my decision on the ss.30/67 question. However, once again the issue must be viewed in context, and, in particular, the fact that EALP received a costs order in the arbitration of USD 28,903,188.90.

79. For those reasons, as I informed the parties at the hearing, I have decided not to make contingent findings on Korea's challenge, which is dismissed.