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Case No: CL-2022-000307

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 08/03/2024

Before :

MR JUSTICE FOXTON

- -

Between :

THE CZECH REPUBLIC	**Claimant/ Applicant**
-and-	
(1) DIAG HUMAN SE **(2) MR JOSEF STAVA**	**Defendants/ Respondents**

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Lucas Bastin KC, Peter Webster, Mattieu Gregoire and **Katherine Ratcliffe** (instructed by **Arnold & Porter Kaye Scholer (UK) LLP**) for **the Claimant**
Lord Verdirame KC, Philip Riches KC, Sam Goodman and **Jonathan Ketcheson** (instructed by **Mishcon de Reya LLP**) for **the Defendants**

Hearing dates: 30 and 31 January and 1, 5, 6 and 7 February 2024
Further written material: 14, 20, 22 and 26 February 2024
Draft Judgment Circulated: 27 February 2024

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Approved Judgment

This judgment was handed down remotely at 10:00am on 08 March 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

The Honourable Mr Justice Foxton:

1. On 18 May 2022, a tribunal appointed under the Agreement between the Czech and Slovak Federal Republic and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments of 5 October 1990 (**"the Investment Treaty"**) made an award in an arbitration commenced by Diag Human SE and Mr Stava ("**the Claimants"**) against the Czech Republic (**"the Award"**).

2. The Award:

   i) rejected various jurisdictional objections raised by the Czech Republic, save that made in respect of events pre-dating the entry into force of the Investment Treaty on 7 August 1991;

   ii) found that the Czech Republic had breached the "fair and equitable treatment" obligation arising under Article 4(2) of the Investment Treaty in certain respects; and

   iii) ordered the Czech Republic to pay damages of US$350m and interest, and to pay 70% of the costs.

3. On 15 June 2022, the Czech Republic brought challenges to the Award under sections 67 and 68 of the Arbitration Act 1996 (**"the 1996 Act**"). The court made orders for the exchange of statements of case and the service of evidence, and the hearing of the entirety of the Czech Republic's challenge was fixed for a 7-day hearing, beginning with a solitary judicial reading day on 29 January 2024. However, issues arose in December 2023 and January 2024 from the service of further evidence by the Claimants and of an amended statement of case by the Czech Republic which made it impracticable to hold the entirety of the hearing on that date.

4. In those circumstances, on 16 January 2024 I adjourned aspects of the challenge, and ordered that this hearing would address the following issues:

   i) whether the Czech Republic was barred under s.73 of the 1996 Act from advancing certain of its challenges;

   ii) whether certain of the matters raised by the Czech Republic under s.67 of the 1996 Act are properly characterised as jurisdictional;

   iii) the Czech Republic's challenge under s.68 of the 1996 Act; and

   iv) certain procedural issues.

5. A very large number of issues have been put in play by the Czech Republic's various challenges. As is often the case, the merits of the points taken vary considerably. One consequence of the decision to run quite so many points is that the parties' advocacy efforts, and the court's time, have been spread thinly over a large area. Particularly on the Czech Republic's part, the 50-page skeleton limit was met by including lengthy, dense, footnotes, one of which cited 9 authorities (the court being taken to none of them

in argument). However hard-fought the litigation, greater selectivity in the points run would have allowed more time and attention to be devoted to the points which really mattered, which raised a number of interesting points.

A THE BACKGROUND

6. In circumstances in which the jurisdictional challenges are not being considered on their merits at this stage, I have provided what is intended to be a relatively brief and uncontentious summary of what is a lengthy and highly contested dispute.

7. The first Claimant (**"Diag SE"**) is a Liechtenstein company which is the successor to a Czech company, Conneco. Conneco was founded by the second Claimant (**"Mr Stava"**).

8. Conneco was incorporated on 15 March 1990 as a subsidiary of a Swiss company, Diag Human AG (**"Diag AG")** with a view to operating in the blood plasma market in the Czechoslovakia. By the late 1980s, there was an acute shortage of certain blood plasma derivatives in Czechoslovakia, which led the Ministry of Health to begin discussions with potential foreign partners, including Diag AG. A draft framework agreement between Diag AG and the Ministry of Health was prepared, but never signed. In addition, the Ministry of Health ran a tender process, in which Conneco was the only participant to submit full documentation within the required period. Its bid anticipated that it would export blood plasma to a Danish company called Novo Nordisk A/S (**"Novo Nordisk"**) who would process the blood plasma, with the appropriately fractionated plasma being imported back into Czechoslovakia.

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

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

11. The second tender was initiated on 10 May 1991, and Conneco was among the companies invited to participate. Conneco's bid was rejected on 25 June 1991. Conneco sought to challenge that rejection, but the tender culminated in a recommendation to commence a project with Immuno Wien, with Instituto Grifols Barcelona as the second choice. On 12 August 1991, the Ministry of Health informed local hospitals that these two companies were the only foreign companies permitted to operate in the blood

plasma sphere, an instruction repeated on 5 November 1991. Once again, some hospitals continued to engage with Conneco notwithstanding these letters.

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

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

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

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

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

16. Various meetings between Conneco and the Ministry of Health took place in the aftermath of the Bojar Letter, and Dr Bojar sent Mr Stava a letter on 22 June 1993 accepting Conneco's good faith and insisting that he did not want to damage the good name of Diag AG or Novo Nordisk. On 23 November 1993, Conneco changed its name to Diag Human a.s., but I will continue to refer to the company by its original name to avoid any risk of confusion with Diag AG.

17. Attempts to settle the dispute were unavailing, and in March 1996, Conneco commenced proceedings against the Ministry of Health in the Czech courts. However, on 18 September 1996, Conneco and the Ministry of Health entered into an agreement to arbitrate the dispute "in respect of compensation for the loss allegedly caused in connection with [the Bojar Letter]" (**"the Arbitration Agreement"**). The Arbitration Agreement provided:

    i) There was to be arbitration by a panel of three arbitrators, with two party-appointed arbitrators selecting the presiding arbitrator.

    ii) The award of that panel of arbitrations would be "submitted to a review by other arbitrators whom the parties appoint in the same manner if an application for review has been submitted by the other party within 30 days from the date on which the applicant party received the arbitral award".

    iii) If the review application of the other party has not been submitted within the deadline, the award would enter into effect and the parties voluntarily undertake to implement it within the deadline to be determined by the arbitrators.

18. The resultant arbitration was referred to by the parties as **the Commercial Arbitration**.

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

20. On 16 August 2001, Conneco merged with a Slovakian company Kolinea a.s. to form Diag SE. I will continue to refer to this entity in the period up to the commencement of the Investment Treaty arbitration as Conneco, and thereafter as Diag SE.

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

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

23. In 2003 the Czech Republic initiated criminal investigations in relation to the evidence submitted in the Commercial Arbitration and in relation to Mr Stava. A Parliamentary

Enquiry Commission was formed "to clarify the facts" in connection with the Commercial Arbitration. Some of the material emanating from these investigations was deployed by the Ministry of Health in the Commercial Arbitration. On 3 May 2004, Conneco's former lawyer in the Commercial Arbitration – Mr Jiří Oršula – met the Prime Minister of the Czech Republic and handed over a written memorandum disclosing confidential information about Conneco's position in the Commercial Arbitration, events which led to Mr Oršula being disbarred.

24. On 4 August 2008, the Commercial Arbitration tribunal rendered its Final Award (**"the 2008 Award"**) ordering the Ministry of Health to pay CZK 8.3 billion in additional damages (CZK 4,089,716,666 in lost profits for the period 1 July 1992 to 30 May 2000, and CZK4,244,879,686 in interest to 30 June 2007). The Commercial Arbitration tribunal criticised the new Minister of Health for "unjustified" interference in their decisions "through public questioning of their professional expert opinion and an attack on their independence." They noted that "documents, contained in the file indicate quite clearly that its content was of interest to the Czech Republic Police, the Parliamentary Enquiry Commission as well as the District Court for Prague 2" and that "the arbitration tribunal has throughout the proceedings made every effort to ensure the integrity of the arbitration file, so that the file was transferred to a safe place abroad for the time until the release of the final arbitration award, as both sides were informed."

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

26. The review process (**"the 2014 Review"**) culminated in a Resolution dated 23rd July 2014 **("the 2014 Resolution")** declaring that the arbitral proceedings were discontinued. The Claimants allege that the Czech Republic corruptly interfered in the review process. Among the allegations made (and upheld in the Award in the Investment Treaty arbitration) were as follows:

    i) The Ministry of Health's party-appointed arbitrator and the presiding arbitrator whose appointment the Ministry of Health had procured the exclusion of Conneco's appointed arbitrator from key deliberations, leading to the latter's resignation.

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

    iii) Those arbitrators manifestly lacked the independence, impartiality and moral standing to deal with the dispute.

iv) The review tribunal shared advance information on its deliberations with the Czech Republic.

v) The Ministry of Health sought to influence two of the members of the review panel to procure a favourable outcome by a combination of threats and bribes. As the Court of Appeal noted in *Czech Republic v Diag Human SE* [2023] EWCA Civ 1518, [11]:

> "The 'high point' of this case, as the judge described it, is a manuscript note ('the Note') made by Mr Michal Švorc, then the Director of the Legal Department of the Czech Ministry of Finance, which appears to have been made at a meeting in the Prime Minister's office on or about 8th December 2009, in relation to the Review proceedings. The manuscript appears to record that the Czech police and intelligence services held one member of the Review tribunal 'by the balls' and that another member wanted 'subsidies' in order to ensure a decision that nothing more would be payable by the Republic."

vi) The use of a criminal investigation into an opinion provided by a Czech lawyer to Conneco advising that the 2008 Award was enforceable to obtain material to support the Czech Republic's case.

27. Conneco sought to enforce the 2008 Award in Luxembourg, the Netherlands, the United States, Austria, Belgium and England. With the exception of Luxembourg, where it transpired that the Czech Republic had no assets available for enforcement, the courts in those jurisdictions have held that the 2008 award was not enforceable as a result of the ongoing 2014 Review and/or the 2014 Resolution.

28. On 22 December 2017, the Claimants commenced fresh arbitration proceedings against the Czech Republic under the Investment Treaty.

B THE INVESTMENT TREATY

29. Before turning to the course of the Investment Treaty arbitration, I should first outline the key provisions of the Investment Treaty,

30. Article 1 ("Definitions") provides:

> "For the purpose of this Agreement:
>
> (1) The term 'investor' refers with regard to either Contracting Party to
>
> (a) natural persons who are nationals of that Contracting Party in accordance with its laws;
>
> (b) legal entities, including companies, corporations, business associations and other organisations, which are constituted or otherwise duly organised under the law of that Contracting Party and

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

(c) legal entities established under the law of any country which are, directly or indirectly, controlled by nationals of that Contracting Party or by legal entities having their seat, together with real economic activities, in the territory of that Contracting Party.

(2) The term 'investments' shall include every kind of assets and particularly:

(a) movable and immovable property as well as any other rights in rem, such as servitudes, mortgages, liens, pledges;

(b) shares, parts of any other kinds of participation in companies;

(c) claims and rights to any performance having an economic value;

(d) copyrights, industrial property rights (such as patents, utility models, industrial designs or models, trade or service marks, trade names, indications of origin), know-how and goodwill;

(e) concessions under public law, including concessions to search for, extract or exploit natural resources as well as all other rights given by law, by contract or by decision of the authority in accordance with the law."

31. Article 2(1) ("Scope of application") provides:

> "The present Agreement shall apply to investments in the territory of one Contracting Party by investors of the other Contracting Party, if the investments have been made later than 1st January 1950 in accordance with the laws and regulations of the former Contracting Party."

32. Article 3 ("Promotion, admission") provides:

"(1) Each Contracting Party shall in its territory promote investments by investors of the other Contracting Party and admit such investments in accordance with its laws and regulations.

(2) When a Contracting Party shall have admitted an investment on its territory, it shall, in accordance with its laws and regulations, grant the necessary permits in connection with such an investment and with the carrying out of licensing agreements and contracts for technical, commercial or administrative assistance. Each Contracting Party shall, whenever needed, endeavour to issue the necessary authorizations concerning the activities of consultants and other qualified persons of foreign nationality."

33. Article 4 ("Protection, treatment") provides:

> "(1) Each Contracting Party shall protect within its territory investments made in accordance with its laws and regulations by investors of the other Contracting Party and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale and liquidation of such investments. In particular, each Contracting Party shall issue the necessary authorizations mentioned in Article 3, paragraph (2) of this Agreement.
>
> (2) Each Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the investors of the other Contracting Party. This treatment shall not be less favourable than that granted by each Contracting Party to the investments made within its territory by its own investors or than that granted by each Contracting Party to the investments within its territory by investors of the most favoured nation, if this latter treatment is more favourable. Joint ventures in which investors of both Contracting Parties participate shall enjoy the aforementioned treatment as economic entity.
>
> (3) The treatment of the most favoured nation shall not apply to privileges which either Contracting Party accords to investors of a third State by virtue of a double taxation agreement or an agreement establishing a free trade area, a customs union or a common market."

34. Article 6(1) ("Dispossession, compensation") provides:

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

35. Article 9 ("Disputes between a Contracting Party and an investor of the other Contracting Party") provides:

> "(1) For the purpose of solving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party and prejudice to Article 10 of this Agreement (Disputes between Contracting Parties), consultations will take place between the parties concerned.
>
> (2) If these consultations do not result in a solution within six months, the dispute shall upon request of the investor be submitted to an arbitral tribunal. Such arbitral tribunal shall be established as follows:
>
> (a) The arbitral tribunal shall be constituted for each individual case. Unless the parties to the dispute have agreed otherwise, each of them

shall appoint one arbitrator and these two arbitrators shall nominate a chairman who shall be a national of a third State. The arbitrators are to be appointed within two months of the receipt of the request for arbitration and the chairman is to be nominated within further two months.

(b) If the periods specified in paragraph (a) of this Article have not been observed, either party to the dispute may, in the absence of any other arrangements, invite the President of the Court of Arbitration of the International Chamber of Commerce in Paris to make the necessary appointments. If the President is prevented from carrying out the said function or if he is a national of a Contracting Party the provisions in paragraph (5) of Article 10 of this Agreement shall be applied mutates mutandis.

(c) Unless the parties to the dispute have agreed otherwise, the tribunal shall determine its procedure. Its decisions are final and binding. Each Contracting Party shall ensure the recognition and execution of the arbitral award.

(d) Each party to the dispute shall bear the costs of its own member of the tribunal and of the chairman and the remaining cost shall be borne in equal parts by both parties to the dispute. The tribunal may, however, in its award decide on a different proportion of costs to be borne by the parties and this award shall be binding on both parties.

(3) In event of both Contracting Party having become members of the Convention of Washington of March 18, 1965 on the Settlement of Investment Disputes between States and Nationals of other States, disputes under this article may, upon request of the investor, as an alternative to the procedure mentioned in paragraph 2 of this article, be submitted to the International Center for Settlement of Investment Disputes.

(4) The Contracting State which is a party to the dispute shall at no time whatever during a procedure specified in paragraphs (2) and (3) of this Article or during the execution of the respective sentence assert as a defense the fact that the investor has received compensation under an insurance contract covering the whole or part of incurred damage.

(5) Neither Contracting State shall pursue through diplomatic channels a dispute submitted to arbitration, unless the other Contracting State does not abide by or comply with the award rendered by an arbitral tribunal."

36. Article 11 provides:

"Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party."

37. Finally, Article 12(1) provides:

> "This Agreement shall enter into force on the day when both Contracting Parties have notified each other that they have complied with the constitutional requirements for the conclusion and entry into force of international agreements …."

C THE TERMINOLOGY USED

38. 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.

39. 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*.

40. 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) (Jan Paulsson, "Jurisdiction and Admissibility" in Gerald Asken *et al* (eds), *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in Honour of Robert Briner* (2005), ICC Publication 693) or between "the existence of adjudicative power" (jurisdiction), and "the exercise of adjudicative power" (admissibility) (Professor Zachary Douglas, *The International Law of Investment Claims* (2009), [291] and [310]) or between challenges "directed against the tribunal (and … hence jurisdictional)" and those or "directed at the claim (and … hence one of admissibility)" (L Gouiffes and M Ordonez "Jurisdiction and Admissibility: Are We Any Closer to a Line in the Sand?" (2015) 31 Arbitration International 107). This terminology featured prominently in the arbitration and in the parties' submissions before me.

D THE ARBITRAL RECORD

41. Determining both the s.68 and s.73 issues in this case requires an in-depth review of the very lengthy arbitral record.

42. The parties' arbitral filings are lengthy and discursive memorials, and the key "pleadable" assertions were less starkly presented than they would be in statements of case served in this court, where the procedure more clearly demarcates the stages of

pleading, evidence and argument. However, I accept that they represent a style of written case presentation commonly found in investment treaty (and indeed many larger commercial) arbitrations, and which the expert cadres of lawyers and arbitrators who are regularly involved in these types of cases have found conducive to their efficient determination. There is no optimal procedure for the determination of substantial disputes, and there are particular features of international arbitration (its different procedural antecedents, a different balance as between written and oral case presentation and, dare one say it, the pre-reading time available for tribunals) which are reflected in its different procedural approach when compared with the procedure of this court.

43. One consequence of this style of written case presentation is that it has taken the court considerable time in the court challenge to identify material relevant to the issues it has to determine. Where investment treaty arbitrations are seated in England and Wales, parties may wish to consider having at least a fraction of an eye, in preparing their arbitral filings, on the issues which might later arise under ss.67, 68 and 73 of the 1996 Act, ensuring a clear labelling of the points which will be significant in any challenge brought in the supervisory court. I would respectfully float the possibility that this might ease the considerable burden on investment treaty arbitral tribunals faced with vast written filings as well.

44. None the less, it is the substance of the position which matters, rather than any particular drafting style. The substance for the purposes of ss.67, 68 and 73 is the same for investment treaty arbitrations as for commercial arbitrations, and in so far as Mr Bastin KC sought to argue for a different treatment as between the two – a submission I described as one of "investment treaty exceptionalism" – I am unable to accept it. The same considerations of fairness and finality are in play, and in any event the terms of the 1996 Act do not draw any such distinction.

45. I have read the entirety of the filings, with particular emphasis on the (very many) particular paragraphs, parts of paragraphs, headings, footnotes and tables the parties asked me to read. I have set out my summary of the relevant aspects of the arbitral record in the Annex to this judgment. I will cross-refer to relevant parts of the Annex as appropriate. In the remainder of this judgment, I adopt the definitions used in the Annex.

E THE AWARD

46. The issue of jurisdiction was addressed in Section VI of the Award, by reference to five objections. As is frequently the case in international arbitration awards, there was a lengthy summary of the parties' arguments, which did not always attach significance to the point in time at which a particular argument had been raised.

47. Objection No 1 was that the Czech Republic could not be liable for acts or omissions before the Investment Treaty came into force. This objection succeeded.

48. Objection No 2 concerned the liability of the Czech Republic for the acts or omissions of Czechoslovakia. This objection failed. It should be noted:

    i) The tribunal recorded the Claimants' comment that the contention that the Czech Republic was only liable from 24 February 1994 (rather than January 1993) was

"a new argument amounting to a new objection according to which the Czech Republic was not bound by the BIT until 24 February 1994. However, Claimants have not complained that these new arguments/this new objection were/was raised belatedly." The argument was then addressed on its merits.

ii) That makes it clear that the tribunal was alive to the issue of whether objections to jurisdiction had been raised timeously, but took the view that it was for the Claimants to raise the argument that any particular objection had been raised too late to be considered.

49. Objection No 3 was that "the dispute is outside the Tribunal's jurisdiction ratione temporis" because the dispute had crystallised before the Investment Treaty came into effect. This objection succeeded in part.

50. Objection No 4 was that "the Claimants had no qualifying investment in the Czech Republic at the time of the alleged breaches":

i) The objection which the Czech Republic was recorded as having made related to (i) whether any investments still existed in 1994 (cf. Objection No 2); (ii) the non-existence of an alleged monopoly of blood plasma services (which was an inaccurate characterisation of the Claimants' case adopted by the Czech Republic for forensic purposes); (iii) the alleged or purported acquisition of a freezer truck, a refrigeration facility and office space were "only pre-investment activities"; (iv) the shares in Conneco were not related to the disputed measures; and (v) the Arbitration Agreement, the claims being asserted and the 2008 Award were not investments.

ii) At [299], reference was made to the Claimants' assertion that the Respondent had abandoned the arguments: "Claimants observe that Respondent abandoned a series of arguments, namely (i) that Mr Stava needed to have Swiss nationality at the time he made his investments; (ii) that Claimants are not entitled to protection as the cooperation agreements were prohibited by the Ministry of Health; and (iii) that the cooperation agreements were only barter-sale transactions".

iii) At [387], the tribunal noted the conclusion of co-operation agreements, referring to disputes as to the number of such agreements, whether they were long-term and "whether the conclusion of such contracts was lawful" but they specifically noted "Respondent did not allege, as part of its jurisdictional defense, that Conneco's contracts were unlawful" (nor, presumably for that reason, did they address that issue in this jurisdictional section of the Award).

iv) At [388] the tribunal found that the Co-operation Agreements were not short-term; at [389] that there was a business cooperation agreement with Novo Nordisk which was "central to Conneco's operation in the Czech Republic" and was an investment; at [391] that the shares in Conneco were an investment. At [391] the tribunal also found that the investments were related to the disputed measures (specifically referencing the cooperation agreements with the hospitals/transfusion centres and with Novo Nordisk).

v) At [392], the tribunal also found that the Claimants had an investment in the form of know-how and goodwill.

vi) At [393], the tribunal found that the Arbitration Agreement was an investment, albeit no express finding was made as to the position of the claims and the 2008 Award.

51. Objection 5 was that the "Claimants cannot be deemed 'investors' of the other Contracting Party":

i) The Czech Republic's objections were summarised as comprising (i) the fact that Mr Stava was only Swiss from 10 June 1991; (ii) Mr Stava had sold Diag SE in June 2011 ([257], in which context it was noted that "the trust documents that Claimants have produced refer to many classes of beneficiaries, and Mr Stava testified at this hearing that a new trust had been created at some other point in time" (with footnotes to sections of the Rejoinder and the Czech Republic's First PHB principally concerned with the Lawbook transaction)); (iii) there was no contemporaneous evidence of Mr Stava's control of Diag AG or Diag AG's control of Conneco from 1990 to 1992; (iv) the Claimants had "failed to explain and disclose details of the Liechtenstein-seated trust structure underlying Mr Stava's claim of ownership and control" of Diag SE, it being stated:

> "Respondent argues that the evidence put forward by Claimant does not list Mr Stava as one of the beneficiaries of the Koruna Trust, and leaves unclear the identity of the settlor; the role and distribution of powers among the trust organs; and the distribution of rights and interests among the separate beneficiaries."

The reference given for this last statement was the section in the RFB dealing with standing, on which the tribunal made a separate comment below.

ii) It was noted at [310] that "Claimants take exception to Respondent's 'new objection' (to which they do not raise timeliness objections) which is premised on Mr Stava having relinquished control over Diag Human" through the Lawbook transaction (as to which I repeat [48(ii)] above).

iii) At [397]-[398], the tribunal found that Mr Stava was Swiss from 10 June 1991, that Diag SE "was at all relevant times under the direct or indirect control of Mr Stava" and that "consequently, as a result of Mr Stava's direct and indirect control, Diag Human SE likewise meets the definition of 'investor'".

iv) There was a finding that Mr Stava owned 100% of Conneco and/or controlled 100% of its bearer shares from 6 April 2001 onwards ([401]-[403]), there having been no disposal through the Lawbook transaction.

v) At [407], the tribunal addressed as a jurisdictional complaint the status of the Koruna Trust, holding at [407]-[408] "pursuant to Schedule A of the Koruna Trust, the beneficiaries of the trust were Mr Stava, his daughters and his grandchildren, Mr Stava was the settlor and protector of the Trust" and that "By

controlling the Koruna Trust, Mr Stava retained the right to vote Diag Human SE's shares and to collect dividend, even following the Lawbook Transaction, at least until payment of the purchase price."

vi) At [412], they continued, "To conclude the Tribunal finds that the evidence in the record supports the finding that Mr Stava continued to control, directly or indirectly, Diag Human SE after the Lawbook transaction. Therefore Diag Human SE meets the definition of `investor' in Article 1(1) of the BIT".

52. The tribunal also made some observations about the standing complaints in the RFB:

i) At [260], "the Tribunal notes that in the Request for Bifurcation, Respondent also argued that the Claimant had failed to provide sufficient evidence of standing. This objection, which is summarized briefly below, was not reiterated in the Counter-Memorial or in the Rejoinder".

ii) That summary referred to the following assertions:

a) In order to demonstrate standing, Claimants must present clear evidence that they had a stake in the alleged investment both on the date of each alleged breach and on the date of submission of the Request for Arbitration. In addition, they must be able to demonstrate that they have not sold or transferred their claim ([261]);

b) there was no evidence proving Mr Stava's control of Diag AG and Diag AG's control of Conneco from 1990-1992 ([261]);

c) there was no clarification about the role of other Diag companies (Diag Human s.r.o. and Diag Human International Holding Ltd) ([261]);

d) Claimants failed to explain and disclose the details of the trust structure underlying Mr. Stava's claim of ownership and control over Diag Human SE, the evidence put forward by Claimants not listing Mr. Stava as one of the beneficiaries of the Koruna Trust, and leaving unclear the identity of the trust settlor; the role and distribution of powers among the trust organs; and the distribution of rights and interests among the separate beneficiaries ([261]). It will be noted in this regard that the tribunal had referenced these last issues both when discussing the jurisdictional issues which had been pursued, and the standing issues raised in the RFB which had not.

iii) At [414], "As regards Respondent's argument, raised in the Request for Bifurcation *but not reiterated thereafter*, that Claimants lack standing, it is equally dismissed. As discussed above, the record shows that Mr. Stava controlled Diag Human AG, and Respondent has not put forward any evidence that would suggest otherwise. As regards Diag Human s.r.o., the record shows that, in November 2001, Diag Human a.s. sold to Diag Human s.r.o. its distribution business in the field of pharmaceuticals and medical supplies. This transaction has nothing to do with the shareholding in Diag Human a.s., and, consequently, with the question of standing. As regards Respondent's contention that, in 2006, shortly before the

> merger with Kolinea, Diag Human a.s.' shares were held by Diag Human International Holding Limited, this is refuted by the same document Claimants are relying upon. Indeed, the extract from the Commercial Register of Diag Human a.s. mentions Josef Stava as sole shareholder at that time." (emphasis added).

53. Addressing the preclusion arguments relating to the awards in the Commercial Arbitrations, the investment tribunal summarised the Claimants' arguments, including that for the 2014 Resolution to have the effect contended for would "contravene 'basic notions of natural justice and fairness'" ([431], [441]). The tribunal's conclusions were as follows:

    i) There could be no question of claim preclusion arising from the awards in the Commercial Arbitration ([471]).

    ii) International law is yet to reach a point where a commercial arbitration award had issue preclusion effects as a matter of international law, but an investment treaty tribunal might choose to give deference to the findings of a commercial tribunal absent compelling circumstances to the contrary ([486]).

    iii) In the particular circumstances of the case, given the "highly disputed nature of the underlying events" the tribunal was "duty-bound to examine the record before it and to reach its own conclusions on the facts of the case" ([507]).

54. The tribunal found that the following breaches of the Investment Treaty had been established:

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

    ii) The Czech Republic abused its sovereign powers to interfere in the Commercial Arbitration and thereby breached Article 4(2) ([752]).

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

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

55. The tribunal found that the 2008 Award had effectively been cancelled as a matter of Czech law by the 2014 Resolution ([795]). In an important paragraph, at [831] they held:

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

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

Statements to similar effect were made in [849], [885] and [914].

56. Turning to the issue of damages, it is helpful to consider the three breaches found separately.

57. As to the Bojar Letter breach:

    i) The tribunal noted that "the Partial Award and the 2008 Award quantified the damage caused to Diag Human SE as a result of the Bojar Letter" ([1026]).

    ii) The Partial Award had already been paid ([1028]).

    iii) As the 2014 Resolution was "not entitled to recognition within the international legal order", the 2008 Award was "entitled to recognition" ([1028]).

    iv) "Recognition of the 2008 Award as valid within the international legal order will compensate Claimants for the remaining damage suffered as a result of the Bojar Letter" ([1029]).

    v) The tribunal "saw no reason not to defer to" the quantification of the losses caused by the Bojar Letter in the Partial and 2008 Awards ([1037]).

    vi) The tribunal concluded "that the recognition of the 2008 Award as valid within the international legal order means that the parties to the 2008 Award, i.e., Diag Human SE and the Czech Republic, as well as Mr. Stava, as a privy of Diag Human SE, are bound by the findings and decisions in the 2008 Award" such that "the quantification of damages suffered by Diag Human SE as a result of the Bojar Letter, which was carried out in the 2008 Award, is also binding on the Parties."

    vii) The tribunal also deferred to the calculation of interest in the 2008 Award ([1059]).

58. The tribunal found that the interference in the Commercial Arbitration prior to the 2008 Award had not caused loss ([1027]).

59. As to the 2014 Review:

    i) The Czech Republic's interference with the 2014 Review "tainted the entire review proceedings" ([1028]).

    ii) That "due to these violations, the 2014 Resolution is not entitled to recognition within the international legal order. This means that, in the international legal order, the 2008 Award, which compensated Diag Human SE for the part of the damage which had not already been awarded under the Partial Award, is entitled to recognition." ([1028]).

iii) That "the ensuing recognition of the 2008 Award will compensate Claimants for the damage suffered as a result of the Respondent's interference with the review process" ([1030]).

60. On that basis, the tribunal:

i) awarded Head of Damage 1 (the amount of the 2008 Award), excluding costs in enforcement proceedings ([1034]);

ii) dismissed Head of Damage 2 (interest on the Partial Award) which overlapped with Head of Damage 1 ([1035]);

iii) noted that Head of Damage 3 also overlapped with Head of Damage 1 ([1036]), and that the parties were precluded from seeking to revisit the quantification of damage by the Commercial Arbitration tribunal as to the loss caused by sending the Bojar Letter (being the only actionable breach found which was relevant to Head of Damage 3: [1038]), with the result that Head of Damage 3 was dismissed.

61. The claim for Head of Damage 4 was dismissed for lack of supporting evidence of both causation and loss ([1044], [1050]) and the claim for Head of Damage 5 was dismissed because the high threshold for awarding moral damages was not met ([1054]).

62. The *dispositif* stated:

"For the reasons set out above, the Tribunal decides as follows:

(i) Finds that it does not have jurisdiction ratione temporis over events that pre-dated the entry into force of the BIT;

(ii) Finds that Respondent breached Article 4(2) of the BIT;

(iii) Orders Claimants to provide Respondent, within 30 days of the issuance of the present Award, a written undertaking confirming the following: a. The amounts, if any, collected by Claimants under the 2008 Award; and b. Claimants' formal commitment that they will discontinue any and every enforcement proceedings commenced under the New York Convention for the 2008 Award, and that they will henceforth only seek to enforce the present Award;

(iv) Awards Claimants damages and interest as calculated in the 2008 Award, from which any amounts already collected under the 2008 Award shall be deducted: a. CZK 4,089,716,666.00 in damages (lost profits, in addition to those awarded in the Partial Award) for the period from 1 July 1992 to 30 May 2000; b. CZK 4,244,879,686.00 in interest for the period from 1 July 1992 to 30 June 2007; c. Interest of CZK 1,287,877.00 per day, starting on 1 July 2007 until payment, and, from 14 July 2007 until payment, additional interest per day on the amount CZK 58,130,213.00 at the repo rate per annum set by the Czech National Bank (on 1 January and 1 July of each year for the respective half calendar year thereafter) plus 7 percent.

(v) Orders Respondent to reimburse Claimants 70% of their share of the arbitration costs, i.e., EUR 378,442.86;

(vi) Orders Respondent to reimburse Claimants 70% of their legal and other costs, i.e., USD 427,135 .7, GBP 739,205.77, CZK 850,688.3, EUR 165,700.21 and CHF 18,225 .65;

(vii) Dismisses all other claims."

F THE SECTION 73 OBJECTION

F1 Introduction

63. By my count, there are eleven issues raised by the Czech Republic by way of jurisdictional challenge under s.67 of the 1996 Act which the Claimants submit are barred by s.73:

i) The absence of a qualifying investment, on the basis that the following were not qualifying investments:

a) The alleged co-operation agreement with Novo Nordisk.

b) Know-how and goodwill.

c) The Arbitration Agreement.

d) The Co-operation Agreements.

(**"the No Investments Objection"**).

ii) The allegation that any investments made by Mr Stava before he acquired Swiss nationality and were not qualifying investments for that reason (**"the No Swiss Investments Objection"**).

iii) The allegation that assets held by Conneco are not investments of Mr Stava (the **"No Indirect Investments Objection"**).

iv) The allegation that the Co-operation Agreements were "unauthorised and contrary to Czech law and/or regulation" and "not protected by the Treaty" (**"the Illegal Investments Objection"**).

v) The allegation that the Claimants obtained the investments by bribing members of staff of public health institutions, and that investments made in such circumstances are "not protected by the Treaty" (**"the Bribery Objection"**).

vi) The allegation that the award of the amount of the 2008 Award and associated interest award were not "with respect" the investments found to exist (**"the No Nexus Objection"**).

vii) The allegation that Mr Stava did not hold the investments held by the tribunal to exist when the arbitration was commenced because he had transferred his interest to the Koruna Trust (**"the Koruna Trust Objection"**).

viii) The allegation that Mr Stava did not hold the investments held by the tribunal to exist when the arbitration was commenced because he had sold his interest under the Lawbook Transaction (**"the Lawbook Transaction Objection"**).

ix) The allegation that Diag SE was not controlled by Mr Stava, or not controlled by him from June 2011 (**"the No Control Objection"**).

x) The allegation that Mr Stava was not Swiss but Czech for the purposes of the Investment Treaty, with the result that neither he nor Diag SE were qualifying investors (**"the No Swiss Nationality Objection"**).

xi) The findings as to the status of the 2008 Award and the 2014 Resolution fell outside the substantive jurisdiction of the tribunal (**"the No Substantive Jurisdiction Objection"**).

F2 The applicable legal principles

F2(1) The statutory and contractual framework

64. Section 31 of the 1996 Act provides:

> **"31 Objection to substantive jurisdiction of tribunal.**
>
> (1) An objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction. A party is not precluded from raising such an objection by the fact that he has appointed or participated in the appointment of an arbitrator.
>
> (2) Any objection during the course of the arbitral proceedings that the arbitral tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised.
>
> (3) The arbitral tribunal may admit an objection later than the time specified in subsection (1) or (2) if it considers the delay justified."

65. Section 73 of the 1996 Act provides:

> "**Loss of right to object**
>
> (1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection—

(a) that the tribunal lacks substantive jurisdiction,

(b) that the proceedings have been improperly conducted,

(c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or

(d) that there has been any other irregularity affecting the tribunal or the proceedings,

he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.

(2) Where the arbitral tribunal rules that it has substantive jurisdiction and a party to arbitral proceedings who could have questioned that ruling—

(a) by any available arbitral process of appeal or review, or

(b) by challenging the award,

does not do so or does not do so within the time allowed by the arbitration agreement or any provision of this Part, he may not object later to the tribunal's substantive jurisdiction on any ground which was the subject of that ruling."

66. The Terms of Reference of 20 June 2018 signed by all three parties and the tribunal provided that the Investment Treaty arbitration was to be conducted on various of the UNCITRAL Rules 2010 (**"the UNCITRAL Rules"**) which were specifically identified and, in some cases, modified. Article 23 of the UNCITRAL Rules provides:

"(1) The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null shall not entail automatically the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defence or, with respect to a counterclaim or a claim for the purpose of a set-off, in the reply to the counterclaim or to the claim for the purpose of a set-off. A party is not precluded from raising such a plea by the fact that it has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope

> of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified."

67. The following features of these provisions should be noted:

i) The 1996 Act reflects a distinction between jurisdictional complaints arising "at the outset of the proceedings" and those arising "in the course of the arbitral proceedings". That distinction is most clearly delineated in s.31, but it is also apparent in s.73 in the references to "takes part" and "continues to take part." That distinction is not clearly recognised in Article 23 of the UNCITRAL Rules as to lack of jurisdiction, only as to excess of authority.

ii) Taking jurisdictional objections arising "at the outset of the proceedings" first, the 1996 Act provides various dates by which the objection must be taken "not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction" (s.31 and, through the words "any provision of this Part", s.73(1)); "forthwith" (s.73); within the time allowed by the arbitration agreement (s.73); and within the time allowed by the arbitral tribunal (ss.31 and 73, the former stating such an extension of time can be granted if the tribunal "considers the delay justified"). There is an open issue, which it is not necessary to determine here, as to whether the arbitration agreement could shorten the time available for a challenge so that it had to be made before the "first step" (see *A v B* [2017] EWHC 3417 (Comm), [31]-[33]). That potential wrinkle apart, it is clearly sufficient if the party meets one of those time limits – such that, for example, a challenge brought before "the first step" is not out of time simply because it was not brought "forthwith", a challenge brought within the time permitted by the arbitration agreement is not out of time simply because it was not brought before "the first step" etc. Article 23 of the UNCITRAL Rules closely resembles s.31, reflecting their common ancestry (cf. *A v B,* [33]-[34] noting the influence of the similarly worded UNCITRAL Model Law on s.31).

iii) As to jurisdictional objections arising in the course of the arbitral proceedings, these must be raised "as soon as possible after the matter alleged to be beyond its jurisdiction is raised" (s.31). or "forthwith" (s.73), which ordinarily at least will have the same effect (cf. *Exportadora de Sal SA de CV v Corretaje Maritimo Sud-Americano Inc* [2018] EWHC 224 (Comm), [45]).

iv) In all cases, a jurisdictional objection which is not taken on a timely basis can nonetheless be raised if the party raising the challenge "shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection."

68. A number of issues of legal principle arise.

F2(2) What is a ground of objection and when is a ground of objection made?

69. First, what is required to "make … any objection … that the tribunal lacks substantive jurisdiction", and the related question of how far it is permissible before the court to elaborate on or supplement an objection which was taken before the tribunal before it becomes a new objection not previously made. Both parties referred me to the summary of the relevant principles in *National Iranian Oil Co v Crescent Petroleum Co International Ltd* [2022] EWHC 2641 (Comm). After reviewing prior authority, Mr Justice Butcher summarised the applicable principles at [36]:

> "(1) The fundamental principle, or policy, is fairness, and justice, in the sense of openness and fair dealing between the parties…
>
> (2) There is also a concern to seek to avoid waste of time and expense…
>
> (3) The issue as to jurisdiction must normally have been raised at least on some grounds before the arbitrator …
>
> (4) In addition, each ground of challenge to jurisdiction or of objection to jurisdiction must have been raised if it is to be raised; by this is meant the jurisdictional objection that the party considers renders the whole or the relevant part of the arbitral process invalid…
>
> (5) It is wrong to be prescriptive or try to lay down precise limits in the abstract for the meaning of the phrase 'ground of objection', but it is usually easy to recognise (or obvious) in particular cases whether a party is attempting to raise a new ground of objection to jurisdiction on an appeal …
>
> (6) The 'grounds of objection' should not be examined closely as if a pleading, but broadly, or adopting a broad approach. The fact that different and broader arguments are raised or new evidence is put forward does not mean that there is a new ground …
>
> (7) This is not to suggest an unduly relaxed approach, especially bearing in mind sub-para (1) above. The substance of each ground of objection relied upon should have been communicated to the other party (and the arbitral tribunal)."
>
> (8) It would be unfair if a party took part in arbitration yet kept an objection up his sleeve and only attempted to deploy it later ...
>
> (9) It is not enough that the party mention an issue; the issue must be distinctly put to the arbitral tribunal as denying jurisdiction."

70. I gratefully adopt that summary, which I would respectfully supplement with some further observations:

i) First, s.73 is concerned not just with jurisdictional objections, but objections as to the conduct of the arbitration, the procedure followed or other irregularities. Where an objection of the latter kind is taken, it will often be possible for the tribunal to put matters right on the spot, and this is one of the reasons for

requiring objections to be taken promptly (*Rustal Trading Ltd v Gill & Duffus SA* [2000] 1 Lloyd's Rep 14, 20). That suggests that some degree of specificity is required when identifying whether an objection taken in court is the same as one taken before the tribunal, and if reasonable actions which the tribunal could take to address the point taken in the arbitration would not have addressed the issue raised with the court, there is a new objection.

ii) Second, s.32 provides for the court to determine "any question as to the substantive jurisdiction of the tribunal in certain circumstances." If the ground of objection raised at the hearing had been the subject of a s.32 order, but the Court's determination of the s.32 issue as then formulated would not have determined the issue raised on the s.67 application, that would suggest the s.67 challenge involves new ground of jurisdiction.

iii) Third, ss.31 and 73 contemplate the tribunal being able to extend time, the former where the tribunal is satisfied the delay is justified (sc, justified in all the circumstances of the case). It is easy to envisage a tribunal considering matters such as how easy it would be to investigate an issue, prejudice caused to the other party by allowing the point to be taken late etc. That too weighs against too broad an interpretation of the grounds of objection, otherwise a tribunal allowing one formulation to be raised late would open the door to an objection being raised in court which would not have merited an extension of time on its own terms.

iv) Fourth, and for similar reasons, the due diligence requirement in s.73 also tells against too broad a formulation of what constitutes one ground of objection, to avoid a situation (for example) in which a party puts forward an objection which, with due diligence, could have been deployed at the hearing but avoids the consequences of that lack of due diligence because the point falls within the broad *chapeau* of an objection which was taken.

71. Both parties referred me to cases in which it was held that the jurisdictional ground of objection before the court was, and was not, the same as that taken before the arbitral tribunal, in an effort to calibrate the court's approach.

72. In *Primetrade AG v Ythan* Ltd [2005] EWHC 2399 (Comm), the issue was whether the arbitration respondent had become subject to the terms of a bill of lading so as to be liable for the fact that dangerous cargo had been shipped:

i) Section 3(1) of the Carriage of Goods by Sea Act 1992 imposed "liabilities under shipping documents", inter alios, upon (a) "the lawful holder of a bill of lading" who (b) "makes a claim under the contract of carriage against the carrier."

ii) Section 5(2) defined three classes of persons who were lawful holders for this purpose, including "(b) a person with possession of the bill as a result of the completion, by delivery of the bill, of any indorsement of the bill or, in the case of a bearer bill, of any other transfer of the bill" and "(c) a person with possession of the bill as a result of any transaction by virtue of which he would have become a holder falling within paragraph (a) or (b) above had not the transaction been

effected at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates" (which would, in turn, raise an issue as to whether the bill no longer gave the relevant right).

iii) Before the arbitral tribunal, Primetrade contended that they had not become the lawful holder because the bills of lading were held by UBS by way of pledge, the "lawful holder" issue having been argued within the context of s.5(2)(b). Before the court, it argued that the issue should be approached within the context of s.5(2)(c), and that Primetrade was not the lawful holder on that basis, and a further argument was made that the underwriters became the holders of the bills to who any rights of suit and liability had passed. Mr Justice Aikens defined the relevant ground of objection as "not the lawful holder" ground, and held that the new arguments concerned the same ground of objection.

73. In *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Company Ltd* [2013] EWHC 4071 (Comm), the issue of an agent's authority to contract had been argued by reference to English law in the arbitration, resulting in a finding that the agent had ostensible authority. On the s.67 application, it was argued that the issue of actual authority and ratification were governed by Turkish law, and that there was also a failure to meet the formal requirements for an arbitration agreement under Turkish law. At [87], Mr Justice Hamblen held that the "arguments on actual and ostensible authority based on Turkish law falls within the ground of objection based on lack of authority made at the arbitration", but that the argument concerning the formal requirements for an arbitration agreement under Turkish law was a new objection.

74. In *Province of Balochistan v Tethyan Copper Company* [2021] EWHC 1884 (Comm), the issue was whether an allegation that the tribunal lacked jurisdiction because the arbitration agreement had been obtained by corruption had been taken before the arbitral tribunal. There was argument as to whether that ground had been taken before the arbitral tribunal, or the argument that the Supreme Court of Pakistan had held the agreement to be void for corruption, without making "an independent case of corruption leading to the invalidity of the arbitration agreement." At [232]-[234], Mr Justice Robin Knowles held:

> "The Corruption Allegation is defined to mean the allegation by the Province of Balochistan that the ICC tribunal lacked jurisdiction because the CHEJVA and related agreements were void due to the existence of corruption.
>
> In my judgment, the jurisdictional issue (relevant for present purposes) that was raised before the ICC tribunal by the Province was whether the Supreme Court of Pakistan had decided that the arbitration agreement was void, including on the basis of corruption, and if so whether the ICC tribunal should give effect to that decision.
>
> The Corruption Allegation as defined is a wider and different allegation to the jurisdictional issue that was raised."

75. Finally in *National Iranian Oil Co v Crescent Petroleum Co International Ltd* [2022] EWHC 2641 (Comm) one of the heads of loss which NIOC had been held liable to pay

CGC under a contract referred to as the GSPC was the amount for which CGC was liable under its contract with CNGC. NIOC contended that the tribunal did not have jurisdiction to determine the amount of that liability. On its face, that looks a hopeless jurisdictional objection, and so it was found to be. However, there was a preliminary question as to whether the objection was open at all. As to this:

i) The jurisdictional objection in the arbitration focussed on the fact that there was a separate arbitration agreement in the CGC-CNGC contract.

ii) The jurisdictional objection in court focussed on the interpretation of the arbitration agreement in the GSPC, which was said to be narrow in scope under its governing law, to which CNGC was not a party, with CGC's liability to CNGC arising under a separate contract with a different dispute resolution mechanism.

iii) Describing the argument as "close to the borderline" ([38]), Mr Justice Butcher found that the objection in both cases was that the arbitration agreement in the GSPC did not embrace a claim based on CGC's alleged liability to CNGC under a different contract.

F2(3) What of putting to proof?

76. It is usually the case that, on conventional burden of proof analysis, an arbitration claimant will bear the burden of proving matters which are essential to a successful claim but which are also jurisdictional (the existence of the contract said to contain the arbitration agreement, the making of protected investments etc), but the burden of making a jurisdictional objection lies on the arbitral respondent. That distinction also applies to investment treaty arbitrations (*Kim v Republic of Uzbekistan* (Caron, Fortier and Landau) ICSID Case No ARB/13/6, [180]) where there is a broader range of jurisdictional factors than in commercial arbitration and, unlike the existence of a contract, many of them may be exclusively or substantially within the claimants' knowledge (e.g. nationality considerations and what investments were made and when).

77. What is the position of a respondent who puts the claimant to proof of some or all of the jurisdictional requirements? I was not referred to any authority on this issue, but approaching the matter from first principles, I would suggest the following:

i) A bare putting to proof of either jurisdiction in general, or broad categories of jurisdiction ("you are put to proof of *rationae materiae, temporis and personae"*) cannot be sufficient to give free rein for any jurisdictional challenge at the s.67 stage. Nor can "non-admission" be treated as a category of jurisdictional objection in its own right, because at the s.67 stage, it is for the challenging party to establish lack of jurisdiction (cf. *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs* [2010] UKSC 46, [160]; s.66(3) of the 1996 Act and *Sovarex SA v Romero Alvarez SA* [2011] EWHC 1661 (Comm), [43]).

ii) That suggests that a mere "putting to proof" in the arbitration would not, of itself, be a jurisdictional objection sufficient to reserve the point for s.67, as would the

language of ss.31 and s.73 which contemplate a positive assertion ("an objection that the arbitral tribunal lacks substantive jurisdiction"; "making … any objection"). Where a respondent does not know at the start of an arbitration whether or not the requirements for jurisdiction are satisfied, the ability to obtain further time from the tribunal, or the safeguards provided by s.31(2) or the "forthwith" and "due diligence" parts of s.73, will provide protection if the process of obtaining evidence in the arbitration (or elsewhere) puts the respondent in a position to make a positive assertion at some later point. I would note that Mr Justice Beatson held that the reservation of a right to bring a jurisdictional challenge did not amount to making a jurisdictional objection, which is, in many ways, the functional equivalent of a non-admission: *The Republic of Serbia v Imagesat International NV* [2009] EWHC 2853 (Comm), [74].

iii) However, the issue of whether or not a positive assertion is made is a matter of substance, not drafting style. If the substance of what the respondent is saying is "the tribunal does not have jurisdiction on ground X", the fact that it may be formulated by reference to what the claimant has failed to establish will not prevent this being a jurisdictional objection for ss.31 and 73 purposes.

F2(4) Points taken and not pursued

78. What is to happen where a party takes a ground of objection to the arbitral tribunal's jurisdiction at an early stage, but fails to maintain that objection, and does not ask the tribunal to rule on it in in the exercise of its s.30 *kompetenz-kompetenz* jurisdiction? Once again, I was not referred to any authority on this issue. However, leaving points not discoverable by due diligence on one side, I am satisfied that a party can only raise a ground of objection on a s.67 challenge if it has not only taken that point before the arbitral tribunal, but maintained it in the sense that the tribunal ought reasonably have understood that it was a matter engaging s.31(4) of the 1996 Act. Were matters otherwise, a party would be able to "save" jurisdictional objections for the s.67 stage, and the philosophy of the 1996 Act that in general the arbitral tribunal should first engage with issues of jurisdiction would be undermined.

79. On this basis, I am not persuaded that the mere fact that a point has been taken as an intended preliminary objection in the RFB is itself enough to satisfy s.73, if the point is not thereafter taken (either expressly or by incorporation) in the Counter-Memorial. The terms of the RFB make it clear that the Czech Republic was not, at that stage, committing itself to what its jurisdictional objections were, but merely indicating its then understanding of what they would be, to assist the tribunal in determining what the procedural course of the arbitration should be: see A14(i)-(ii) and A16. As Mr Bastin KC realistically recognised, "one sees requests for bifurcation where a number of jurisdictional objections are taken and then some of these may then not be pursued as the arbitration continues. So it is a case where you might say there are six jurisdictional objections taken in a request for bifurcation, but then three are taken forward in the counter-memorial". Further, the Counter-Memorial did not expressly incorporate the position in the RFB: A17.

F2(5) Where the tribunal addresses a late point without expressly extending time?

80. Both ss.31 and 73 of the 1996 Act, and Article 23 of the UNCITRAL Rules, contemplate that the arbitral tribunal may extend the time for making jurisdictional objections. There is a long-standing controversy as to whether this requires an express invocation or application of the power to extend time, or whether it is sufficient for the tribunal to address the late jurisdictional objection on its merits in an award, without stating the objection that the point was taken out of time.

81. I was referred to three cases in which this issue had been considered.

82. In *Gulf Import & Export Co v Bunge SA* [2007] EWHC 2667 (Comm), B appealed to the FOSFA Board of Appeal against a refusal of the first-tier tribunal to exercise its discretion to allow a stale claim to continue. Submissions were exchanged, but on the day of the oral hearing G argued for the first time that the Board of Appeal had no power to permit a claim to continue, that power being confined to the first-tier tribunal. The Board of Appeal disagreed, and extended time for the pursuit of the stale claim. Mr Justice Flaux held that the respondent's renewed complaint was a s.68 challenge. But he also rejected, obiter, B's argument that G could not renew its challenge because it had been raised out of time in the arbitration, observing at [47]:

> "I consider that Mr Males is right in his submission that, in circumstances where the Board of Appeal allowed the objection to the exercise of discretion by it to be fully argued on the merits and decided the point, albeit against Gulf, it would be bizarre if Bunge could successfully argue before the Court that the objection was too late by reference to either section 71 or section 73(1) . In effect, Gulf would be worse off than if Bunge or the Board of Appeal had protested about the point being raised late and the Board had then ruled that the objection could still be argued. It seems to me that the Board has allowed the point to be argued and if it would otherwise have been too late, it is not precluded by section 31 or section 73(1) , either because section 31(3) comes into play or because the objection has been raised 'within such time as is allowed by … the tribunal' within the meaning of the opening words of section 73(1)".

83. The issue next came before Mr Justice Beatson in *The Republic of Serbia v Imagesat International NV* [2009] EWHC 2853 (Comm), a case concerned with an ICC arbitration in which Serbia's objection to the jurisdiction of the arbitral tribunal was not taken in the Answer to the Request for the Arbitration, which was the "first step" for s.31 purposes. The Terms of Reference recorded that neither party was aware of "any ground for challenging the jurisdiction of the tribunal" at that point. The jurisdictional objection was taken for the first time in the Statement of Defence, and ImageSat asked the tribunal to determine if the point was open to Serbia (albeit not by reference to the time when it was taken: [55]). Directions were then given for the issue to be determined as a preliminary issue, as it was. Mr Justice Beatson rejected Imagesat's ss.31/73 objection:

> "109 [A]t the arbitration, although the issue of delay was in issue in general terms, ImageSat did not rely on section 31 as a ground for contending that the jurisdictional objection Serbia had raised in its Defence was too late.

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

84. The final decision is that of Mr Christopher Hancock KC in *Stockman Interhold SA v Arricano Real Estate Plc* [2017] EWHC 2909 (Comm). In that case, an issue arose as to whether a further award made by an LCIA tribunal following remission from the court fell within the scope of that remission, and in particular, whether remission of an award granting specific performance which it had not been possible to execute extended to permitting a claim to be brought for damages in lieu. No objection had been taken when such a claim was first intimated, nor was any application made for an extension of time within which to make the objection. When the point was raised, the argument that it was raised too late was taken, which the arbitrator rejected ([119(3)(a)]). Mr Hancock KC held:

> "150 I do not think that I need to express any concluded view on whether or not the comments of Flaux J set out above are correct, since in my judgment the issue must always depend on the facts of the individual case. On the facts of the current case, I have concluded that there was no implicit extension of time. I have reached this conclusion for the following reasons:
>
> (1) As I have noted, in my judgment the objection to jurisdiction was not made forthwith.

(2) It was thus for Stockman to make an application to the arbitrator for an extension of time. Only the arbitrator had a discretion to extend time, and this would have been a matter of discretion, applying the principles established under s.73 and/or s.31(3).

(3) Because such an application was not made, the arbitrator did not have to consider these principles.

(4) In circumstances in which the arbitrator did not have to address his mind to the question of whether or not to extend time, because no such application was made, I do not think it is safe to assume that he would have done so, particularly since the consequence of so doing would have been that his decisions on jurisdiction would become challengeable in a way that they would not be absent such an extension.

151 Accordingly, I hold that Stockman also waived its right to object to the jurisdiction of the arbitrator…."

85. I have not found it easy to extract any clear principles from these cases on this issue, or indeed the 1996 Act. Approached purely as a matter of principle, there is some force in the argument that if a party who needs an extension of time to advance an argument does not request it, with the result that the arbitral tribunal has not been asked to consider whether to give an extension and has not been required to do so, and the other party has not been called upon to address the question of extension, it is quite something to assume that an arbitral tribunal has granted an extension simply because it has proceeded to address the issue on its merits. I accept there may be cases in which there would be a strong inference that there has been such an extension, for example where the tribunal proceeds to determine the objection in the face of a submission by the other party that it should not do so because the point was taken out of time (ironically, *Stockman* may have been such a case: see [84] above).

86. However, there are strong pragmatic considerations which favour the conclusion that, if the point is raised before the arbitral tribunal, and determined on its merits without reference to the timing of the objection, the court should proceed on the basis that time has been extended by the tribunal, or it has concluded that no extension is necessary because the point had been sufficiently taken at an earlier stage:

i) As noted in *Bunge* and *Republic of Serbia*, if the respondent to such a challenge takes the point that it was made out of time for the first time before the court, it will be too late for the challenging party to seek an extension of time from the arbitral tribunal.

ii) The 1996 Act does not provide for a right to challenge to the determination of the arbitral tribunal on a jurisdictional point on the basis that it was taken out of time unless it can be brought within ss.67 or 68. Section 1(c) of the 1996 Act tells against the suggestion that, without invoking s.68, a respondent to a s.67 challenge in respect of a jurisdictional challenge considered and determined on

its merits can, in effect, submit to the court that the arbitral tribunal should not have entertained the objection. In considering the difficulties which might arise, it is helpful to consider the position where the arbitral tribunal upholds a jurisdictional challenge said to have been taken late. If the other party wishes to challenge that determination not on the basis that it was wrong on its merits, but that the point was taken too late, it must bring itself within s.68.

iii) Where the respondent to the challenge is required to take the timing objection before the tribunal, the tribunal is able to consider not simply whether to grant an extension, but whether one is required (there being scope for dispute as to whether a challenge is a new challenge or a permissible development of one which has already been made). The tribunal will not be able to do so if the timing objection is taken for the first time in court. The policy of the 1996 Act, as reflected in s.30, is better given effect by a rule which requires a party wishing to take the timing point to do so before the arbitral tribunal.

iv) A rule which requires the respondent to take the timing objection, and thereby crystallise the issue for the tribunal, reflects the essentially collaborative nature of the arbitral process, in which parties are expected to take positive steps to support the "proper conduct" of the arbitration (s.40 of the 1996 Act), and to raise any irregularities promptly during the arbitration (s.73(1)(b)-(d)).

Due diligence

87. Finally, turning to the "due diligence" proviso to s.73, the burden is on the party seeking to take the jurisdictional objection to show that the requirements of the proviso are satisfied: *Rustal Trading Ltd v Gill & Duffus SA* [2000] CLC 231, 237-38.

F3 The No Investments Objection

88. While the Counter-Memorial includes some generalised introductory statements about the Claimants not having an investment protected by the Investment Treaty (A18, A20, A22), these were developed through a number of arguments addressing specific investments relied upon. I am not persuaded that a general formulation of that kind would be sufficient to permit a No Investments Objection to be advanced on the s.67 challenge, including objections to investments which had not been addressed in the Counter-Memorial:

i) That would be to permit the Czech Republic to formulate the jurisdictional objection at a very high level of abstraction, cutting across the indicia as to the appropriate level of granularity outlined at [67] above, and would effectively allow the Czech Republic to advance now a jurisdictional objection which the tribunal would not have known it was being asked to decide, and which the Czech Republic did not provide it with any assistance in deciding.

ii) A jurisdictional objection taken in the arbitration is intended to permit the tribunal to identify and deal with the ground, not simply to act as a placeholder for some future hearing. The tribunal would not understand those generalised introductory statements to be freestanding jurisdictional objections in their own

right (which is how the Czech Republic is now seeking to treat them) but would look to the development of the argument for the purposes of identifying what the issue was and what they needed to decide.

iii) The issue of which assets the tribunal has jurisdiction over is a significant issue when it comes to identifying what relief can be ordered in respect of what breaches. A contention that alleged asset A was not a protected investment and an argument that alleged asset B was not a protected investment are not simply alternative routes to the same destination which will have the same consequences, however it may be reached.

iv) In these circumstances, it is necessary to consider the four protected investments found by the tribunal which the Czech Republic now challenges.

89. First, the alleged co-operation agreement with Novo Nordisk (Award, [389]). In this regard, the objection which the Czech Republic now seeks to advance is that the "alleged business co-operation agreement with Novo Nordisk" which the tribunal found "did not exist". As to this:

i) I asked the Claimants to identify where in the arbitral record they had identified a contract with Novo Nordisk not simply as a relevant fact, but as an investment said to have been made in the Czech Republic. An aspirational list of alleged references, including headings, sub-headings, footnotes and witness evidence followed. I am confident that the irony of the stylistic resemblance between this list, and the Czech Republic's much-criticised list of references where they say that jurisdictional objects were taken, was not lost on those who prepared it. I have diligently followed those references up. The existence of a commercial relationship with Novo Nordisk and its importance to the Claimants' business enterprises generally (including in the Czech Republic) were asserted, as was the contention that the Czech Republic's breaches had wiped that relationship out. However, I have been unable to find a particularly clear assertion that any co-operation agreement was itself an investment for jurisdictional purposes. This may well be because the relationship was central to the means by which the Claimants were intending to carry out the Czech business, rather than an investment in Czechoslovakia in its own right, but that is an issue for another day.

ii) Thus, the existence of a co-operation agreement with Novo Nordisk was not clearly identified as an alleged investment by the Claimants in the Czech Republic in the Request for Arbitration (A2(ii)) nor in the Claimants' Memorial, which pleaded the issue of "investment" in unhelpfully general terms (A9(ii)). The high point for the Claimants is that assertion in the quantum section of the Memorial, when explaining why the Claimants had suffered loss internationally, to the fact the relationship was "part and parcel of the Claimants' investment and a cornerstone of its global business model." This and other references to interference with the relationship as a means by which the Claimants suffered loss are *not* the same as identifying a co-operation agreement with Novo Nordisk as an investment establishing jurisdiction under the Investment Treaty. Nor does

the statement in Mr Stava's witness statement that the Novo Nordisk relationship "was a critical component of the Diag Human's investment in the Czech Republic" suffice: the Memorial in Section IIIC had specifically identified the investments relied upon as establishing jurisdiction, and a co-operation agreement with Novo Nordisk was not among them.

iii) The Counter-Memorial made various comments about the fragile nature of any co-operation agreement between Novo Nordisk and the Claimants, and alleged that the co-operation had been terminated by the date the Czech Republic came into existence. It also made the point in the introductory section that "Claimants also predicate much of their claim on the relationship between Conneco and Diag Human AG and the Danish pharmaceutical company Novo Nordisk … There is also no credible evidence that Novo Nordisk ever in fact had any long-term commitment to working with Diag Human AG or Conneco, Claimants have failed to identify or produce any agreement to that effect." There was also a denial that any co-operation was established "in relation to Czechoslovakia". Later, referring to the Memorial's statements about "the importance of the Claimants' relationship with Novo Nordisk for their international business model", the Czech Republic denied that Novo Nordisk had any commitment to work with the Claimants. Mr Bastin KC characterised the first of these submissions as "very much the same thing as saying that contract is an investment for the treaty when the Czech Republic's submission [is it] is not an investment." In my view, that affords a charitable interpretation to both the Claimants' case and the Czech Republic's response. However, if the Czech Republic understood that this case was being advanced, I should be very slow to conclude otherwise. However, if the Claimants had done enough to raise a case that there was a co-operation arrangement with Novo Nordisk which was itself an investment for jurisdictional purposes, I accept that a challenge had been mounted to that case on the basis that there was no binding or sufficiently substantial relationship or which extended to Czechoslovakia (but not otherwise).

iv) The Claimants' Reply did not identify an alleged co-operation arrangement between the Claimants and Novo Nordisk as a covered investment: A42(ii). While it did state that the relationship was "central to [the Claimants' business in the Czech Republic]" in the Statement of Facts section, it did not feature in Section V addressing jurisdiction.

v) The Czech Republic did not deny that there was an investment in the form of a co-operative relationship between the Claimants and Novo Nordisk in its Rejoinder (perhaps because no such contention had clearly been advanced): A52(iv).

vi) The finding in the Award that there had been an investment in the form of co-operation agreement between Novo Nordisk and the Claimants is the first occasion when this agreement is specifically and unequivocally identified as an investment for jurisdictional purposes.

vii) In these circumstances, I am satisfied that either the Czech Republic has taken this objection in the Counter-Memorial (by way of a somewhat exiguous response to a somewhat exiguous assertion) or that it has acted with reasonable diligence in raising this challenge for the first time in its s.67.

90. Second, "know-how and goodwill" (Award, [393]):

i) The Claimants relied on "know-how and goodwill" as an investment in the Request for Arbitration and the Memorial. If it matters, it also drew attention to the fact that the Czech Republic had neglected to address its case that these were investments in its Answer to the RFB.

ii) The Czech Republic never responded specifically to this contention and is unable now to point to any objection that the tribunal lacked jurisdiction because this was not an investment. All that is relied upon is criticism of the Claimants' case being "vague about the details – and timing – of their supposed investment" and that "while they repeatedly assert that '[their] case is that [they] had a plasma business', [Ds] neglect to explain what specifically such business consisted of or entailed or when or how particular 'business' activities were being conducted" (in the Czech Republic's Rejoinder). However, that was followed by a list of eight specific matters addressing the position in January 1993, none of which address the issue of know-how or goodwill.

iii) In these circumstances, the tribunal's finding in relation to know-how and goodwill at Award, [393] cannot be challenged under s.67.

91. Third, the Arbitration Agreement (Award, [393]).

i) The Claimants asserted that the Arbitration Agreement constituted an investment in their RFA (A2(ii)).

ii) While the Memorial referred to the Arbitration Agreement in its factual section (A8(ii)), and in its breach section where it was said to constitute "an asset" (A10(ii)), it did not rely upon it to establish the tribunal's jurisdiction (A9(ii)). It was, no doubt, for this reason that the Claimants (having overlooked the RFA) did not originally allege that a s.73(1) argument arose in relation to this challenge. The Claimants sought permission to raise this contention at this hearing and I am satisfied that I should grant such permission. The Czech Republic could not realistically assert that it was unable fairly to deal with the point at the hearing.

iii) The Czech Republic did not challenge the tribunal's jurisdiction by reference to the Arbitration Agreement in its Counter-Memorial: A24(vii).

iv) The Claimants clearly took the point that the Arbitration Agreement was an investment in their Reply: A42(ii).

v) The Czech Republic clearly challenged that assertion in their Rejoinder: A52(vi).

vi) The Claimants' Rejoinder on Jurisdiction did not suggest that this point was taken too late: A58(vi).

vii) The Czech Republic repeated this challenge in its First PHB: A71(vii). There was no suggestion this had been made too late in the Claimants' Second PHB.

viii) The tribunal noted the parties' argument on this issue (Award, [255], [295]-[296]) and found that the Arbitration Agreement qualified as an investment (Award, [393]). In these circumstances, I am satisfied that this point was taken within the time permitted by the arbitral tribunal. This issue provides a very good example of the appropriateness of the pragmatic rule outlined at [86] above. There is a very real issue as to whether the Claimants had made their own reliance on the Arbitration Agreement as an investment clear before the Reply – to the point where they have only raised the point themselves by way of amendment before the court. If I had not reached the conclusion that the tribunal had allowed the point to be taken in the Rejoinder, I would have held that the need for this jurisdictional objection only became clear when the Claimants' Reply was served, and that the Czech Republic exercised due diligence by taking the point in the Rejoinder.

92. Fourth, the Co-operation Agreements (Award, [390]). Some care is required in identifying precisely what the Czech Republic's contention is here. It is not disputed that three Co-operation Agreements were entered into (the Czech Republic's skeleton paras. 10, 12, 13 and 15). In the Amended Reply, the Czech Republic explains the case it now seeks as follows:

> "The Claimant refers in particular to Counter-Memorial paragraphs 84 and 85 (referring to the "short-term" nature of these agreements and the minimal performance under them), paragraph 219 (referring to the short duration of these contracts and their limited number) and paragraph 220 (stating that these agreements 'fail to assist Claimants in establishing jurisdiction"); to the Claimant's FPHB pp 48 – 50 (where the Claimant described these as "alleged investments' and made various points regarding them, including that they were concluded in violation of the Ministry's instructions, were short-term and were executed with Conneco (Czech) at a time when Mr Stava had not yet acquired Swiss nationality); to the Request for Bifurcation, paragraph 55; and to the Award at paragraphs 387 – 388 (where the Tribunal noted in its discussion of jurisdiction that the parties disagreed on how many contracts had been concluded and whether they could be considered long-term, but held that the Treaty does not set a de minimis threshold for what is protected as an investment

93. In these circumstances, I shall proceed on the basis that the jurisdiction challenge which the Czech Republic now wishes to run on the basis of this objection is as follows:

i) the Co-operation Agreements were too "short-term" and/or too insubstantial in number or content to constitute an investment for the purposes of the Investment Treaty; and

ii) the Co-operation Agreements were "barter-sale transactions" which were transitory in nature and for that reason do not constitute an investment for the purposes of the Investment Treaty.

I shall leave any issue of the legality of these agreements to the Illegal Investments Objection which I address below.

94. As to the objections in [93(i) and (ii)]:

i) The Claimants made it clear that they were relying upon the Co-operation Agreements as an investment in the Request for Arbitration (A2(ii)) and in the Memorial (A9(ii)).

ii) The RFB indicated intended jurisdictional objections based on the fact that "the Co-operation Agreements were merely barter trade contracts", had been prohibited by the Ministry of Health when executed, were terminated in 1992 and were limited in scope (A14(vi)(c)). For the reasons set out at [79] above, I do not regard the assertions in the RFB as the making of a ground of objection in themselves, although they are relevant context to the interpretation of later documents whose purpose was to identify the case the Czech Republic was actually advancing, rather than material which sought to outline intended jurisdictional objections for the purposes of assisting the tribunal in determining the procedural course of the arbitration.

iii) The Counter-Memorial submitted that the Co-operation Agreements "failed to assist Claimants in establishing jurisdiction, as all of them were signed in direct contravention of the Ministry's February 1991 direction …" and they had "all terminated by mutual consent by November 1992": A24(i)-(ii). While it referred to the Co-operation Agreements as "barter contracts" (A19), it did not expressly repeat the jurisdictional objection in the RFB relating to "barter trade contracts".

iv) The Claimants' Reply referred to the arguments in the RFB that the Claimants were not entitled to protection because the Co-operation Agreements were prohibited by the Ministry of Health" or that "the relevant contracts were only barter-sale transactions", asserting that these were no longer being advanced: A42(i).

v) The Czech Republic's Rejoinder pleaded that the Co-operation Agreements were executed "in defiance of the Ministry's earlier instructions" and all of which were terminated by mutual consent before February 1994, which was alleged to be the date when the Czech Republic became bound to the Investment Treaty (A52(iv)(b)).

vi) The Czech Republic's opening presentation asserted that the Co-operation Agreements contravened the Ministry's February 1991 directive and were replaced within a short period: A62(ii).

vii) The Czech Republic's First PHB referred to the Co-operation Agreements as "barter contracts …. signed under questionable circumstances" (A70(i)) and as

"short-term", and said that they had been "entered into in violation of ministry instructions, had ethically questionable aspects and Conneco had agreed to terminate them all by the end of 1992" (A71(iii)).

viii) The tribunal addressed and rejected an objection based on the number and duration of the Co-operation Agreements (Award, [387]-[388]). They did so, on my reading of the Award, not in performance of some independent duty to establish their jurisdiction under the Investment Treaty *motu proprio* (cf. *Metal-Tech Ltd v Republic of Uzbekistan* ICSID Case No RB/10/3, Award of 4 October 2013 (Kaufmann-Kohler, Townsend and von Wobestar) [41]) but on the basis of the position the tribunal understood was being taken by the Czech Republic.

95. Against this background, after some hesitation, I am (just) satisfied that objections on the basis that the Co-operation Agreements were too short-term, transitory or few in number to constitute an investment under the Investment Treaty were taken before the tribunal, and taken in time (alternatively that these objections were taken within the time permitted by the arbitral tribunal if, contrary to my assessment, there was a sufficiently significant distinction between the position taken in the Counter-Memorial and that taken in the Czech Republic's First PHB). While I accept that, particularly in the Counter-Memorial, the arguments concerning the Co-operation Agreement were bound up with the argument (no longer pursued) that the investments had to remain in existence in February 1994, I am not persuaded that they were limited to that argument, nor did the tribunal so treat them. However, that is the limit of the jurisdictional challenge "in play" so far as the Co-operation Agreements are concerned.

F4 The No Swiss Investments Objection

96. This challenge raises an argument as to the construction of the Investment Treaty – if Mr Stava acquired assets before he acquired Swiss nationality, but had acquired Swiss nationality and still owned the assets when alleged breaches of the Investment Treaty took place, are they protected assets for the purposes of the Investment Treaty?

97. This point was identified as an intended jurisdictional objection in the RFB (see A14(iii)(a)). However, it did not feature in the Counter-Memorial. Indeed, the only reference the Czech Republic now gives to the Counter-Memorial in support of the contention that this point was taken ([212] of the Counter-Memorial) is addressing the date of *breach* (the 1990 Selection Procedure) not the date of the investment.

98. The Claimants reply asserted that the Claimant was *not* taking the No Swiss Investments objection (A42(i)).

99. The Czech Republic did not challenge that assertion, nor make the No Swiss Investments Objection in its Rejoinder. The key events which Section III asserted had to take place when the Investment Treaty was in force were (i) breach; and (ii) the holding by Swiss investors of assets affected by the breach (Award, [448]), but there was no suggestion that it was also necessary to show that Mr Stava or Diag SE met the Swiss nationality requirement at the date the assets were first acquired.

100. The Czech Republic contends that this argument was referred to on page 50 of its First PHB, but this is simply an entry for the date when Mr Stava acquired Swiss nationality, with no submission that investments made before then were not protected in respect of breaches occurring after the Investment Treaty came into force.

101. In short, this argument was not maintained by the Czech Republic, nor could the tribunal reasonably have understood that the point was being maintained, which is no doubt why they did not deal with it. Nor am I persuaded that this argument falls within some form of general "No Investment" objection:

    i) As explained at [88] above, I am not persuaded that that is a sufficient objection to cover any challenge premised on the absence of a protected investment, nor is this how the Czech Republic would reasonably have been understood as formulating its case.

    ii) The No Swiss Investments Objection raises distinct issues as to the interpretation of the Investment Treaty (see e.g. the split on this issue in *Pugachev v Russia* Award on Jurisdiction 18 June 2020 (Jaramillo, Clay and Cremades)) as well as factual issues concerning the date when particular assets were required. If the point had been taken, it would have involved drawing a distinction between Co-operation Agreements entered into before and after 10 June 1991, and a fine analysis of those Co-operation Agreements entered into before 10 June 1991 and amended afterwards (see Award, [122], [388] footnote 317).

    iii) In short, this point turns entirely on unique legal and factual issues which did not arise in those jurisdictional objections which the Czech Republic did make, and is a distinct jurisdictional objection.

102. Accordingly, this ground of objection is barred by s.73(1).

F5 The No Indirect Investments Objection

103. This raises the contention that assets held by Conneco are not investments of Mr Stava for the purposes of the Investment Treaty. The Czech Republic admits that "this argument was not put in these terms in the arbitration" but it is said to be "merely a new argument which falls within the scope of the ground of objection – which was made – that Ds did not have a protected investment". In short, therefore, the Czech Republic's argument rests upon its insertion that any "No Investments" objection taken in the arbitration is sufficient to avoid the application of s.73(1) to any "No Investments" objection taken in the s.67 challenge. As to this:

    i) I have already held that, fairly construed, the jurisdictional objection which the tribunal was asked to determine in the arbitration was not some blanket "no investment" objection, but the specific contentions developed under that heading, and that a blanket "no investment" objection without more would not be sufficient given the specific issues and consequences which would arise in relation to different objections falling within some broad "no investment" chapeau ([88] above).

ii) Nor is this objection the same or similar to that advanced in the Counter-Memorial at [267] – as the Czech Republic has asserted. That argued that Mr Stava's shares in Conneco were not a sufficient investment because "the registered company had no assets or rights that relate to the disputed measures" – i.e. the No Nexus Objection considered below. This assumed the very opposite of the No Indirect Investments Objection – that the shares *would* have been a relevant investment of Mr Stava if Conneco had had assets or rights that relate to the disputed measures.

iii) The "No Indirect Investment" raises distinct issues as to the interpretation of the Investment Treaty, and engages a well-trammelled body of international and investment treaty jurisprudence as to the effect of investments through locally registered corporate entities. Both sides of the arbitration and the tribunal would have been fully alive to this as a potential argument, and the tribunal would have been on the "look out" for it. None of that material was deployed or developed before the arbitral tribunal, because this ground of objection was not taken.

104. Accordingly, this ground of objection is barred by s.73(1).

F6 The Illegal Investments Objection

105. This objection contends that the Co-operation Agreements were "unauthorised and contrary to Czech law and/or regulation" and were "not protected by the Treaty", with a similar objection advanced by reference to the Claimants' business model more generally. The Amended Reply makes it clear that the alleged illegality is said to comprise:

i) "the conclusion of the Co-operation Agreements";

ii) "the business model which the Defendants contend their investment would operate (i.e. export of blood plasma acquired from Czech hospitals / clinics with surplus fractionated products being sold outside the Czech Republic."

106. The Czech Republic is able to point to a number of passages where reference was made either to the fact that the Co-operation Agreements were entered into contrary to the Minister's direction to Czech hospitals not to enter into such agreements, or to the limited scope of the permits it had obtained. Taking the material in sequence:

i) The RFB (as to which I repeat the general comment at [79] above) includes the general assertion that the investments were "unsubstantiated, irrelevant or illegitimate" (A14(vi)(e)), and the fact that had been prohibited by the Ministry of Health (14(vi)(c)).

ii) The Counter-Memorial in the chronology section made reference to the fact that Conneco's permits did not extend to blood plasma (A20(iv)) and in a jurisdictional chronology, referred both to the limited permits Conneco had in 1990, and the fact that the Co-operation Agreements were signed in contravention of the Minister's directive (A24(i)). However, there was no attempt to link these facts to a jurisdictional objection, nor to deploy the

extensive investment treaty jurisprudence on the nuanced issue of whether and to what extent non-compliance with particular forms of local regulatory requirements impact on protection under an investment treaty. The highpoint of the Czech Republic's case – the entry in the chronology at A24(i)(c) – is aimed at showing the transient nature of the Co-operation Agreements, and the fact that they had ceased to exist by the time the Czech Republic was alleged to have become a party to the Investment Treaty. I am not persuaded that a reasonable arbitral tribunal would have understood from these passages in the context in which they appeared in a 232-page filing that it was being asked to rule on an illegal investment jurisdictional objection.

iii) The Rejoinder included reference to the Minister's directive to hospitals not to enter into Co-operation Agreements in the lengthy section on "the Claimants' 'Factual' Case" (A48(i)) and a list of the permits the Claimants did and did not have, and what they permitted (A48(ii)). Section III referred to the instructions given in relation to the Co-operation Agreement, and the lack of evidence of permits, but this was all in support of a contention that no investment continued to exist by February 1994: A52(iv). Once again, I am not persuaded that a reasonable arbitral tribunal would have understood from these passages in the context in which they appeared in a 391-page filing that it was being asked to rule on an illegal investment jurisdictional objection.

iv) The Claimants' Rejoinder on Jurisdiction responded to criticism of the decision to enter into the Co-operation Agreements (A58(iii)) and on the issue of permits (A58(iv)). However, that response was made as part of the Claimants' answer to the objection that there was no investment in existence at the relevant date, not to deal with an argument which had not been made that there was no jurisdiction because the investment was illegal.

107. It is worth, at this stage, noting the issues to which an illegal investment objection could have given rise:

i) whether the Minister's letter made the Co-operation Agreements void under Czech law (an issue not raised before the tribunal, albeit the general flavour of the Czech Republic's filings were that agreements did come into existence but were voluntarily terminated);

ii) whether the Claimants were even aware of the letter (their case was that they were not) and, if not, whether this could be an illegal investment;

iii) whether the Claimants intended to operate their business without the requisite permits (or whether or not they were obtained), or to obtain such permits as they required;

iv) whether and to what extent this was said to be illegality in the making of an investment, or in the operation of the investment, there being suggestions in investment treaty jurisprudence that these may have different effects see e.g. *ECE Projektmanagement International GmbH v The Czech Republic* PCA Case no 2010-05, Final Award 19 September 2013 (Berman, Bucher and Thomas),

[3.169]; *Muszynianka v Slovak Republic* UNCITRAL, PCA Case No 2017-08, Award 7 October 2020 (Kaufmann-Kohler, Volterra and Thomas), [301], [314]);

v) the degree of proximity between the illegality and the investment (*Cortec Mining Kenya Limited, Cortec (Pty) Ltd and Stirling Capital Limited v Republic of Kenya* ICSID Case No ARB/15/29, Award, 22 October 2018 (Binnie, Dharmananda and Stern), [366]); and

vi) the severity of the illegality (*Michael Anthony Lee-Chin v Dominican Republic* ICSID Case No UNCT/18/3, Final Award, 6 October 2023 (Arroyo, Leathley and Kohen), [187]; *Kim v Uzbekistan* ICSID Case No ARB/13/6, Decision on Jurisdiction, 8 March 2017 (Caron, Fortier and Landau), [413], [435]; *Alvarez y Marin Corporation SA and others v Republic of Panama* ICSID Case No ARB/15/14, Award, 12 September 2018 (Fernádez-Armesto, Naón and Álvarez), [151]; *Anthony Del Valle Ruiz and others v Kingdom of Spain* PCA Case No 2019-17, Final Award, 13 March 2023 (Kaufmann-Kohler, Park and Mourre), [491]).

108. Those issues were not developed in argument, because the Illegal Investments Objection was not taken. The tribunal, with considerable experience of dealing with issues of illegality in the investment treaty context, were, as one would expect, fully alive to this question, and rightly concluded in footnote 318 that "Respondent did not allege, as part of its jurisdictional defense, that Conneco's contracts were unlawful".

109. As Mr Justice Butcher's summary of the principles makes clear, for a jurisdictional ground to be taken in an arbitration, it must be clear that the point is said to go to jurisdiction ([69] above). That is no idle formality, but reflects the fact that accurate labelling of jurisdictional objections is important to the fair and efficient conduct of the arbitration:

i) Knowing which points are said to be jurisdictional is relevant to the tribunal's management of the arbitration, when determining whether to hold a bifurcated hearing.

ii) It will also be relevant to the parties and the tribunal in knowing whether there is scope for a s.32 order (although I accept that such orders are not made in investment treaty arbitrations).

iii) It is relevant for the parties and the tribunal in knowing whether the specific time periods for making jurisdictional objections apply and/or have been met.

iv) If an issue is flagged as jurisdictional, the other party will itself have a right to challenge an adverse decision under s.67, and that should be clear at the time the point is taken.

110. While the Czech Republic pointed to various regulatory or administrative matters to support a suggestion that the Claimants did not have much of a business and/or that there had been no breach of Article 4(2) of the Investment Treaty, the objection that the tribunal lacked jurisdiction in respect of some or all of the Claimants' claims because

the assets to which they were related were unlawful was not taken in the arbitration. It is barred by s.73(1) now.

F7 The Bribery Objection

111. The Czech Republic seeks to raise a jurisdictional objection on the basis that the Claimants obtained investments by bribing members of staff of public health institutions, and that investments made in such circumstances are "not protected by the Treaty". Its s.73(1) case is as follows:

> "C raised the objection that the Tribunal lacked substantive jurisdiction in the arbitration proceedings. That objection included the ground that there was no protected investment. C deployed a number of arguments in respect of it, though did not argue in support of that ground that the investment was obtained by or tainted by bribery."

112. The contention that a party who challenges the existence (either at a particular time or at all) or the extent of an investment before an arbitral tribunal can run a case that the investment was made or tainted by bribery before the court under s.67 is hopeless. The thrust of the complaint, the legal principles in play and the evidential scope of the enquiry are fundamentally different. While the Czech Republic seeks to make something of the fact that "the key evidence relied upon by C was already in play", it was not "in play" as a jurisdictional objection. The fact that the Czech Republic for the first time advances an allegation of bribery on the basis of material which was in its possession throughout the arbitration hardly enhances its argument. This challenge is barred by s.73(1).

F8 The No Nexus Objection

113. This argument contends that the award of the amount of the 2008 Award and the associated interest award were not "with respect to" the investments found to exist. This issue is closely bound up with the First S.68 Challenge and I address it in this context in Section H below.

F9 The Koruna Trust, Lawbook Transaction and No Control Objections

114. I have considered these objections under the same heading because the paragraphs in the arbitral filings which are relevant to one are usually relevant to the others. However, the s.73(1) argument in relation to each must be assessed on its own merits.

115. The RFB specifically raised as a potential issue the effect of the transfer of shares in Diag SE into the Koruna Trust, but as an issue which was expressly not jurisdictional: A14(v)(d)-(e).

116. In the Counter-Memorial, reference was made in section addressing the facts to the obscurity of Mr Stava's interest in the bearer shares (A20(v)), and in a footnote, in the jurisdiction section, to the obscurity of his ownership interest in Diag SE and the extent of Mr Stava's interest (A22).

117. Documents relating to the Koruna Trust were sought and granted by way of disclosure, on the basis that documents bearing on Mr Stava's ownership interest in the Koruna Trust were relevant to jurisdiction: A36.

118. The Czech Republic's Rejoinder:

i) pleaded a sale of Mr Stava's interest in Diag SE in June 2011 in the factual section, which was said to give rise to a "standing" objection to any claim relating to the 2008 Award: A50(i);

ii) raised the same objection in relation to Diag SE, which was said to prevent it bringing any claim under the Investment Treaty: A50(ii); and

iii) raised a jurisdictional objection based on the Lawbook transaction (A52(i)-(iii)) which "in practical terms means that Mr Stava cannot assert any claim herein in respect of events that occurred *after June 2011*" and "*for the period after June 2011*, there is no basis on which the Tribunal could deem Diag Human SE to be a Swiss 'investor'" (emphasis added).

119. The Czech Republic's First PHB, under the heading "Jurisdictional Context", referred to Mr Stava divesting himself of his stake in Diag SE in June 2011 and submitted "as a result of Mr Stava's divestment, both Claimants lost any status as qualifying investors with investments in the Czech Republic: A71(xii).

120. I am satisfied that the arbitral tribunal admitted the Lawbook Transaction as a jurisdictional complaint, such that it was brought within the time permitted by the arbitral tribunal. The tribunal specifically noted that the Claimants took "exception to Respondent's new objection", but did not raise a timeliness objection to it (Award, [310]) and the tribunal dealt with the Lawbook Transaction Objection on its merits. There has been no s.68 challenge by the Claimants to the tribunal's conclusion that they did not advance a timeliness objection to this challenge.

121. That leaves an issue as to the scope of the objection taken, and whether it was limited to breaches after June 2011, or whether it extended to all claims. The Czech Republic position on this issue was unclear and inconsistent: see A50(i) and (ii), A52(i)-(iii) and A71(xii). However:

i) In relation to Mr Stava, I am satisfied that the objection is limited to breaches post-dating June 2011 (which is also how the tribunal understood the objection: Award, [258]).

ii) In relation to Diag SE, the position is much more difficult, but I have ultimately come to the conclusion that the objection is not so limited (in particular given the terms in which the tribunal summarised it at Award, [259] and dealt with it in the Award, [412]). Without needing to determine whether this could never be the case, it must be a very rare case in which the tribunal addresses *as a jurisdictional objection* a point correctly classified *as a jurisdictional objection* (which is the assumption that I am required to make at this point), and yet the

court refuses to permit that same point to be run as a s.67 challenge on the basis that the same objection was not made in the arbitration.

122. The issue of whether the Koruna Trust and No Control Objections were made in respect of the period from June 2011 onwards is finely balanced. I have ultimately concluded that these objections were sufficiently taken, and that they are not barred by s.73(1):

i) The Czech Republic had questioned Mr Stava's interest in the Koruna Trust in the jurisdictional section of the Counter-Memorial and maintained that as a potential jurisdictional issue in the disclosure phase.

ii) The movement of the bearer shares into the Koruna Trust and the documenting of what was presented as the Lawbook transaction were undertaken at the same time, as part of what was presented as one process (Award, [257], [404]-[405]).

iii) Both fall within the scope of the objection that Mr Stava had lost control of the bearer shares in June 2011, which was taken.

iv) I have set out the tribunal's treatment of the issue at [51]-[52]] above. I attach particular significance to the fact that the tribunal do consider and address the Koruna Trust and associated No Control Objections as jurisdictional objections which they address on the merits. Accordingly, the Koruna Trust and No Control Objections are not barred by s.73(1).

v) However, the scope of those objections was not advanced on any wider basis than the Lawbook transaction – they relate to Mr Stava so far as claims from June 2011 are concerned, and as to Diag SE's status as an investor: see [123].

123. In Section G:

i) I will refer to the objection relating to Mr Stava's inability to claim in respect of conduct after June 2011 as **the Stava June 2011 Objection**.

ii) I will refer to the objection relating to Diag SE's ability to claim if it was not Swiss after June 2011 as **the Diag SE June 2011 Objection.**

F10 The No Swiss Nationality Objection

124. This objection seeks to contend that Mr Stava was not Swiss but Czech for the purposes of the Investment Treaty, with the result that neither he nor Diag SE were qualifying investors. The Czech Republic's Amended Skeleton Particulars of Claim are not as clear as they might be on this issue, and I should therefore make clear the basis on which I have determined I should approach paragraphs 5 to 7 of that document:

i) To the extent that the argument is that the moving of the shares in Diag SE into the Koruna Trust and/or the Lawbook Transaction in June 2011 had the effect that Diag SE was not a protected investor from June 2011 onwards, that falls within the three objections I have just addressed. That leaves two arguments.

ii) First, that Mr Stava did not meet the Swiss nationality requirement even after he acquired Swiss nationality on 10 June 1991, with the result that neither he nor Diag SE met the Swiss nationality requirement of the Investment Treaty at any point.

iii) Second, that the Claimants have not shown that Mr Stava controlled Diag SE even before June 2011.

iv) Finally, I should note (for the avoidance of doubt) that I am not at this stage considering a further issue which the Czech Republic seek permission to raise, namely whether Mr Stava has at some point lost Swiss nationality for the purposes of the Investment Treaty (if he otherwise had it) by reason of his having homes in and holding the nationality of other countries and his connection to those countries.

125. As to the first, the Czech Republic "accepts that it did not advance in the Arbitration the argument that Mr Stava was not a protected investor because his dominant and effective nationality was Czech." In the face of that admission, the contention that the Czech Republic is not making a new jurisdictional objection is utterly hopeless. All that the Czech Republic's skeleton refers to in this context are:

i) Paragraph 201 of the Counter-Memorial, which does not address the nationality of the Claimants at all, but the need for them to be the investors.

ii) Paragraphs 448-449 of the Rejoinder, which make the same point.

iii) Paragraphs addressing the position from June 2011, which do not relate to Mr Stava's nationality, but to the alleged sale or disposal of the investment with which I have dealt separately above. That is also the issue addressed in Section E of the Claimants' Rejoinder on Jurisdiction.

126. As to the second, putting Mr Stava to proof of his control of Diag SE before June 2011 is not a jurisdictional objection (and therefore not an objection made in the arbitration), nor an argument that can be advanced under s.67. The Czech Republic made no real attempt to develop this argument either orally or in writing, and I therefore say nothing more about it.

127. For these reasons, the Czech Republic's jurisdictional objection at (ii) and (iii) above are barred by s.73(1).

F11 The No Substantive Jurisdiction Objection

128. The argument that the tribunal's findings about the status of the 2008 Award and the 2014 Resolution fell outside the substantive jurisdiction of the tribunal is addressed in Section H below.

G JURISDICTION AND ADMISSIBILITY

G1 Introduction

129. The Claimants contend that a number of the points which the Czech Republic seeks to advance under s.67 of the 1996 Act are not, on proper analysis, jurisdictional objections at all, but at best points going to the admissibility of claims before the tribunal:

i) The Indirect Investments Objection.

ii) The Illegal Investments Objection.

iii) The Bribery Objection.

iv) The No Nexus Objection.

v) The Stava June 2011 Objection.

vi) The Diag SE June 2011 Objection.

vii) Whether a dispute arose prior to the entry into force of the Investment Treaty ("**the Dispute Timing Objection"**).

130. Given my conclusions that the Indirect Investments, Illegal Investments and Bribery Objections are not now open to the Czech Republic, I do not propose to address those objections under this heading. I intend to address the No Nexus Objection in Section H below.

G2 The applicable principles

G2(1) Jurisdiction, admissibility and standing

131. The matters which are jurisdictional for the purposes of s.67 of the 1996Act are (by virtue of s.82(1)) those set out in s.30(1)(a) to (c):

> "(1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to—
>
> (a) whether there is a valid arbitration agreement,
>
> (b) whether the tribunal is properly constituted, and
>
> (c) what matters have been submitted to arbitration in accordance with the arbitration agreement."

132. The ambit of these concepts is (relatively) clear, with s.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 s.30(1)(a) and (c)).

133. 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 s.67, where the court is ultimately faced with a binary decision of whether the challenge brought falls within s.30(1) or not. It is not surprising that, particularly when issues under ss.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. s.3(2) of the Arbitration (International Investment Disputes) Act 1966 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).

134. In determining which objections are properly jurisdictional, both parties referred me to the judgment of Mr Justice Butcher in *PAO Tatneft v Ukraine* [2018] EWHC 1797, [97], [100]-[101]:

> "Issues of jurisdiction go to the existence or otherwise of a tribunal's power to adjudge the merits of a dispute; issues of admissibility go to whether the tribunal will exercise that power in relation to the claims submitted to it. The distinction was expressed by the International Court of Justice in *Oil Platforms (Islamic Republic of Iran v United States of America*) [2003] ICJ Rep 161, para 29 as follows:
>
> > 'Objections to admissibility normally take the form of an assertion that, even if the court has jurisdiction and the facts stated by the applicant state are assumed to be correct, none the less there are reasons why the court should not proceed to an examination of the merits.'"

135. In that case, there were three issues which Ukraine argued were jurisdictional.

136. The first was whether Tatneft had made an investment, defined in the Russia-Ukraine BIT as "assets and intellectual property of all kinds that are invested by an investor of one contracting party within the territory of the other contracting party", the issue being whether the purchase by Tatneft of shares from someone who had (indirectly) made such an investment was sufficient. It was common ground this issue was jurisdictional (see [61] of *Tatneft*).

137. The second was the contention that Tatneft had acquired the relevant asset after the breach of the treaty had occurred. In concluding that this issue was jurisdictional, at [84] Mr Justice Butcher cited the following passage in *Levy v Republic of Peru* ICSID Case No ARB/11/17, Award dated 9 January 2015 (Kaufmann-Kohler, Zuleta and Vinuesa):

> "146 … it is clear to the tribunal that, where the claim is founded upon an alleged breach of the Treaty's substantive standards, a tribunal's jurisdiction is limited to a dispute between the host state and a national or company which has acquired its protected investment before the alleged breach occurred. In other words, the Treaty must be in force and the national or company must

> have already made its investment when the alleged breach occurs, for the tribunal to have jurisdiction over a breach of that Treaty's substantive standards affecting that investment.
>
> 147 This conclusion follows from the principle of non-retroactivity of treaties, which entails that the substantive protections of the BIT apply to the state conduct that occurred after these protections became applicable to the eligible investment. Because the BIT is at the same time the instrument that creates the substantive obligation forming the basis of the claim before the tribunal and the instrument that confers jurisdiction upon the tribunal, a claimant bringing a claim based on a Treaty obligation must have owned or controlled the investment when that obligation was allegedly breached.
>
> 148 [A claimant] must therefore prove that [it] had already acquired [its] investment at the time of the impugned conduct."

138. At [87], Mr Justice Butcher concluded:

> "I accept, in line with this extensive jurisprudence, that the offer to arbitrate contained in article 9 of the BIT should be construed as one subject to a temporal limitation by reference to the relationship between the date on which a protected investment was acquired and the date of the occurrence of the breaches of the BIT complained of. More specifically, I accept that the limitation is, as indicated by the tribunal in the *Philip Morris* case, as to whether the relevant investment had been acquired before the time at which the alleged breach of the BIT occurred, and that the offer to arbitrate is only in respect of disputes where that was the case."

139. The third argument was that Tatneft had made the acquisition when it was reasonably foreseeable that an investment treaty claim would arise, and that the acquisition was made to obtain the benefit of the Russia-Ukraine BIT in relation to that foreseeable dispute. This was described as the "abuse of rights" objection, and at [100]-[101], Mr Justice Butcher held that it was not jurisdictional:

> "The argument that the issue is jurisdictional depends on being able to read into the offer to arbitrate contained in article 9 of the BIT a restriction that it does not extend to an 'abusive claim. I do not consider that such a restriction can be read in. On the contrary, especially considering the nature of the test and what is involved in a determination of whether a claim is abusive, to which I revert below, I consider that the offer to arbitrate includes an offer to arbitrate disputes as to whether or not a claim is abusive. This is what both contracting parties to the BIT would be expected to desire and is the result which is 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 whether a claim in relation to a particular investment was abusive.
>
> I consider that the nature of a determination as to whether there is an abuse of rights reinforces the conclusion that the issue is not jurisdictional:

(1) In order to determine whether a claim is an abuse of rights, what is required is the application of an imprecise principle of international law to the particular, and it may be strongly contested, facts of the case, including issues as to the characterisation of the purpose of the parties in taking certain steps. One would not expect the result of an exercise of that type to determine jurisdiction.

(2) This is especially so, given that it has been recognised that "the threshold for finding an abusive initiation of an investment claim is high ... The binary question of whether a tribunal does or does not have jurisdiction would not be expected to depend on whether or not the facts are sufficiently out of the ordinary as to pass a 'high threshold'".

140. The Czech Republic also relied upon the judgment of the Singapore Court of Appeal in *BBA v BAZ* [2020] SGCA 53, [78]-[79] in which Justice Quentin Loh observed:

> "Consent serves as the touchstone for whether an objection is jurisdictional because arbitration is a consensual dispute resolution process: jurisdiction must be founded on party consent. For this reason, arguments as to the existence, scope and validity of the arbitration agreement are invariably regarded as jurisdictional, as are questions of the claimant's standing to bring a claim or the possibility of binding non-signatory respondents.
>
> Conversely, admissibility relates to the 'nature of the claim, or to particular circumstances connected with it' … It asks whether a tribunal may decline to render a decision on the merits for reasons other than a lack of jurisdiction, and is determined by the tribunal on the basis of their discretion guided by, amongst others, principles of due administration of justice and any applicable external rules …"

141. Finally I was referred to the arbitral award on jurisdiction in *Micula v Romania* ICSID Case no ARB/05/20 of 24 September 2008, [64] (Lévy, Alexandrov and Ehlermann), in which the tribunal suggested that "when an objection relates to a requirement contained in the text on which consent is based, it remains a jurisdictional objection. If such a requirement is not satisfied, the Tribunal may not examine the case at all for lack of jurisdiction."

142. With the benefit of those authorities, the approach which I will adopt in determining the characterisation of the three matters in issue is as follows:

i) I remind myself that, ultimately, the issue for me to determine is whether the Czech Republic's challenge falls within s.30(1)(a) or (c).

ii) Those provisions reflect a requirement that *these parties* must have agreed to arbitrate *this dispute*. Challenges which raise those same issues in the investment treaty context will be jurisdictional for s.30(1) purposes, those raising different issues will not.

iii) As Mr Justice Butcher notes, in the investment treaty context (in which a treaty between two states on the international law plane contains an offer to non-parties – investors who are qualifying nationals of each state – to arbitrate certain disputes against the other state), the s.30(1)(a) and (c) questions require the court to determine the questions of who the offer to arbitrate is addressed to, and the disputes to which the offer applies. As the arbitral tribunal noted in *Micula*, this is ultimately a question of interpretation of the treaty.

iv) 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) Finally, in my view it is helpful to keep in mind that s.67 challenges can involve a challenge to a tribunal's decision that it does *not* have jurisdiction, as well as a challenge to the decision that it has.

G2(2) The interpretation of the Investment Treaty

143. In *Tatneft*, [38]-[39], Mr Justice Butcher summarised the approach which should be adopted in relation to the construction of BITs, drawing on the judgment of Mr Justice Bryan in *GPF GP SARL v Republic of Poland* [2018] Bus LR 1203, [46]-[62]. At [38], Mr Justice Butcher stated:

> "(1) It is for the court to interpret the Bilateral Investment Treaty in accordance with international law, and the principles of interpretation contained in articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969 ('the Vienna Convention'), which codifies customary international law …
>
> (2) Article 31 sets out the primary rule of interpretation:
>
> (i) A treaty shall be interpreted 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.
>
> (ii) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> (3) There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties

regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.

(4) A special meaning shall be given to a term if it is established that the parties so intended."

144. He continued:

> "The rule of interpretation is textual, not teleological ... That is, 'interpretation must be based above all upon the text of the treaty' (per the International Court of Justice in *Territorial Dispute (Libya/Chad)* [1994] ICJ 6, para 41). Accordingly, the text is presumed to be the authentic expression of the intention of the parties and is not to be substituted for or overridden by the presumed intention of the parties …"

The Stava June 2011 Objection

145. The effect of this objection is that even if Mr Stava is Swiss, and made the investments which the tribunal found were made at Award, [387]-[393], all of which were made long before June 2011, the tribunal would not have jurisdiction to determine whether or not Mr Stava retained those investments at the date of the Article 4(2) breach in relation to the 2014 Review for the purpose of determining a claim by Mr Stava for damages in relation to such a breach.

146. On that basis, Mr Stava was an investor, and he made investments for the purposes of the Investment Treaty. Construing Article 9 of the Investment Treaty in accordance with the principles set out in [142] above, I see nothing in Article 9 which limits the offer to arbitrate to breaches which occur at the date when the investor still owns the investments they made (albeit it is easy to see how this would be relevant to the investor's standing to complain about the breaches and to the question of loss). It is important to recall that Article 9 refers to "*disputes* with respect to investments". If the question is asked whether the dispute between Mr Stava and the Czech Republic as to his continuing ownership of the investments from June 2011 onwards (such that he has standing to claim for breaches of the Investment Treaty impacting on those investments) is a dispute "with respect to investments", the answer, in my view, is clearly yes. The contrary argument requires the court to read into Article 9 a limitation which is not expressly stated, something the applicable principles of interpretation make a challenging task.

147. I should acknowledge that this conclusion can, at some level, be contrasted with the conclusion reached by Mr Justice Butcher in *Tatneft* as to the second issue before him: whether under a different BIT, the requirement that the investor make the investments *before* the breach was a jurisdictional matter. In concluding that it was, Mr Justice Butcher relied upon investment treaty jurisprudence which justified this conclusion by reference to what is clearly a forceful and well-established presumption that treaties do not have retrospective effect. It is easy to see why it might be said that this principle, the interpretative canon which it reflects and the provision (such as Article 12 here) stipulating when the treaty comes into force, combine to provide a sufficient basis for reading a limitation of this kind into the offer to arbitrate. That consideration does not arise here, nor does the issue of trafficking of investment treaty claims which post-

breach transfers might raise. It is not necessary for me to consider this aspect of the decision in *Tatneft* further.

The Diag SE June 2011 Objection

148. The Diag SE June 2011 Objection raises challenging issues which received only limited air (and paper) time in the parties' submissions. It raises not simply the issue raised by the Stava June 2011 objection (which, considered in isolation, I would answer in the same way), but the more fundamental issue that, if Mr Stava ceased to control Diag SE in June 2011, it ceased to be Swiss for the purposes of the Investment Treaty at that point, and it was not, therefore, Swiss at the date it purported to accept the standing offer to arbitrate in the Investment Treaty on 22 December 2017.

149. The effect of a change in nationality of an investor between the date when a claim accrues and loss is suffered (cf. the Bojar Letter claim) and the date when arbitration is invoked raises a number of challenging issues. Such a claim would appear to fall outside the protection offered by any investment treaty of the investor's "new nationality" because protective nationality status under that treaty did not exist at the date of the breach, raising the risk of an investment treaty "black hole", as well as difficulties if it is alleged that the change of nationality was itself a response to the actions of the host state (of which there is something of a suggestion here: Award, [411]), albeit concepts of good faith and estoppel might avail in such circumstances.

150. Investment treaty jurisprudence has generally (although not universally) been hostile to a "continuous ownership requirement", which requires investors to retain ownership of the asset to the point when the standing offer to arbitrate is accepted (*Daimler Financial Services AG v Argentine Republic* ICSID Case No ARB/05/01 Award 22 August 2012 (Dupuy, Brower and Bello Janeiro), [145], [154] quoting at [141] the award in *EnCana Corporation v Ecuador,* Award LCIA Case No UN3481, ILC 91 (3 February 2006) (Crawford, Naón and Sweeney), [31].

151. What of a continuing nationality requirement? This issue was considered in *Loewen Group Inc and Raymond L Loewen v United States of America*, ICSID Case No ARB(AF)/98/3, 26 June 2003 (Mason, Mikva and Mustill), an award of an investment treaty tribunal sitting in a dispute arising under the North American Free Trade Agreement. In that case, which the tribunal described as "important and extremely difficult", after the oral merits hearing the Loewen group has assigned its NAFTA claims against the US government to a Canadian corporation owned and controlled by a United States corporation following a corporate re-organisation in bankruptcy. At [225], the tribunal held:

> "Claimant TLGI urges that since it had the requisite nationality at the time the claim arose, and, antedate the time that the claim was submitted, it is of no consequence that the present real party in interest - the beneficiary of the claim - is an American citizen. Both as a matter of historical and current international precedent, this argument must fail. In international law parlance, there must be continuous national identity from the date of the events giving rise to the claim, which date is known as the dies a quo, through the date of the resolution of the claim, which date is known as the dies ad quem."

152. That award has been criticised to the extent that it supports a requirement of continuous nationality to the point of adjudication (e.g. *Daimler Financial Services AG v Argentine Republic* ICSID Case No ARB/05/01 Award 22 August 2012 (Dupuy, Brower and Janeiro), [143] and see also *Ecuador v Occidental Exploration & Petroleum Co* [2005] EWCA Civ 1116,[22]), albeit that is not the question here. By contrast, I note that in *Pugachev v Russia* Award on Jurisdiction 18 June 2020, [389] it was common ground that both "the date of the alleged violation of the Treaty and the date of commencement of the arbitral proceedings are relevant dates for assessing Claimant's nationality."

153. In any event, the issue for me is not whether a loss of Swiss nationality before the offer to arbitrate is invoked precludes recovery, but whether any rule of this kind is jurisdictional. I am satisfied that it would be – it involves an argument by the Czech Republic that the offer to arbitrate is only capable of acceptance by investors meeting the nationality requirement at the time the offer is accepted. Whether that contention is right or wrong, it is jurisdictional in character.

154. I note that my conclusion that the effect of the June 2011 events raises issues which are not jurisdictional so far as Mr Stava is concerned (with the result that they cannot be re-opened before me) but raises an argument which is jurisdictional in character for Diag SE (because it would affect its nationality at what might be a relevant point) might itself raise further issues as to the effect of the former findings on this jurisdictional challenge to the latter's claim. These are matters for the next hearing.

The Dispute Timing Objection

155. This objection concerns the submission that the dispute regarding the Bojar Letter, properly analysed, was a dispute which arose before the Investment Treaty came into force. The Czech Republic contends that this objection is properly characterised as jurisdictional for s.30(1) purposes.

156. In response, the Claimants pointed to the judgment of the Paris Court of Appeal of 21 February 2023 in a challenge to the award in *Agarwal v Uruguay* PCA Case No 2018-04, [70] in which the investment treaty provided "this Agreement shall in no case apply to disputes arising before its entry into force", and to Professor Douglas' contention that "this limitation must be made express in the treaty to apply in any given case" (Z Douglas, *The Law of Investment Claims* (2009), [632]). Professor Douglas' view gains support from the Interim Award in *Chevron Corporation v The Republic of Ecuador* PCA Case No 2007-02/AA277, 1 December 2008 (Böckstiegel, Brown and van den Berg), [265]-[267], but Mr Bastin KC was able to point to awards going other way (*Société Générale v Dominican Republic*, LCIA Case No UN 7929 Award on Preliminary Objections to Jurisdiction of 19 September 2008 (Bishop, Cremades and Vicuña), [84;] and *Walter Bau AG v Thailand* Award of 1 July 2009 (Barker, Lalonde and Bunnag), [9.67] and *ATA Construction, Industrial and Trading Company v Jordan* ICSID Case No ARB/08/02, 18 May 2010 (Fortier, El-Kosheri and Reisman), [98]).

157. However, the issue which arises at this hearing is not whether Professor Douglas' view is correct (as the Claimants' submissions assumed) but whether this issue is in the nature of a jurisdictional objection. The argument that, by virtue of a principle of non-retroactivity or otherwise, the offer to arbitration disputes "with respect to investments"

in Article 9 of the Investment Treaty is limited to those arising during the period when the treaty is in force is, in my judgment, a jurisdictional objection.

H THE SECTION 68 APPLICATIONS

Introduction

158. The Czech Republic brings four challenges to the Award under s.68 of the 1996 Act:

i) First, it is alleged that the tribunal made their award of Head of Damages 1 on a basis which was not argued (giving rise to a challenge under s.33 and 68(2)(a) of the 1996 Act) or alternatively did not decide all of the issues before it in relation to Head of Damages 1 (giving rise to a challenge under s.68(2)(d) of the 1996 Act) (**"the First S.68 Challenge"**).

ii) Second, it is alleged that the tribunal failed to determine whether the award of damages should be reduced to reflect "an assignment by [Conneco] of 30% of the value of its claim to its former lawyer, Mr Oršula" (giving rise to a challenge under s.68(2)(d) of the 1996 Act) ("**the Second S.68 Challenge"**).

iii) Third, it is alleged that the tribunal failed to determine whether the award of damages should be reduced to reflect the percentages of ownership Mr Stava had in Diag AG and Diag AG in Conneco (giving rise to a challenge under s.68(2)(d) of the 1996 Act) (**"the Third S.68 Challenge"**).

iv) Finally, there is a s.68 challenge relating to the so-called post-2011 measures (**"the Fourth S.68 Challenge"**).

The applicable principles

159. Section 68 of the 1996 Act provides:

> "(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award. A party may lose the right to object (see section 73)) and the right to apply is subject to the restrictions in sections 70(2) and (3).
>
> (2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—
>
> (a) failure by the tribunal to comply with section 33 (general duty of tribunal);
>
> (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);
>
> (d) failure by the tribunal to deal with all the issues that were put to it."

160. The principles application to the determination of a s.68 challenge were summarised by the Privy Council in *RAV Bahamas Ltd v Therapy Beach Club* [2021] UKPC 8:

i) The test of serious irregularity was intended to limit intervention to "extreme" cases where it could be said that "the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected" ([30]).

ii) Serious irregularity has been recognised as imposing a "high threshold" or as "the hurdle" ([31]).

iii) The focus is on due process, not the correctness of the decision reached ([32]).

iv) Even if a case is shown to fall within one or more of the kinds of irregularities listed in section 68 this will only amount to a serious irregularity if the court considers that it "has caused or will cause substantial injustice", which means "more than some injustice" ([33]).

v) There will be substantial injustice where it is established that, had the irregularity not occurred, the outcome of the arbitration might well have been different, but it is not necessary to show that the outcome would "necessarily or even probably be different" ([34]).

vi) Some irregularities may be so serious that substantial justice is "inherently likely" or "likely in the very nature of things" to result ([35]), including where "on a central matter a finding is made on a basis which does not reflect the case which the party complaining reasonably thought he was meeting, or a finding is ambiguous, or an important issue is not addressed."

vii) In general, there will, however, be no substantial injustice if it can be shown that the outcome of the arbitration would have been the same regardless of the irregularity ([37]).

161. As to challenges under s.68(2)(a):

i) At [46], the Board approved the observations of Bingham J in *Zermalt Holding SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14, 16 that:

> "The rules of natural justice do require … that matters which are likely to form the subject of decision, in so far as they are specific matters, should be exposed for the comments and submissions of the parties. If an arbitrator is impressed by a point that has never been raised by either side then it is his duty to put it to them so that they have an opportunity to comment. If he feels that the proper approach is one that has not been explored or advanced in evidence or submission then again it is his duty to give the parties a chance to comment … It is not right that a decision should be based on specific matters which the parties have never had the chance to deal with, nor is it right that a party should first learn of adverse points in the decision against him."

ii) An arbitrator will not have acted fairly if a party is learning for the first time in the award about findings and matters in the decision of the arbitrator which that party has not had the opportunity to address.

iii) Dealing with assessments of damages, the Board approved Mr Justice Popplewell's statement in *Reliance Industries Ltd v Union of India* [2018] 2 All ER (Comm) 1090, [32] that "it is enough if the point is 'in play' or 'in the arena' in the proceedings, even if it is not precisely articulated … [A] party will usually have had a sufficient opportunity if the 'essential building blocks' of the tribunal's analysis and reasoning were in play in relation to an issue, even where the argument was not articulated in the way adopted by the tribunal. Ultimately the question which arises under section 33(a), whether there has been a reasonable opportunity to present or meet a case, is one of fairness and will always be one of fact and degree which is sensitive to the specific circumstances of each individual case."

iv) The Board also cited with approval the observation of Judge Humphrey Lloyd QC in *Weldon Plant Ltd v Commission for the New Towns* [2001] 1 All ER (Comm) 264, [33] that "matters of quantification and valuation frequently lead to the tribunal taking a course which is not that put forward by either party, but which lies somewhere between. 'Doing the best one can on the material provided' almost inevitably produces such a result. Provided that the finding is not based on a proposition which the parties have not had an opportunity of dealing with the arbitral tribunal will not be in breach of its duties … if it makes such a finding without giving the parties a chance of dealing with it."

162. On this issue, in a s.68(2)(a) challenge in an investment treaty arbitration, in *LMH v EGK* [2023] EWHC 1832 (Comm), [32]-[33], I noted that the tribunal had been faced with a very large claim by the arbitration claimant, and a "root and branch" attack on the reliability of that claim, without a competing analysis from the arbitration respondent, and observed that:

> "Against this background it must have been obvious to the parties, and wholly within their contemplation, that if the case reached the question of damages, then unless the Tribunal either awarded the entire amount claimed or nothing (and I cannot believe any lawyer with experience of international arbitration would have regarded either outcome as a likely scenario), then the Tribunal would have to make its own adjustments or allowances to reflect LMH's attacks on EGK's quantum case to the extent that they were regarded as having merit."

163. Turning to s.68(2)(d)) challenges in particular, the Board in *RAV Bahamas* observed:

i) Section 68(2)(d) can be broken down into three questions. What is an issue? Has the issue been put to the arbitrators? Have the arbitrators failed to deal with it? ([38]).

ii) There is a distinction to be drawn between 'issues' on the one hand and 'arguments', 'points', 'lines of reasoning' or 'steps' in an argument, although it can be difficult to decide quite where the line demarking issues from arguments

falls. However, the authorities demonstrate a consistent concern that this question is approached so as to maintain a 'high threshold' that has been said to be required for establishing a serious irregularity ([40(ii)]).

iii) A matter will constitute an 'issue' where the whole of the applicant's claim could have depended upon how it was resolved, such that 'fairness demanded' that the question be dealt with ([40(iii)]).

iv) There will be a failure to deal with an 'issue' where the determination of that 'issue' is essential to the decision reached in the award. An essential issue arises in this context where the decision cannot be justified as a particular key issue has not been decided which is critical to the result and there has not been a decision on all the issues necessary to resolve the dispute or disputes ([40(iv)]).

v) The issue must have been put to the tribunal as an issue and in the same terms as is complained about in the section 68(2) application ([42]). It is necessary to consider the arbitration proceedings as a whole, including the pleadings and the written and oral submissions. Having done so, in general what is required is that the tribunal's attention has been sufficiently clearly drawn to the issue as one which it is required to determine, such that it would reasonably be expected to deal with it.

vi) If the tribunal has dealt with the issue in any way, section 68(2)(d) is inapplicable and that is the end of the enquiry; it does not matter for the purposes of section 68(2)(d) that the tribunal has dealt with it well, badly or indifferently ([43]). It matters not that the tribunal might have done things differently or expressed its conclusions on the essential issues at greater length. A failure to provide any or any sufficient reasons for the decision is not the same as failing to deal with an issue. Nor is a failure by a tribunal to set out each step by which it reached its conclusion or deal with each point made by a party a failure to deal with an issue that was put to it.

vii) A tribunal may deal with an issue by so deciding a logically anterior point such that the other issue does not arise. If the tribunal decides all those issues put to it that were essential to be dealt with for the tribunal to come fairly to its decision on the dispute or disputes between the parties, it will have dealt with all the issues ([43]).

viii) Whether there has been a failure by the tribunal to deal with an essential issue involves a matter of a fair, commercial and commonsense reading (as opposed to a hypercritical or excessively syntactical reading) of the award in question in the factual context of what was argued or put to the tribunal by the parties (and where appropriate the evidence) ([43]).The court can consider the pleadings and the written and oral submissions of the parties to the tribunal in this regard.

The First S.68 Challenge

164. I should state at the outset that this ground was unnecessarily overcomplicated by the Czech Republic, reflecting a well-established feature in cases such as this that damages

issues are over-analysed at the point of challenge before the supervisory court, having been under-analysed in the arbitration. At the heart of the First S.68 Challenge lie three assertions:

i) The Czech Republic did not have a fair opportunity to deal with the tribunal's decision that the 2014 Resolution would not be recognised under international law with the result that the 2008 Award was to be recognised as binding, because this had not been either party's case.

ii) The Claimants had not alleged that the level of compensation quantified in the 2008 Award accurately quantified the loss flowing from the Bojar Letter but contended for a far higher loss.

iii) The Claimants had not pleaded that, as a consequence of breaches of international law, the 2008 Award was still binding.

165. Although advanced as separate points, they are interconnected. It is helpful to summarise the progress of the arbitration on this issue before reverting back to these three points at the end, beginning with the filings in the pre-disclosure phase:

i) It is accepted that the Claimants were always asserting breaches in relation to both the Bojar Letter and the 2014 Review, and always claimed damages both in the amount of the 2008 Award (which became Head of Damage 1), and a much larger claim for loss of the Czech business (which became Head of Damage 3). I do not accept any suggestion that the former loss was only claimed for breach of Article 11 (which the tribunal did not find it necessary to decide). Both the RFA (see A5) and the Memorial (see A11) advanced a compendious claim for "all losses for all breaches", accompanied by an expert report (A12) which similarly failed to address any issue of overlap. The alternative submission – that *no loss* was being claimed for the Article 4(2) breaches in relation to the 2014 Review – is wholly unrealistic.

ii) The Counter-Memorial expressly raised the overlap between Heads of Damage 1 and 3 (A27-A28) as did the accompanying expert report (A31, A35). The Counter-Memorial also made it clear that the Czech Republic understood that the Claimants were alleging that the Article 4(2) breaches in relation to 2014 Review caused the invalidation of the 2008 Award (A25(ii)).

iii) At that point, therefore, the Claimants were clearly pursuing claims for both Head of Damage 1 and Head of Damage 3, (which the Czech Republic rightly recognised were for overlapping losses) and, for good or ill, pursuing all of those Heads of Damage for all of the alleged breaches.

166. Turning to the Claimants' Reply:

i) The Claimants advanced a case that the awards in the Commercial Arbitration gave rise to some species of estoppel or were entitled to deference (A38 – I shall use the term "preclusive effect" to cover both formulations). The Reply Memorial sought to walk a difficult line between contending – as it clearly did (e.g. A38,

A39) – that the 2008 Award was binding, and including examples of findings said to have preclusive effect for the purposes of its quantum case (A38(ii)) while trying to claim a higher sum than the 2008 Award had awarded because "wider issues" were in play (A37).

ii) It was alleged that the 2008 Award had preclusive effect against the Czech Republic and that the Czech Republic's expert was seeking to re-litigate matters determined in the Commercial Arbitration (A45).

iii) The Claimants also advanced an argument that, if the 2014 Review had the effect of annulling the 2008 Award under the Czech law, the tribunal should not acknowledge that effect: either by not allowing the Czech Republic to rely on the 2014 Resolution (A39); or because it would be "abusive" (A40(i)); or contrary to natural justice, fairness or public policy (specifically submitting that the courts of the seat would not "recognise" the 2014 Resolution) (A40(ii)).

iv) The reply did not expressly mention Head of Damage 1 in the "Relief Sought" section (A45(vi)), which may have been the first attempt to address the overlapping claims issue. Subject to that, this was still an "all damages for all breaches" pleading. For all their protestations, the Czech Republic cannot have seriously believed that any Head of Damage 1 claim had been abandoned, and they did not bring a challenge on this basis.

v) Mr Shopp's report had still failed to engage with the overlap between Heads of Damage 1 and 3, albeit there was some recognition of overlap (A47).

167. As to the Czech Republic's Rejoinder:

i) It mounted a series of strong attacks on the reliability of the quantum findings in the 2008 Award as one of the reasons why it should not be given preclusive effect (A48(iii), A49(ii), A54(i)). It clearly understood that the tribunal was being asked to give these findings some form of preclusive effect.

ii) Contrary to its previous position in the Counter-Memorial (A26(ii)) it now contended that the Claimants were not alleging that the interference in the 2014 Review caused the 2014 Resolution (A48(v) and, in relation to pre-2008 Award conduct only, A53).

iii) It correctly understood that the tribunal was being invited to reach a conclusion that the 2008 Award was valid and submitted it would have no authority to do so (A48(vi)).

iv) The overlap between Heads of Damage 1 and 3 was noted (A54(ii)).

168. At this point, two matters would have been clear to the experienced lawyers on both sides:

i) There was a clear overlap between Heads of Damage 1 and 3, and the Claimants could not claim both.

ii) The obvious consequence of the Claimants' reliance on the 2008 Award as having preclusive effect, including on issues relevant to quantum, was that it might have preclusive effect in its entirety, not just on the parts the Claimants liked, but the parts they hoped to do better than.

Not surprisingly, those issues did not escape the attention of the tribunal at the oral hearing.

169. At that hearing:

i) The Claimants clearly argued that the 2008 Award had preclusive effect, with a non-exhaustive list being given (A87(i)-(iii)). In that context, the Claimants relied on the arbitral award in *Desert Line v Republic of Yemen* ICSID Case No ARB/05/17, Award of 6 February 2008 (Tercier, Paulsson and El-Kosheri). However, they did not (as they do now) seek to rely on that award to support a proposition that events nullifying a commercial arbitration award on the domestic plane can be ignored on the international law plane. That particular refinement reflects further and better thoughts in this litigation.

ii) The Claimants accepted that their heads of loss overlapped (A61(ii)).

iii) It was clear that at least one member of the tribunal, Professor Knieper, had identified an award of the amount of the 2008 Award as a potential "cut through" (A61(iii)).

iv) The Czech Republic put forward its case as to why the quantum findings in the 2008 Award should not have preclusive effect (A63(v)). I would note that the extensive criticism made by the Czech Republic in the investment treaty arbitration of the quantum findings in the 2008 Award provide a complete answer to the Czech Republic's submission that it was deprived of the opportunity to show "just how untenable" the 2008 Award quantum figure was. It is clear that repeated submissions were made to that effect.

v) The obvious consequence of the Claimants' preclusion argument was finally articulated by the Czech Republic– that they would be stuck with the findings in the 2008 Award as a ceiling, as well as a floor (A63(vi)).

vi) That provoked what everyone would have understood was a highly significant intervention from one of the arbitrators, Mr Price – if the tribunal accepted preclusion, should it apply to both sides. Understandably, given the obvious significance of that question, the Czech Republic preferred to consider it overnight before answering, in effect, "yes": A63(vii). That, of necessity, meant that if the tribunal accepted the Claimants' preclusion argument in relation the 2008 Award, they would get the amount of loss assessed in it, no more and no less. The Claimants said that they would revert on a question raising this issue but never did (A63(viii)).

vii) The complete overlap between the loss claimed was stressed by the Czech Republic (A63(ix)).

170. In cross-examination, Mr Shopp confirmed that Heads of Damage 1 and 3 could not be added together (A64(iii)), and he was challenged on his inconsistent approach to findings in the 2008 Award (A64(iii)). Clearly the obvious inference of that line of questioning was "all binding or none binding" and it cannot have been lost on the Czech Republic that this was a choice the tribunal would face.

171. The tribunal's questions also made it clear that they were considering the effect of the Article 4(2) breaches alleged in relation to the 2014 Review on the 2014 Resolution and the 2008 Award, and the interrelationship between any award of damages in the Investment Treaty arbitration and the 2008 Award (A65, questions 4 and 8).

172. In the first round of PHBs:

i) It was absolutely clear that the Claimants were arguing that the effect of the interference in the 2014 Review was that the Respondent could not rely on the 2014 Review but the Claimants could rely on the 2008 Award: (see A67(i)-(v)) and they accepted a "substantial overlap" between Heads of Damage 1 and 3: A69.

ii) It was absolutely clear that the Czech Republic recognised the "double-edged" nature (from the Claimants' perspective) of the preclusion arguments in relation to the 2008 Award, and deployed them, in particular in relation to the cut-off date which was one of the principal differences between Heads 1 and 3: A70(ii) and A73.

iii) It argued for a causation requirement, the Claimants having to show the Article 4(2) breaches in relation to the 2014 Review affected its outcome: A70(iii). At the same time, it sought to argue the (inconsistent) position that it was "simply not the role of this Tribunal to speculate how the Review Proceeding would have unfolded, absent the alleged flaws in the constitution of the Review Tribunal." However, the Czech Republic clearly understood the Claimants were arguing for a response by which the effect of the Article 4(2) breaches would be to entitle the tribunal to "ignore" or "disregard" the 2014 Review: A72; A74(ii).

173. In the second round of PHBs:

i) The Czech Republic did not suggest that the Claimants' case as to the consequences of any Article 4.2 breach in the 2014 Review was not open (and as noted at [172(iii)] above, they had anticipated it in their first PHB).

ii) The Czech Republic stressed the "double-edged" nature of the Claimants' preclusion arguments again (A70(ii)).

iii) The Czech Republic reiterated its argument that the Claimants had to prove the causal consequences of any Article 4.2 breach in the 2014 Review (A70(iii)).

174. Against that background, it is clear that each of the Czech Republic's three complaints within S.68(2)(a) Ground 1 are without merit:

i) The tribunal was clearly being asked by the Claimants to ignore, or not give effect to, the 2014 Resolution to the extent that it had the effect of invalidating the 2008 Award under Czech law and the Czech Republic understood this, had the opportunity to challenge the argument and did so.

ii) The tribunal clearly rejected the Czech Republic's (unattractive, intuitively unpersuasive and, it must be said, wholly underdeveloped) argument that it was for *the Claimants* to prove what the outcome of the 2014 Review would have been but for the Czech Republic's Article 4(2) breaches. In any event, the tribunal found "the entire review proceedings" (i.e from the commencement to the 2014 Resolution) were riddled with due process violations ([754], [795], [1027]-[1029]) and that the Czech Republic's interference was "successful" ([828]), and expressly contrasted the interference with the 2008 Award which "did not affect the actual outcome" with the interference with the 2014 Review ([1027]-[1028]).

iii) Both parties clearly understood that there was a very real possibility that the Claimants' preclusion argument in relation to the 2008 Award would limit the Claimants' recovery for the Bojar Letter breach to the amount of the 2008 Award, and while the Claimants never faced up expressly to that fact, they had no answer to it. The Respondents pointed out the logical consequence of the Claimants' own argument on more than one occasion.

iv) The Claimants were clearly asking the tribunal to treat the 2008 Award as still binding notwithstanding the effect of the 2014 Resolution under Czech law, and the Czech Republic understood this and availed themselves of the opportunity to make submissions on this issue.

175. The Czech Republic's alternative s.68(2)(d) challenge – that "the tribunal did not actually ask itself, or determine what loss recoverable under international law has been caused by either sending the Bojar Letter or, in particular, the inference with the Review Proceeding" – is hopeless:

i) The answer to the first question was that there was no reason not to defer to the assessment of that very loss in the 2008 Award: see [1026], [1028]- [1029] and [1037].

ii) The answer to the second question was that this issue did not arise because the tribunal found that the effect of the Article 4(2) breaches which "riddled" the entire 2014 Review was that the 2014 Resolution should not be recognised as having effect, which was itself sufficient compensation for the breach [1030].

iii) Nor can I accept, if relevant, the suggestion that the two findings are "linked and cannot be separated", such that if (for example), the tribunal had decided not to defer to the quantification of the Bojar Letter loss in the 2008 Award, it necessarily follows that they would not have held that the value of the 2008 Award was the appropriate compensation for the 2014 Review breach, having held that the Arbitration Agreement was itself an investment (see [50(vi)] above).

176. The Czech Republic may not like those answers (although it can scarcely have been surprised by them). But that is not the basis of a s.68(2)(d) complaint.

177. Finally, I should deal at this point with the suggestion that the tribunal did not simply accede to the Claimants' submission that they should "disregard" the 2014 Resolution because of the Article 4(2) breaches which "riddled" the 2014 Review, but that they purported as an international law tribunal "to exercise a power under international law to declare a domestic legal decision a nullity." That, with respect, was a baroque over-complication of a much simpler issue:

    i) In dealing with the Czech Republic's many arguments that the 2014 Resolution provided an answer to the Claimants' claims relating to the 2008 Award, the tribunal accepted that they were entitled to disregard (or "not recognise") the invalidating effect of the 2014 Resolution.

    ii) The arbitral tribunal made no order purporting to invalidate the 2014 Resolution on the domestic law plane (where it retains its status with whatever efficacy it had), which is why there is no reference to any "invalidation" in the *dispositif*. That itself answers Mr Bastin KC's submission that "the effects of its *dispositif* go well beyond the international legal system."

    iii) The contrary conclusion is not supported by the tribunal's decision to require undertakings that the Claimants would not seek to enforce the 2008 Award under the New York Convention. That was necessary to avoid a risk of "double recovery" if it was able to persuade some enforcement jurisdiction that the 2014 Resolution did not have the consequence under Czech law for which the Czech Republic contended. Those undertakings did not "deprive [the Czech Republic] of the ability to continue to resist the 2008 award" in enforcement proceedings, as Mr Bastin KC suggested, but obviated its need to deploy what is a purely passive defensive response to an enforcement attempt. This amounts to a suggestion that a party has been deprived of the right to defend themselves if attacked by an order preventing the attack. It is a particularly wicked dog who deprives you of the opportunity to defend yourself by not attacking you.

178. For those reasons, the challenge to the tribunal's findings in relation to the 2014 Resolution on the basis that it involved the tribunal exceeding its powers (and therefore a challenge under s.68(2)(b)) also fails. A s.68(2)(b) challenge is concerned with "the absence of procedural power", not the (allegedly) erroneous exercise of such a power: *Lesotho Highlands Development Authority v Impregilo SpA* [2006] 1 AC 221, [31]. The tribunal did not purport to make an order invalidating the 2014 Resolution on the domestic law plane but concluded that they would not recognise it as having cancelled the 2008 Award solely for the purposes of their damages assessment. The tribunal clearly had power to determine what deference (if any) to give to the 2014 Resolution when adjudicating on the claims of breach, causation and loss.

179. As the Czech Republic had recognised on Day 2 of the hearing that

> "As a matter of comity, efficiency, good order and promotion of justice, it makes sense, we believe, in some instances for investment tribunals to defer to a local

> adjudicatory ruling, but it kind of depends on the nature and source of the ruling. So, for example, a well-reasoned and well-substantiated supreme court or constitutional court decision, with a well-developed lower court record, for example, even though not binding on an international tribunal, is at least entitled to some deference or consideration by the international tribunal. But a domestic decision, whether judicial or arbitral, that is clearly deficient in some fashion -- due to lack of due process or corruption, or whatever other reason -- is entitled to no deference at all, since it would not promote the goal of promoting justice or of reaching a fair result to adopt the findings of such a decision."

On the arbitral tribunal's findings, the 2014 Resolution was "clearly deficient in some fashion – due to lack of due process [and] corruption" and the tribunal was acting within its powers in deciding to give it no effect for those reasons.

The issues arising in relation to the No Nexus and No Substantive Jurisdiction Objections

The No Nexus Objection

180. This argument arises from the fact that Article 9 of the Investment Treaty refers to "disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party". It is suggested that the award of the amount of the 2008 Award and interest on the 2008 Award were not "with respect to" the investments the tribunal had found to be established, and that this gives rise to a jurisdictional objection for s.67 purposes.

181. Under Article 9, it is the *dispute* which must arise in relation to a qualifying investment. In this case:

i) The tribunal found that various investments had been established, which attested to "the *reality* of Conneco's business in Czechoslovakia, and to Claimants' investments in Conneco" (Award, [384]). For the purposes of this challenge, it is to be assumed that those findings cannot be challenged.

ii) It is accepted by the Czech Republic (in the sense that these are not the subject of any similar s.67 challenge) that the breaches of Article 4(2) of the Investment Treaty found by the tribunal in relation to those investments fell within the tribunal's jurisdiction.

iii) In these circumstances, the approach taken by the tribunal to the quantification of the breaches found in respect of the investments made must fall within the tribunal's jurisdiction, and a dispute about the amount of such compensation must be a "dispute with respect to" such investments.

iv) I am satisfied that the Czech Republic's contrary argument is an attempt to dress up what is, in effect, an attempt to challenge the tribunal's findings on the merits as a jurisdictional challenge, which, if it were to be accepted, would largely obscure the very different legal distinctions between those two types of challenge. Indeed, I find it difficult to see how a finding as to the amount of

compensatory damages for breaches of legal obligations over which an arbitral tribunal have jurisdiction can ever be subject to a jurisdictional challenge.

The No Substantive Jurisdiction Objection

182. This argument rests on the fundamental mischaracterisation of the tribunal's decision in relation to the 2014 Resolution which I have addressed at [177] above. The tribunal reached a decision to quantify compensatory damages for breaches of the Investment Treaty by:

    i) deferring to findings made in the 2008 Award as to the amount of loss for essentially the same breach; and

    ii) awarding compensation for breaches of Article 4(2) which "riddled" the 2014 Review by disregarding the setting aside of the 2008 Award by the 2014 Review as a matter of Czech law.

183. The Czech Republic's attack on that reasoning is not jurisdictional in character (any more than the Claimants could have re-argued any rejection of those arguments by the tribunal under s.67). This is a merits challenge.

The S.73(1) issue

184. In these circumstances, it is not necessary to consider whether the No Nexus and No Substantive Jurisdiction Objections are themselves precluded by s.73(1). In this case, the Claimants did not argue that the First S.68 Challenge was precluded by s.73(1). It may well be, in a case of this kind where the issue is whether the tribunal decided a case on the basis that was not argued or which there was no fair opportunity to deal with, the question of whether the tribunal determined the case on a basis which was "in play", and whether the challenging party could have taken the objection if it had exercised due diligence, cover very similar terrain, and an answer to one issue will essentially answer the other.

The Second Section S.68 Challenge

185. This ground alleges that the tribunal failed to determine whether the award of damages should be reduced to reflect "an assignment by [Conneco] of 30% of the value of its claim" to its former lawyer, Mr Oršula.

Is this an argument or an issue?

186. An argument that a claimant does not have title or standing to claim for 30% of the amount in issue is clearly an issue, not merely an argument. Save where the claim fails altogether, it has a clear, distinct and significant impact on the extent of recovery independent of the outcome of other issues and is critical to an assessment of the amount awarded, and fairness demands that it be addressed.

Was this issue put to the tribunal, and in what terms?

187. The first reference to the assignment was in the RFB (A14(vii)). However, given the nature of this document (an early filing made with a view to obtaining a procedural order) and the lack of any clear identification of the consequences said to flow from the assignment, I do not think it can be said at this stage that the tribunal's attention has been sufficiently clearly drawn to the issue as one which they were required to determine, such that they would reasonably be expected to deal with it.

188. The point first emerged in clear terms in Mr Laputa's report accompanying the Counter-Memorial (A31), which referred to assignment of "any potential award."

189. The Czech Republic referred to the assignment in the same terms in its Rejoinder (A54(v) and A55), as a reason why:

    i) any award of Head of Damage 3 to Diag SE should be reduced by 30%; and

    ii) any award of Head of Damage 1 to Diag SE should be reduced by 30%.

190. I accept that an issue as to the effect of the alleged assignment was "put" at this stage, and was put in relation to a claim for breach of the Bojar Letter (then Head of Damage 3) as well as interference with the Award (then Head of Damage 1), and that the assignment was said to impact on the claims of both Mr Stava and Diag SE, given the words "jointly with Mr Stava" in the table at A55, and the utter incoherence of allowing Mr Stava to recover more than the company through which any investment was said to have been made by him which was affected by the breaches of the Investment Treaty which were upheld. Given the particular importance of the written filings in arbitrations of this kind, I am satisfied that the combination of Mr Laputa's report and the Rejoinder was sufficient to "put" the point for s.68(2)(d) purposes.

191. In cross-examination, Mr Stava was asked about Mr Oršula's account (A64(ii)), not in terms which appear to have been designed to support a case that there had been such an assignment, but rather to suggest that Mr Oršula's claim that there had been such an assignment showed that Mr Oršula was "unscrupulous and unethical and a liar." However, I do not think that the form of cross-examination during a 5 day-hearing which was very pressurised is sufficient for the point to have been withdrawn. It remained a point which had been taken and to which the tribunal's attention had been sufficiently clearly drawn that the tribunal would reasonably be expected to deal with it.

Did the tribunal fail to deal with the issue?

192. There are three references in the Award to the alleged assignment, all when summarising the parties' arguments:

    i) At [466], when summarising the Czech Republic's case as to what the 2014 Resolution decided.

    ii) At [959], when noting the Claimants' case that the assignment was invalid "so there is no reason to reduce Claimants' claim by 30% (as Mr Laputa suggests)".

iii) At [1006], when noting the Czech Republic's case that there were no documents confirming the alleged invalidity of the assignment.

193. While it might be said of any issue which would impact the relief granted that the tribunal must have rejected the argument because it is not reflected in the relief, I do not think that inference cannot fairly be drawn on this occasion. On a fair, commercial and commonsense reading of the Award in question in the factual context of what was argued or put to the tribunal by the parties, I am satisfied that the tribunal did not deal with this issue in the Award.

Is the challenge barred by s.70(2) of the 1996 Act?

194. The Claimants contend that the Czech Republic is barred from raising this s.68(2)(d) challenge by s.70(2) which requires a challenging party to "exhaust any available arbitral process for review and any available recourse under s.57."

195. Section 57 provides:

> "57 Correction of award or additional award.
>
> (1) The parties are free to agree on the powers of the tribunal to correct an award or make an additional award.
>
> (2) If or to the extent there is no such agreement, the following provisions apply.
>
> (3) The tribunal may on its own initiative or on the application of a party—
>
> (a) correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award, or
>
> (b) make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award.
>
> These powers shall not be exercised without first affording the other parties a reasonable opportunity to make representations to the tribunal.
>
> (4) Any application for the exercise of those powers must be made within 28 days of the date of the award or such longer period as the parties may agree."

196. As noted at [66] above, the Terms of Reference of 20 June 2018 signed by all three parties and the tribunal provided that the Investment Treaty arbitration was to be conducted under various of the UNCITRAL Rules which were specifically identified and, in some cases, modified.

197. Article 1 of the UNCITRAL Rules provides:

> "(1) Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree.
>
> …
>
> (3) These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail."

198. Article 37 provides:

> "(1) Within 30 days after the receipt of the award, a party, with notice to the other parties, may request that the arbitral tribunal give an interpretation of the award.
>
> (2) The interpretation shall be given in writing within 45 days after the receipt of the request. The interpretation shall form part of the award…"

199. The Claimants advance two arguments by reference to these provisions:

i) First, that it was open to the Czech Republic to seek an interpretation of the Award for the purposes of ascertaining whether the tribunal had dealt with the assignment issue.

ii) Second, if such a request cannot be made under Article 37, such a request could have been made under s.57.

The failure to follow one or other of these courses is said to preclude the Second S.68(2) Challenge.

200. David Caron and Lee Caplan's commentary on the UNCITRAL Rules (*The UNCITRAL Arbitration Rules: A Commentary* 2nd, [802]) states "interpretation, as distinct from other post-award proceedings, provides a means of 'clarification of the award' by resolving any ambiguity and vagueness". They refer to the *travaux préparatoires* for the UNCITRAL Rules noting that the word "clarification" had at one stage been proposed, referring to certain observations from representatives that interpretation involved "clarification of 'the purpose of the award'" or was "useful in resolving confusion and ambiguity in the wording of the award arising in cases where the award was not rendered in the native language of the parties". Caron and Caplan continue:

> "Interpretation is not a mechanism for revisiting an issue … that the tribunal should have decided but did not."

201. Other commentary also stresses the need for lack of clarity before an Article 37 request can be made: e.g. Thomas Webster, *Handbook of UNCITRAL Arbitration* (4th), [37-05] ("if the operative part is unclear") and [37-06] ("If the reasons are unclear in some

respect, a party may wish to have an interpretation of the reasoning of the Award to determine the scope of any issues of res judicata"). The Claimants relied upon *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* (2020) [851-22] when commenting on Article 33 of the UNCITRAL Model Law (which permits one arbitrating party with the agreement of the others to "request the arbitral tribunal to give an interpretation of a specific point or part of an award"). This commentary states:

> "There may be situations where a statement needs to be clarified, or it is uncertain whether some specific issues have been dealt with in the award or reserved for future determination.
>
> Interpretation can be used whenever the final award does not contain the minimum information necessary to grasp the tribunal's line of reasoning."

Once again, this commentary presupposes a genuine lack of clarity or "uncertainty", or an inability to "grasp" reasoning. I would note that the scope for abusive requests for interpretation under the UNCITRAL Model Law led to a requirement that both parties consent before it can be exercised (see the 329th meeting of the UNCIRAL Working Group on the UNCITRAL Model Law, on 18 June 1985 for discussion of this issue).

202. I was also referred to three decisions of this Court on wordings in other sets of arbitral rules, which I will consider in chronological order.

203. The first was *Xstrata v Benxi* [2016] EWHC 2022 (Comm), a decision of Mr Justice Robin Knowles, in which a contact referred to a party as ICRA NCA Pty Limited, but the claim had been brought in the arbitration by ICRA OC Pty Limited. Although awarding relief to ICRA OC, the award did not explain how they were able to enforce a contract to which the named party was ICRA NCA. This does not appear to have been raised as an issue in the arbitration, but proved an obstacle on enforcement. The Claimants sought an extension of time under s.79 of the 1996 Act to make an application to the tribunal under Article 27.1 of the LCIA Rules 1998 "to correct in the award any errors in computation, clerical or typographical errors or any errors of a similar nature." At [32], the Judge held that "clarifying or removing ambiguity would fall within the words 'any errors of similar nature' in Article 27.1" At [34], he said it was not a case of "interpretation", but that the Claimants could "request the arbitral tribunal to make corrections to the Award that would clarify a matter that omission had left unclear or ambiguous." It is clear that this extends to am ambiguity which has arisen in the enforcement process even though, from the English court's perspective, the meaning or effect of the award is objectively clear (*Mobile Telecommunications Co KSC v HRH Prince Hussam Bin Saud Bin Abdulaziz A Saud* [2019] EWHC 3109 (Comm), [34]-[35]).

204. The second was *X v Y* [2018] EWHC 741 (Comm), in which Mr Justice Bryan faced a s.68(2)(d) challenge to an award on the basis that the tribunal had failed to take account of certain evidence and had failed to decide an issue, namely whether the contract sued on was intended to give rise to legal relations. By the time of the hearing, the applicant to the challenge was no longer represented and did not appear, with the result that there was no full argument. The respondent took a preliminary s.70(2) objection:

i) At [14], Mr Justice Bryan held that "the present case would appear, at first blush, to be a classic example of a case where the claimant should have applied to the Tribunal under section 57 for clarification or the removal of any ambiguity in the case of arguments 1, 2 and 4." It is not possible to determine from the judgment what the award did or did not say in relation to the challenged matters.

ii) The Judge agreed with the decision of Mr Justice Robin Knowles in *Xstrata* that "clarifying or removing ambiguity" would fall within the words "any errors of a similar nature" in Article 27.1.

iii) He also held that even if that was not right, "it does not follow that Article 27 is an agreement on the part of the Tribunal that ousts or excludes the power under section 57(3)" and that "a clearer agreement would be needed to exclude or oust the power under section 57(3) to clarify or remove an ambiguity. Put another way, Article 27 is contractually permissive in terms of the Tribunal's powers but it is not to be construed as thereby excluding the powers under section 57(3)."

205. The third was *ZCCM v Kansanshi* [2019] EWHC 1285 (Comm), an application for an extension of time to bring a s.68 challenge. That application failed for a large number of reasons, and one "doubly contingent" point was a s.70(2) objection by reason of the applicant's failure to seek an additional award under Article 39 of the UNCITRAL Rules. It appears that claims were advanced for misrepresentation, breach of contract and breach of fiduciary duty, and the complaint was that the claims for breach of fiduciary duty had not been dealt with. Mrs Justice Cockerill held that if the challenged ruling had been an award (which it was not) and had the claims not been dealt with (which they had), the applicant should have sought an award on the breach of fiduciary duty claims under Article 39. It will be immediately apparent that the decision is not concerned with the meaning of Article 37, or with a failure to deal with an issue as opposed to a claim capable of giving rise to its own award or relief.

206. Against that background, I am quite satisfied that no issue of "interpretation" of the Award arises here, and that Article 37 of the UNCITRAL Rules is not engaged. There is no consideration of the merits of the 30% assignment point, nor any language in the Award which is ambiguous or otherwise lacking clarity the interpretation of which might provide an answer to the assignment issue. If I were to accept the Claimants' submissions, there is no s.68(2)(d) case which would not fall within Article 37. This is not a case, like *Xstrata*, in which there is an obvious ambiguity on the face of the award (the name of the claimant in whose favour the award is made and the name of the signatory to the contract which is the subject of the award). *ZCCM* is not addressing this point at all, and it is not possible to determine from the report in *X v Y* what the award said.

207. That brings me to the Claimants' s.57 argument. The Czech Republic was given a full opportunity to address this issue in a post-hearing submission, and I reject its (wholly unrealistic) argument that I should hold that the point is not open to the Claimants.

208. The first issue is whether the s.57 jurisdiction continues to apply alongside Articles 37 to 39:

i) It clearly must be possible to exclude s.57, which is not a mandatory provision of the 1996 Act, and which expressly recognises in s.57(1) the parties' right to agree other arrangements.

ii) While the words "to the extent that" in s.57 make it clear that simply addressing one of the topics covered by s.57 will not necessarily preclude the default rules in relation to another applying (e.g. as to the time within which such an application may be made), where the parties' rules appear to make comprehensive provision for post-Award adjustments by the tribunal, and do so in narrower terms than s.57, I am not persuaded that the provisions of s.57 can apply alongside those powers.

iii) The word "and" in s.70(2) does not assist – there may be a right of appeal within s.70(2)(a) (e.g. as with certain forms of commodity arbitrations) alongside recourse under s.57.

iv) In this case, the UNCITRAL Rules are intended to be a comprehensive set of arbitration rules which will ensure a uniformity of procedure for those who arbitrate on them, whatever the seat of the arbitration. That much is clear from Article 1(3) (see [197] above), which only allows for *mandatory* laws of the seat to supplement the rules. Section 57 does not satisfy this requirement.

v) Further, the care taken by the parties and the tribunal to identify the specific UNCITRAL Rules which would apply, with amendments as necessary, itself tells strongly against the suggestion that the rules are simply permissive, existing alongside any "default" non-mandatory rules of the seat.

209. This makes it strictly unnecessary to consider the position under s.57(3). However, I can deal with this issue briefly:

i) In *Torch Offshore LLC v Cable Shipping Inc* [2004] EWHC 787 (Comm), the applicant had brought claims that it had entered into a charterparty in reliance on two misrepresentations. The arbitrator found that both misrepresentations had been made, albeit innocently. The claim for rescission and damages failed, but a claim for breach of contract which had the same subject as one of the misrepresentations succeeded. There was a s.68(2)(d) challenge on the basis that the arbitrator had failed to address the issue of inducement in relation to one of the misrepresentations, albeit the arbitrator had rejected the claim for rescission.

ii) At [25] and [27]-[28], Mr Justice Cooke held:

> "If Torch is correct in its submission that the arbitrator simply failed to deal with the issue to which I have adverted, then there is no question of any clerical mistake or error arising from an accidental slip or omission. There is a wholesale failure to deal with an important issue.
>
> …

> In my judgment section 57(3)(b), which uses the word 'claim', only applies to a claim which has been presented to a Tribunal but has not been dealt with, as opposed to an issue which remains undetermined, as part of a claim. It is noteworthy that the terms of section 7(3)(b) differ from the terms of section 68(2)(d) in the language used. I consider that the terms of section 57(3)(b) are apt to refer to a head of claim for damages or some other remedy (including specifically claims for interest or costs) but not to an issue which is part of the process by which a decision is arrived at on one of those claims. As Counsel for Torch pointed out, Torch had claimed rescission and that claim had been rejected by the arbitrator. He could not change his award on that point and there was no room for an application to him to decide that claim, even if he had failed to decide whether there was inducement by the second representation which would have entitled Torch to rescind.
>
> If however Torch had reverted to him, applying for clarification as to whether he had decided against it on inducement by the second representation, it would have been clear in this court whether or not he had determined the issue. It seems to me that section 57(3)(a) can be used to request further reasons from the arbitrator or reasons where none exist. The policy which underlies the Act is one of enabling the arbitral process to correct itself where possible, without the intervention of the Court. Torch contended that it was clear that the arbitrator had not decided the issue and that therefore there was no ambiguity in the award which required clarification, but the very existence of a genuine dispute on this question militates against that argument. If there was unarguably a clear failure to deal with an issue, it could be said that there was no ambiguity in the award, but as set out in *Al Hadha* at paragraph 70, an award which contains inadequate rationale or incomplete reasons for a decision is likely to be ambiguous or need clarification. There was therefore room for an application by Torch under section 57, as an exchange of letters with the Owners in relation to this part of the Award would have revealed, so that the time limit of 28 days (for which section 57(4) provides) applied. In these circumstances Torch had available recourse under section 57, which had not been exhausted and section 70(2) therefore presents an insurmountable bar to Torch's section 68 application."

iii) In that case, far from it being unclear whether the arbitrator had addressed the issue of inducement in relation to the second arbitration, Mr Justice Cooke found that it was clear he had: [44] and [46]. *Torch* was a case in which the claimant was seeking to bring appeals on points of law on both inducement and loss of the right to rescind, and if it was not clear on what ground or grounds the arbitrator had refused rescission in respect of the second misrepresentation, it would not be possible to determine the practical effect of each s.69 application on its own (cf. [64]). To that extent, the claimant was seeking to raise a specific kind of ambiguity: ambiguity as to the precise basis on which it had lost.

iv) In *Buyuk Camlica Shipping Trading and Industry Co Inc v Progress Bulk Carriers Limited* [2010] EWHC 442 (Comm), [42], Gavin Kealey QC (as a

Deputy High Court judge) rejected the argument that s.57(3)(a) applied to an alleged failure to deal with an issue (whether a breach had been waived) where there was "no ambiguity in the Reasons (and thus in the Awards) that requires clarification". He distinguished the case before him from "cases where there is an element of real doubt as to whether or not an issue has been deal with", where that might be scope for s.57(3)(a) to apply ([43]). He suggested that *Torch* was such a case, in which "a tribunal has come to a decision but there is some inadequacy or absence of analysis that leaves it unclear whether, and if so how, it has dealt with certain issues in order to arrive at its decision."

v) In *Pulis v Crystal Palace* [2016] EWHC 2999 (Comm), a section 68 challenge was brought on the basis that the tribunal had failed to consider evidence as to the date of a key meeting, and failed to address arguments as to the tax consequences of ordering damages in the amount of a payment made to the applicant on the basis of fraudulent misrepresentations he had made. Sir Michael Burton rejected the argument that the failure to seek relief under s.57(3)(a) barred the s.68 challenge, holding at [6]:

> "I am however satisfied that the two challenges made by way of s.68 to this Award are not, or would not amount to, a correction of the Award, so as to qualify for recourse under s.57. If the Claimant were right, it would mean in relation to the two grounds, either no liability of the Claimant at all or, in relation to the second ground, a substantially lesser figure in damages; and I am clear that neither of the two grounds argued before me would have or could have been satisfactorily dealt with by an application under s.57."

vi) Finally, in *Gracie v Rose* [2019] EWHC 1176 (Ch), His Honour Judge Russen KC reviewed the authorities on this issue. He referred to Mr Justice Toulson's observation in *Ascot Commodities NV v Olam International Ltd* [2002] CLC 277, [29] that "where there is a finding which addresses a central issue, but leaves its reasoning unclear, the appropriate course is to ask for further reasons, But if an award as delivered fails to contain a finding on a central issue, it would be odd to ask for reasons for something which is not there." Judge Russen KC observed at [37] that "if there are no words to be corrected, removed or clarified – because [of] the complete absence of them on an essential issue means there has been a 'failure' in the section 68(2)(d) sense – then an application under section 57(3)(a) aimed at 'correcting' the omission on that issue would risk blurring the distinction between the exercise of taking up clerical points and that of repeating earlier substantive submissions as if the [award] had been remitted for further consideration under section 68."

210. I am wary of any interpretation of section 57(3)(a) which would have the effect, in conjunction with s.70(2), that any complaint that the arbitral tribunal had not considered particular evidence or determined a particular issue would automatically fail unless a s.57(3)(a) application was made. Accepting this argument risks blurring the point when a tribunal becomes *functus officio* in relation to the subject-matter of their award absent remission from the court and is likely to engage a deluge of precautionary s.57

applications with which tribunals would have to deal. Section 57 was not intended to be a ritual pre-cursor to any s.68 application.

211. I do not need to consider the issue of whether allegedly ignored evidence can fall within s.57(3)(a) (an assertion which I regard as highly improbable). However, I am satisfied that the s.57(3)(a) power is engaged in cases in which there is genuine uncertainty or ambiguity on the terms of the award as to whether a particular issue has been dealt with. The mere fact that the terms of the award would have been different had the issue been determined in the s.68 applicant's favour is not itself enough to raise such an ambiguity, nor should the court seek artificially to discern an ambiguity when, objectively, the award simply does not address the issue.

212. In the present case, the terms of the Award are not ambiguous or uncertain as to whether the 30% assignment argument was determined. On the contrary, it is clear that it has not been determined. Had s.57(3)(a) been available to the Claimants, it would not have assisted them.

Did the tribunal's failure cause substantial injustice?

213. In the arbitration, the only argument put forward by the Claimants in response to the alleged assignment is that it was not valid. That contention rested on the evidence of Mr Stava, from whom the tribunal heard. Self-evidently, the court cannot conclude on a s.68 application that this evidence is so obviously correct that the tribunal's failure to address the issue has caused no substantial prejudice.

214. On this appeal, the Claimants developed another argument – namely that any assignment of the "value" of any award against the Czech Republic would not reduce the amount of the award, but simply give Mr Oršula a claim against Diag SE for its share.

215. I see force in that submission. And there are other difficulties with the assignment argument from the Czech Republic's perspective:

i) In the arbitration (which is what matters), it articulated its argument as to what had been assigned in inconsistent terms: sometimes as the assignment of 30% of the claim (which might have provided a basis for awarding it only 70% of the loss in the Commercial Arbitration) and sometimes an interest in the claims or of the value of the award (which would not): compare A14(vii); A29, A32; A48(iv); A54(v) and A64(ii) among other references.

ii) Those submissions may reflect the lack of clarity in the document relied upon as the purported assignment, which offers something for both interpretations (albeit, clause 2 appears to contemplate Diag SE pursuing the claim, meeting the costs of doing so and charging Mr Oršula 30% of the expenses, something which suggests that it is the recovery rather than the cause of action which is assigned). I accept, however, that this is not a point which can or should be resolved in the context of the "substantial prejudice" issue.

iii) To the extent that Mr Oršula, rather than Diag SE, was said to have title to bring some of the claim against the Czech Republic in the Commercial Arbitration, this would have provided a *pro tanto* defence in the Commercial Arbitration. However, the Commercial Arbitration tribunal rejected any attempt by Mr Oršula to intervene in the arbitration or to be awarded some amount, held that he had not "presented any relevant evidence that in this case, there is no legitimisation of [Diag SE] regarding the asserted claim, or part thereof" and it awarded the full amount of the 2008 Award in Diag SE's favour, which 2008 Award the investment treaty tribunal held was entitled to recognition on the international law plane and the terms of which were held to bind the parties.

iv) To the extent that the assignment was of the value of the Commercial Award, there has been no recovery under the Commercial Award and the Claimants have now undertaken not to enforce it. To the extent that the assignment extends to the value of any Investment Treaty award of the tribunal, this would not provide a basis for reducing the amount of the Czech Republic's liability (but would give Mr Oršula a claim against Diag SE). A party may often have to pay over some of the benefit of an award to a third party – most commonly a litigation funder. The suggestion that this provides a basis for reducing the award is difficult to understand.

216. However, the arguments advanced by the Claimants in court are more extensive, and nuanced, than those advanced before the arbitral tribunal. While I can see a number of reasons why the arbitral tribunal *might* reject this argument, I do not feel sufficiently confident as to the manner in which the tribunal *would* have determined the issue to be confident that there has been no substantial prejudice.

217. I had reached this conclusion, and written the relevant section of this judgment, before being provided on 22 February 2024 with a letter sent on behalf of the Czech Republic drawing attention to a communication which they said came to their client's attention in late January and which was said to be relevant to the issue of substantial prejudice. Given the conclusion I have reached, I will say no more about this communication or the follow-on letters from the parties.

The Third S.68(2) Challenge

218. Third, it is alleged that the tribunal failed to determine whether the award of damages should be reduced to reflect the percentages of ownership Mr Stava had in Diag AG and Diag AG had in Conneco (giving rise to a challenge under s.68(2)(d) of the 1996 Act).

Is this an argument or an issue?

219. An argument that a claimant can only recover a certain percentage of loss because its protected investor or investment status only extends to part of that loss is an issue, not an argument. Once again, save where the claim fails altogether, this point would have a clear, distinct and significant impact on recovery independent of the outcome of other issues, is critical to an assessment of the amount awarded and fairness demands that it be addressed.

Was this issue put to the tribunal, and in what terms?

220. The Counter-Memorial clearly took the point that Diag SE could only recover to the extent it was owned by Mr Stava (A28), and criticised Mr Shopp for not reflecting Mr Stava's 66.7% ownership of Diag AG and Diag AG's 80% ownership of Conneco. That criticism was expressed in general terms and not limited to Head of Damage 3. The proposition asserted in footnote 943, fairly read, was making a general assertion.

221. Mr Lapuerta's accompanying report raised the 66.7% point in relation to Mr Stava (A31). It did not, however, raise any point relating to the Diag AG's 80% ownership of Conneco, although it did refer to that fact: A31-A33. Mr Lapuerta's report did not address Head of Damage 1.

222. In the Reply, the Claimants (understandably) made the point that "under the BIT, Diag Human SE is treated as a Swiss investor on the basis that it is controlled by a Swiss national", and "Mr Stava's level of shareholding in Diag Human SE is irrelevant"(A45(iii)). It did not address the position of Mr Stava personally.

223. The Czech Republic's Rejoinder raised both issues including, the 80% issue: A54(iv) and A55. The point was clearly taken both in relation to Mr Stava and Diag SE. It was not limited to Head of Damage 3 but a general assertion that "Claimants are only entitled to a proportion of any awarded damages". Figure 9 also made it clear that these points were taken in relation to both Heads of Damage 1 and 3.

224. On the basis of this material, I am satisfied that the point was put. I am also satisfied that it was not limited to Head of Damage 3.

Did the tribunal fail to deal with the issue?

225. I am satisfied that the tribunal clearly addressed the issue so far as Diag SE is concerned. The argument taken (that Diag SE was, in effect, only partially Swiss for the purposes of the Investment Treaty) had been correctly answered by the Claimants on the basis that Mr Stava's control of Diag SE was sufficient for it to constitute a Swiss investor, and the tribunal accepted that argument at Award, [397]-[398], finding that Mr Stava was Swiss from 10 June 1991, that Diag SE "was at all relevant times under the direct or indirect control of Mr Stava" and that "consequently, as a result of Mr Stava's direct or indirect control, Diag Human SE likewise meets the definition of 'investor'". Indeed, Mr Bastin KC did not really seek to challenge that conclusion, his only responsive argument being that this did not address the position of Mr Stava.

226. What of Mr Stava?

    i) There was a finding that Mr Stava owned 100% of Conneco and/or controlled 100% of its bearer shares from 6 April 2001 onwards ([401]-[403]), there having been no disposal through the Lawbook transaction ([407]-[408], [412]).

    ii) "The tribunal awarded the amount of the 2008 Award as compensation for the damage suffered as a result of the Respondent's interference with the review process" ([1030]), which took place during the period of Mr Stava's 100% ownership.

iii) It follows, therefore that at the date of breach as found by the tribunal, Mr Stava was the 100% owner of Conneco, and the 66.7%, 80% and 53.4% issues simply do not arise in relation to that breach.

227. In those circumstances, to the extent of the 2014 Review breach, I am satisfied either that the tribunal did deal with the point, or that there was no substantial prejudice in the relation to the 2014 Review breach claim.

228. I accept that the tribunal did not deal with the issue of Mr Stava's 66.67% interest in Diag AG and its 80% interest in Conneco at the date of the Bojar Letter breach (although, given their finding in relation to the 2014 Review breach, I can well understand why this point was overlooked).

Is the challenge barred by s.70(2)?

229. Focussing on the impact of Mr Stava's 66.67% ownership of Diag AG and Diag AG's 80% ownership of Conneco at the date of the Bojar Letter breach, I am satisfied that there is no genuine uncertainty or ambiguity as to effect of the Award, and that s.70(2) does not operate as a bar to this s.68(2)(d) challenge.

Did the tribunal's failure cause substantial injustice?

230. On the basis of my findings at [226] and [227] above, I am not presently persuaded that the tribunal's failure to deal with the 66.7%, 80% and 53.4% issues at the time of the Bojar Letter breach caused substantial injustice. However, I will defer reaching a final decision on this issue until all of the challenges have been determined.

The Fourth S.68 Challenge

231. This challenge asserted that if the tribunal did not have jurisdiction by reason of the Koruna Trust or Lawbook Objections, then there was a s.68(2)(d) challenge on the basis that it should not have awarded damages by reference to events after June 2011. I found the basis on which this was said to raise a s.68(2)(d) issue difficult to understand, and there was no real attempt in argument to develop the point. For present purposes, it suffices to state:

i) The Tribunal did consider and determine this argument, because they rejected the Czech Republic's case as to the effect of the June 2011 transactions (Award, [410]).

ii) I have held that it is not open to the Czech Republic to re-open the post-June 2011 issue so far as Mr Stava is concerned, because the point is not jurisdictional ([145]-[146] above).

iii) If, however , a jurisdictional challenge to Mr Stava's right to claim post-June 2011 loss did exist and was upheld, the Czech Republic could seek to set aside the Award to the extent of any such award (under s.67(30(c)).

I CONCLUSION

232. For these reasons:

i) Save for (i) the No Investments Objection so far as it concerns the existence and extent of the Novo Nordisk co-operation agreement, the issue of whether the Arbitration Agreement constitutes an investment and the existence and extent of the Co-operation Agreements; (ii) the Koruna Trust, Lawbook and No Control Objections to the extent set out at [121] (subject to (ii) below) and the Dispute Timing Objection, the s.67 challenges brought by the Czech Republic are not open to them.

ii) The Koruna Trust, Lawbook and No Control Objections to the extent set out at [121] are only open to the Czech Republic against Diag SE, and not Mr Stava.

iii) The First S.68(2) Challenge is dismissed.

iv) The Second S.68(2) Challenge is upheld.

v) The position on the Third S.68(2) Challenge is reserved.

vi) The Fourth S.68(2) Challenge is dismissed.

ANNEX

THE COURSE OF THE ARBITRATION

The Pre-Disclosure Phase

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8. Focussing on the issues of relevance to jurisdiction:

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

ii. It was alleged that the Claimants had shared knowledge and know-how with the Czech healthcare sector, that a large number of hospitals and transfusion centres

entered into co-operation agreement with the Claimants, that pursuant to those agreements the Claimants provided training, equipment and paraphernalia; invested in an office building; developed storage for blood derivatives including a walk-in freezer; established employee accommodations; acquired six vehicles; one deep freezer truck; goods and equipment kept in stock; a consignment warehouse and purchased equipment and derivatives ([48]-[52]). Reference was also made to the Arbitration Agreement ([158]), and the various awards in the Commercial Arbitration, albeit these were not clearly described as investments in this section ([173], [197], [238]).

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

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

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

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

10. The allegations of breach included:

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

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

11. Section V addressed loss and damage. In an approach which court and arbitration practitioners will find equally familiar (and, I suspect, equally unenlightening), this advanced a compendious damages claim for all the pleaded breaches. The claim, totalling USD 2.483 billion, had the following principal elements:

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

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

    iii. Loss of reputation ([508]).

    iv. Moral damages ([508]).

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

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

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

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

    The claim for moral damages was not addressed.

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

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

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

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

ii. There was some development of the "intended preliminary objections" with a view to showing that they were sufficiently arguable to merit an order for bifurcation (this being a criterion to be applied when considering whether to make an order for bifurcation identified in *Glamis Gold Ltd v United States* UNCITRAL Procedural Order No 2 (Revised) 31 May 2005). In this context, the Czech Republic submitted (at [73]):

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

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

a) Mr Stava had only acquired Swiss nationality in June 1991; the Investment Treaty only came into force in August 1991; and Diag SE did not exist before August 2006. However, the dispute had crystallised before the Investment Treaty entered into force and the "alleged investments" were made before Mr Stava acquired Swiss nationality.

b) The Czech Republic did not come into existence until January 1993 and could not be liable for breaches of the Investment Treaty before that date.

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

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

a) It was noted that "the issue of whether or not the Claimants are entitled to bring claims as injured parties requires a separate analysis from the question of whether the requirements for jurisdiction under the BIT have been met." It was reiterated that the question of standing "is distinct from the question of whether each Claimant meets the BIT definition of 'investor'".

b) This was said to require the Claimants to prove that they had suffered personal loss by establishing that they held a stakeholding interest in the alleged investment and had "not sold or transferred their claims" (with a footnote reference stating "as noted above, on 2 March 2011 Diag Human a.s. assigned 30% of its claim against the State to its lawyer").

c) There was no contemporaneous evidence proving that between 1990 and 1992, Mr Stava controlled Diag Human AG which in turn allegedly owned and controlled Diag Human a.s", with a footnote reference to a 1998 report stating Mr Stava owned 66% of the capital of Diag AG (footnote 117).

d) There was "scant evidence" as to Mr Stava's interest in the various companies at the time of breach or the time the RFA was filed, with the result that there was not "sufficient evidence of Mr Stava's standing (and therefore the standing of Diag Human SE which is predicated on Mr Stava's nationality)", which "requires a thorough examination before the Tribunal turns to the merits phase."

e) There was no evidence Mr Stava was a beneficiary of the Koruna Trust which held bearer shares in Diag SE, and a general lack of evidence as to the trust arrangements.

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

a) The 2008 Award and the arbitration proceedings were not investments because they were not "based on an underlying foreign investment in the Czech Republic" ([10]).

b) There was no "Framework Agreement" between the Claimants and the Czech Republic ([11]).

c) The Co-operation Agreements were "merely barter trade contracts", "had been prohibited by the Ministry of Health at the time they were executed" and were terminated in 1992, and there were only a few of them for a limited quantity of products ([11]).

d) There had been no attempt to "itemize the property that allegedly formed the basis of their investment" which, even if it existed, was not targeted by any of the alleged measures, and which only formed "pre-investment activities" ([52]).

e) The matters relied on were "either unsubstantiated, irrelevant or illegitimate" ([53]).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

        a) At the time of the 1990 Selection Procure, Conneco did not have permits which were "blood plasma-specific or directly related to the blood plasma activities."

        b) The Co-operation Agreements were "inappropriate backdoor efforts … to circumvent the bidding process."

    ii. The Co-operation Agreements "failed to assist Claimants in establishing jurisdiction, as all of them were signed in direct contravention of the Ministry's

February 1991 direction …" and they had "all terminated by mutual consent by November 1992", with the result that "to the extent that Mr Stava ever had a plasma 'business' in the Czechoslovakia (*quod non*), that business had already ceased exist before the Czech Republic came into existence as a sovereign state in January 1993".

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

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

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

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

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

viii. No reference was made to the Arbitration Agreement.

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

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

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

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

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

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

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

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

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

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

Footnote 943 stated:

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

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

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

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

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

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

32. He also stated:

> "In 2001 CONNECO had assigned 30% of any potential award to Mr Oršula. As Mr Oršula is not a named party to this arbitration, I would reduce any damages to Claimant Diag Human SE by 30%."

This was a reference to Head of Damages 3, because Mr Laputa did not address loss said to flow from the interference in the 2014 Review and the non-payment of the 2008 Award.

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

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

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

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

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

Disclosure

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

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

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

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

iv. The tribunal ordered production of the documents.

The Period from Disclosure to the Oral Hearing

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

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

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

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

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

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

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

40. It was also alleged that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

i. failure to pay the 2008 Award;

ii. interest on the Partial Award;

iii. loss of Czech business enterprise; and

iv. reputational losses.

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

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

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

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

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

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

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

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

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

i. It denied that the awards in the Commercial Arbitration had preclusive effect in the Investment Treaty arbitration. In summarising the Claimants' case, the Rejoinder submitted "in other words, in lieu of presenting evidence in this investor-State arbitration, Claimants hope to establish a breach of the BIT,

causation *and damages* in the present arbitral context by relying upon the purported findings in the Domestic Arbitration awards." (emphasis added) ([369]).

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

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

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

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

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

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

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

([427]-[428]).

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

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

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

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

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

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

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

a) It said that Diag SE only came into existence in 2006 (an argument which assumed it was not the corporate successor to Conneco which is no longer pursued) ([472]) and in any event ceased to be "Swiss" for the purposes of the Investment Treaty when Mr Stava sold his interest ([474]).

b) It was "wholly irrelevant" whether Mr Stava had an investment before February 1994, and by that date, any "alleged pre-existing investment" had ceased to exist ([461]). In this context it was noted that the co-operation agreements were executed "in defiance of the Ministry's earlier instructions", all of which were terminated by mutual consent before February 1994 ([466]).

c) "To demonstrate that by 1994, any alleged pre-existing 'investment' by Mr Stava had already ceased to exist", reference was made to the Minister of Health's directive to hospitals and the early termination of the Co-operation Agreements by mutual consent ([462]-[466]).

d) By January 1993, when the Czech Republic became a sovereign state ([468]), "no 'cooperation agreements' existed"; Conneco had no export permit for plasma for fractionation (with a footnote suggesting Conneco had not proved it had the necessary permits); Conneco had purchased an office building about which "no merits or damages claim was made"; and "whatever blood plasma 'business' Conneco may have had (at some point) was gone".

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

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

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

54. Section V addressed damages:

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

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

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

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

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

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

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

Figure 9: Claimants' entitlement to any damages awarded

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

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

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

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

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

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

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

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

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

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

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

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

The Oral Hearing

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

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

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

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

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

61. The Claimants' presentation also discussed:

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

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

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

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

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

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

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

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

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

which was said to make the claims "contrary to the spirit, if not the letter, of the BIT".

ii. It noted "the Tribunal expressed a preference not to hear the parties on the jurisdictional issues at this hearing" but made brief submissions on the "temporal reach of the substantive provisions of the treaty, which is a merits issue", referring to the timing of the alleged breaches. In this regard, it specifically challenged the assertion in the Rejoinder on Jurisdiction that the argument that the Czech Republic succeeded to the Investment Treaty only from 1994 was "a brand-new argument."

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

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

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

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

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

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

> "Are you saying that if we apply [preclusion] even-handedly, we, the Tribunal, should apply issue preclusion to both parties?"

to which the Czech Republic, after the opportunity for overnight consideration, replied:

> "If the Tribunal were to decide that it must apply issue estoppel, at a minimum, it would have to try to be even-handed in its application …"

before identifying various matters the Claimants should be estopped from re-arguing, concluding:

> "You need to do whatever makes sense. You need to apply a little reason and do whatever would advance the goal of justice and the goal of fairness."

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

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

64. So far as cross-examination is concerned:

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

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

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

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

an assignment could have given rise to a pro tanto defence in the Commercial Arbitration).

The Post-Hearing Phase

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

> "4. What was the state of Claimants' contractual relations with Novo Nordisk at the various times relevant to assessing both Treaty breaches and damages? What bearing should the state of those relations have on the Tribunal's assessment of Treaty breaches and damages?
>
> …
>
> 8. Is there evidence that there were improper or corrupt measures to constitute and influence the 2014 review panel? If so, what bearing should that have on the tribunal's consideration of the review panel's 2014 resolution and of the award of 2008?
>
> 9. If the tribunal were to find that non-compliance with a domestic arbitration award could, in and of itself, be considered a breach of a BIT, should it be concerned that the system of BITs might then constitute a parallel enforcement process to the New York Convention?
>
> 10 Would a potential award in this dispute present a risk of double-recovery (i.e. under the BIT and through enforcement proceedings in national courts of the award of 2008) and, if so, would the Claimants be prepared to give an undertaking foregoing the possibility of double-recovery?"

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

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

> i. "What has emerged is undeniable proof of the Respondent's attempts to unduly and unlawfully interfere with the arbitral process; and this fact offers a further principled reason why the Tribunal must not depart from the earlier findings" ([10]).
>
> ii. "Perversely, the Respondent attempts to rely on its own misconduct in interfering with the arbitral process to undermine the res judicata effect of the Commercial Arbitration. The general principle that no one should benefit from his own wrongdoing ('commodum ex iniuria sua nemo habere debet') is central to the administration of justice, whether by international or domestic courts and tribunals. Nothing the Respondent has said or done shows it deserves an exemption" ([33]).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

    v. It referred to a further alleged breaches on 25 June and 12 July 1991 and submitted that (i) the Investment Treaty was not in force; and (ii) the only alleged investments at those dates were the Cooperation Agreements which were signed before Mr Stava acquired Swiss nationality, were executed by the hospitals in breach of the Ministry of Health instructions, and were superseded and terminated in 1992.

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

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

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

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

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

effect. Later, the argument that the 2008 Award was not an investment was developed.

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

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

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

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

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

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

73. The section on damages addressed what was said to be uncertainty as to whether the Claimants were claiming both Heads of Damage 1 and 3, noting the Claimants were seeking to claim twice the amount awarded in the 2008 Award, relying on some findings in the Commercial Arbitration but not regarding themselves as being bound by others, in particular whether loss continued after 2000 ([187]). It was said that the Claimants

"rely on the findings of the Domestic Arbitration Awards as supposedly *res judicata* while simultaneously departing from findings they consider inconvenient" ([189]).

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

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

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

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

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