UKSC/2025/0176

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

THE CZECH REPUBLIC

Claimant/Respondent

and

(1) DIAG HUMAN SE
(2) JOSEF STAVA

Defendants/Appellants

DEFENDANTS'/APPELLANTS' WRITTEN CASE

- *References are in the following form:*
  - *to the appeal bundle: {**Vol/Tab/Page**};*
  - *to the first instance judgment of Foxton J dated 9 August 2024: (HC Judgment/[para number]);*
  - *to the judgment of the Court of Appeal (the "**CA**") dated 7 May 2025: (CA Judgment/[para number]);*
  - *to the Statement of Facts and Issues dated 28 May 2026: (SOFI/[para number]);*
  - *to the arbitral award dated 18 May 2022: (Award/[para number]).*

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A. INTRODUCTION

(1) The background to this appeal

1. This is an appeal in a challenge to an arbitral award brought pursuant to s.67 of the Arbitration Act 1996 ("**AA 96**").

2. The Claimant is the Czech Republic ("**C**"). Since **1992**, it has been engaged in a dispute with the Respondents, Diag Human SE ("**Diag SE**") and Josef Stava ("**Mr Stava**") (collectively, "**Ds**"), arising out of its interference in Ds' burgeoning Czech blood plasma business.

3. That dispute led to Diag SE pursuing a claim against C in domestic Czech arbitration (the "**Commercial Arbitration**"). An award was initially made in Diag SE's favour (the "**2008 Award**"), but was subsequently (purportedly) cancelled in arbitral review proceedings (the "**Review Proceedings**"). Ds then commenced an arbitration 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 "**BIT**" or the "**Treaty**") contending (amongst other things) that C's original interference in Diag SE's blood plasma business and its interference in the Commercial Arbitration and Review Proceedings were in breach of C's obligations under the Treaty. {TAB21.1/651}

4. By an award dated **18 May 2022** (the "**Award**"), the Tribunal constituted under the Treaty held that C was in breach of its Treaty obligation of "*fair and equitable treatment*", including by engaging, in the Commercial Arbitration and the Review Proceedings, in a campaign of corruption and subterfuge which amounted to an abuse of its sovereign powers. The Tribunal awarded **both Ds** damages and post-award interest in a sum which currently totals **c.US$750m**. {TAB21.10/738}

5. The specific findings made by the Tribunal (which now have presumptive validity) include the following: **(i)** at a meeting in the office of the (then) Czech Prime Minister, it was confirmed (as recorded in minutes of the meeting) that the Czech secret service and the Czech police held one of three review arbitrators "*by the balls*" and that another of the review arbitrators had requested "*subsidies*" to ensure a favourable outcome for the State;[1] **(ii)** the Czech secret service had not only engaged in intimidation but had also been {TAB21.10/990}

[1] Award/[820]-[825] {**ref**}.

deployed to provide "*harmful information about Mr Stava*" for use in the Commercial Arbitration;[2] **(iii)** further, the Czech State had "*abusively*" deployed "*the coercive powers of the police in order to exercise pressure on the various actors in the Commercial Arbitration and to obtain evidence favourable to the State*",[3] including "*threaten*[ing]" arbitrators "*with fines and criminal proceedings*";[4] **(iv)** the (then) Czech Prime Minister had accepted a meeting with Diag SE's former (disbarred) lawyer and obtained from him a "*memorandum containing confidential information belonging to Diag Human a.s.* [Diag SE's predecessor];[5]" and **(v)** the Czech Republic had even gone as far as attempting to use its Parliament to make amendments to the Czech Arbitration Act "*in order to win the Commercial Arbitration*".[6] See SOFI/[40] for further detail as to the findings made in the Award. {TAB1/23}

6. The seat of the BIT arbitration was London. In **June 2022**, C issued an arbitration claim challenging the Award on numerous grounds under ss.67 and 68 AA 96. As noted by Males LJ in an earlier judgment of the CA, C's arbitration claim *did not* include a challenge to the findings of wrongdoing made in the Award ([2023] EWCA Civ 1518 at [16]). {TAB22.3/1083}

7. C's challenge *did* include a contention that the Tribunal lacked jurisdiction over the Treaty claims brought by Diag SE. C relied (so far as relevant to this appeal) on Article 1(1)(c) of the Treaty, which provides that an "*investor*" shall include "*legal entities established under the law of any country which are, directly or indirectly, controlled by nationals of* [a] *Contracting Party*". C alleged that Diag SE did not meet this definition and therefore did not qualify as an "*investor*". {TAB21.1/653}

8. However, C's jurisdictional objection was held to be limited by operation of s.73 of the AA 96 (see HC Judgment/[168]). C was only permitted to advance the objection which the Court held C had raised in the BIT arbitration, namely that Mr Stava ceased to be in control of Diag SE **as a result of certain events in 2011 and as of the end of December 2011**. In particular: {TAB13/531}

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[2] Award/[729] {**ref**}. {TAB21.10/963}
[3] Award/[737]-[749] {**ref**}. {TAB21.10/965}
[4] Award/[750] {**ref**}. {TAB21.10/971}
[5] Award/[736] {**ref**}. {TAB21.10/965}
[6] Award/[751] {**ref**}. {TAB21.10/972}

(1) In **May 2011**, Mr Stava entered into a transaction called the '**Lawbook Transaction**'. This consisted of a purported sale by Mr Stava of his 100% shareholding in Diag SE (the "**Diag Shares**") (see SOFI/[42]). {TAB1/25}

(2) The effect of the transaction documents was (in summary) that, if the purchase price was not paid by the buyer by **31 December 2011**, ownership of the Diag Shares would be vested in a Liechtenstein law trust called the '**Koruna Trust**'. Mr Stava was Settlor and Protector of the Trust, as well as a discretionary beneficiary under it.

(3) The trial Judge held that the Lawbook Transaction was not a "*genuine transaction*" (HC Judgment/[170(iii)]) and that it was only entered into because C had told Mr Stava that it would help the settlement of their long-running dispute if he were to "*distance*" himself from Diag SE (HC Judgment/[170(iii)]). Thus - as intended from the outset - the purchase price was never paid. {TAB13/532} {TAB13/532}

(4) It is common ground that, notwithstanding the performative nature of the Lawbook Transaction, the transfer of ownership of the Diag Shares into the Koruna Trust was effective.

9. At first instance, Foxton J (as he then was) held that, on the proper interpretation of the Treaty, the requirement for an entity to be "*controlled*" by a national of a Contracting Party in Article 1(1)(c) did not require *de jure* control and could in principle be satisfied by *de facto* control (see HC Judgment/[214]). He further held that Diag SE was under the *de facto* control of Mr Stava (a national of Switzerland, being one of the Contracting Parties) even after ownership of the Diag Shares had been transferred to the Koruna Trust (see HC Judgment/[216]). Thus, C's s.67 challenge in respect of Diag SE was dismissed. {TAB13/548} {TAB13/549}

10. The CA reversed the decision on both points and therefore upheld C's s.67 challenge in respect of Diag SE (see CA Judgment/[193], [208]). At a consequentials hearing, it also held that the success of that challenge had no impact on the Award in favour of Mr Stava (see [2025] EWCA Civ 998 at [22]). {TAB6/297} {TAB6/302} {TAB7/353}

(2) The issues on appeal

11. The Supreme Court granted Ds permission to appeal on two grounds. In summary:

(1) **First**, that the CA erred by concluding that "*control*" for the purposes of Article 1(1)(c) required that a legal entity be controlled *de jure* and could not be established by *de facto* control.

concluding that Mr Stava was not in *de facto* control for the purposes of Article 1(1)(c).

12. In summary:

    (1) Ds' case on the **first ground** is that the term "*control*" in Article 1(1)(c) of the BIT includes both *de jure* and *de facto* control, with either alone sufficing. This is the correct interpretation on the basis of the general rule of treaty interpretation, i.e. Article 31(1) of the Vienna Convention on the Law of Treaties ("**VCLT**"). The correctness of this interpretation is confirmed when account is taken of relevant rules of international law applicable in the relations between the parties (Article 31(3)(c) of the VCLT) and supplementary means of interpretation (Article 32 of the VCLT). {TAB29.32/2420} {TAB29.32/2420}

    (2) Ds' case on the **second ground** is that the CA erred by applying an unduly narrow test for assessing *de facto* control. In particular, the CA required Mr Stava to have actually exercised his power to replace the *de jure* controller with himself/his company before it could be said that he was in *de facto* control. However, control is context-specific and, on the facts of this case, the correct test was to ask (in summary) whether Mr Stava could procure that his wishes be carried out. For the reasons explained below, the answer to that question is plainly "*yes*". It was therefore not necessary for Mr Stava to have actually exercised his power of coercion/sanction over the *de jure* controller in order to establish his *de facto* control.

13. Each of the grounds is addressed in turn in **Sections B and C** below.

14. Finally, by way of introduction:

    (1) C has been granted permission to appeal in respect of the CA's dismissal of its challenge to the Tribunal's jurisdiction over the claims brought by **Mr Stava**. In summary, the CA held that C's s.67 challenge in respect of Mr Stava did not in fact raise any issue of jurisdiction (CA Judgment/[123]). As agreed by the parties and notified to the Court, Ds will address C's appeal in a separate written case. {TAB6/277}

    (2) C was refused permission to appeal in respect of the CA's conclusion that a successful jurisdiction challenge in respect of Diag SE has no impact on the award in favour of Mr Stava.

B. GROUND 1: THE MEANING OF 'CONTROL' IN ARTICLE 1(1)(C)

15. The Judge at first instance was correct to conclude that "*control*" in Article 1(1)(c) carries both of its ordinary meanings of legal and *de facto* control. Ds' submissions on this issue are structured as follows:

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

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

    (3) **Section 3** addresses the proper interpretation of Article 1(1)(c):

        a. **Subsection i** identifies what Ds submit are two errors in the CA's approach to interpretation, which pervaded its reasoning and had a decisive impact on its conclusion.

        b. **Subsection ii** contains what Ds submit is the correct application of the principles of treaty interpretation to Article 1(1)(c), addressing in turn: (a) ordinary meaning; (b) the context by reference to i) Article 1(1); ii) Article 1(2); and iii) the Protocol; (c) the object and purpose of the Treaty; and finally (d) other interpretive aids. A proper application of the principles in context demonstrates that "*controlled*" in Article 1(1)(c) encompasses *de facto* control and does not require control *de jure*.

    (4) **Section 4** addresses the relevance and weight to be given to investment treaty jurisprudence on control, a majority of which supports the conclusion that "*control*" may be satisfied by *de facto* control. It also addresses relevant academic commentary.

(1) The applicable principles of treaty interpretation

16. The general or basic rule of treaty interpretation is set out in Article 31(1) of the VCLT {**ref**}. This requires a court "*to ascertain the ordinary meaning of the terms used in their context and in the light of the [relevant treaty's] object and purpose, with recourse to supplementary means of interpretation … to confirm the meaning thus ascertained*": *MSC Mediterranean Shipping Co SA v. Stolt Tank Containers BV* [2024] 1 All. E.R. (Comm) 364; [2023] EWCA Civ 1007 at [61] {**ref**}. {TAB29.32/2420]} {TAB27.10/1899}

17. Article 31(3) of the VCLT further provides that:

> "*[t]here 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." ***{ref}*** {TAB29.32/2420}

18. As the CA emphasised by reference to *JTI Polska Sp Z.o.i. v. Jakubowski* [2024] A.C. 621; [2023] UKSC 19 (CA Judgment/[154]), Article 31 involves a "*single combined operation*" {**ref**}. {TAB6/286} {TAB27.9/1876}

19. Article 32 of the VCLT permits recourse to be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning if applying Article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. {TAB29.32/2421}

(2) The terms of the Treaty

20. Article 1(1) of the Treaty defines the term "*investor*":

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

(a) natural persons who are nationals of that Contracting Party in accordance with its laws;

(b) legal entities, including companies, corporations, business associations and other organizations, which are constituted or otherwise duly organized under the law of that Contracting party and have their seat, together with real economic activities, in the territory of that same Contracting Party;

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

21. Article 1(2) contains a broad definition of the term "*investments*" which notably does not limit an investment to one made through a joint stock company. It states:

The term "investments" shall include every kind of assets and particularly:

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

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

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

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

*(e) concessions under public law, including concessions to search for, extract or exploit natural resources as well as all other rights given by law, by contract or by decision of the authority in accordance with the law. {***ref***}* {TAB21.1/653}

22. The context for interpretation under Article 31 includes the preamble, which expresses the object and purpose of the Treaty – in broad terms – as encouraging, protecting and promoting foreign investments. It states:

The Czech and Slovak Federal Republic and the Swiss Confederation,

Desiring to intensify economic cooperation to the mutual benefit of both States,

Intending to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party,

Recognizing the need to promote and protect foreign investments with the aim to foster the economic prosperity of both States.

Considering the Final Act of the Conference on Security and Cooperation in Europe,

*Have agreed as follows: {***ref***}* {TAB21.1/652}

23. The CA placed significant emphasis on the first paragraph of the Protocol to the Treaty, which provides that:

*(1) An investor according to Article 1, paragraph 1, letter (c) may be required to submit proof of such control in order to be recognized by the Contracting Party in the territory of which the investment has been or is to be made as an investor of the other Contracting Party. {***ref***}* {TAB21.1/662}

(3) The proper interpretation of Article 1(1)(c)

i. Errors underlying the CA's interpretation of Article 1(1)(c)

24. Ds contend that two fundamental errors underlay the CA's analysis.

(a) It misconceived the function of the 'investor' definition in the Treaty

25. The Court considered that the analysis should start with the "*function of the definition of 'investor'*" in the BIT (CA Judgment/[155]-[159]). As noted in paragraph 16 above, however, the starting point under the VCLT is the ordinary meaning of the terms used in their context and in the light of the Convention's object and purpose. {TAB6/286}

26. As regards the function of the definition, the CA concluded that the concept of ownership "*is inherent in the function of the definition of 'investor'*". It justified this conclusion on the basis that, first, the substantive rights conferred on an investor "*suggest*[*s*] *that an investor should be someone to whom returns from making the investment will flow, typically as a result of their ownership of the investment*"; and, second, that "*it is to be expected that the person entitled to make a claim for compensation would be a person who would have been entitled to receive those profits – typically, in the case of a company, the owner of the shares*" (CA Judgment/[156]-[157]). {TAB6/286}

27. This functional analysis cannot however be sustained.

28. Article 1(1) is concerned solely with the definition of 'investor'. It introduces three sub-paragraphs in general terms ("*The term 'investor'... refers to*"). Each sub-paragraph then identifies a connection between one of two very broad categories of persons - "*natural persons*" in 1(1)(a) and "*legal entities*" in 1(1)(b) and (c) - and either of the Contracting States. "*Natural persons*" or "*legal entities*" that satisfy a specified connection are "*investors*" for the purposes of the Treaty. {TAB21.1/653}

29. Nothing in the terms of Article 1(1) suggests that persons seeking to qualify as "*investors*" must also have a connection with the "*investment*". The tribunal in *Nova Group Investments, B.V. v. Romania*, ICSID Case No. ARB/16/19, Award, 13 June 2024 (Kalicki (P), Clay, Reichert) {**ref**} rejected this approach even in the context of a treaty where a nexus between "*investors*" and "*investments*" was expressly required (albeit under the provision on jurisdiction *ratione materiae*, i.e. the definition of "*investment*"). The Tribunal said at [517]: {TAB30.16/2794}

> "*The Tribunal is unpersuaded by the Respondent's argument that the Treaty's stated definition of "investors" in Article 1(b) should be informed by its separate definition of "investments" in Article 1(a), as meaning "every kind of asset invested by investors of one Contracting Party in the territory of the other ..." The Respondent's argument is that the word "by" in this phrase implies that a Dutch national must have had an active role, in the sense of ultimate control or beneficial ownership, in the establishment of the investment. However, the Tribunal does not see this phrase as addressing at all the subject of ratione personae, namely whether a particular claimant is a qualifying person or entity under the Treaty. Rather, the phrase is relevant to the different issue of ratione materiae (discussed below in Section V.B), which considers whether a claimant itself made any real "investment," in the ordinary sense of that word.*" *{***ref***}* {TAB30.16/2804}

30. Thus, a *'natural person'* who possesses the nationality of either Contracting State will meet the definition of Article 1(1)(a), irrespective of any entitlement to profits or returns from the investment, or of any ownership of the investment. The same would apply under Article 1(1)(b) to a *'legal entity'* having its seat, and real economic activities, in the territory of either Contracting State.

31. Article 1(1)(c) extends the protection of the treaty beyond legal entities in Article 1(1)(b) (i.e. those with the nationality of either Contracting State as well as the seat and real economic activities in either territory) to legal entities with *any* nationality, provided that they are controlled, directly or indirectly, by natural persons satisfying Article 1(1)(a) or legal entities satisfying Article 1(1)(b). The purpose of this provision is simply "*to expand potential access to treaty protection to legal entities that cannot meet the requirement ... that they are constituted under the law of the other Contracting Party*" (*Nova Group Investments* at [512] {**ref**}). {TAB30.16/2802}

32. The State Parties to the Treaty could have adopted a definition of "*investor*" that included some of the substantive elements discussed by the CA, including a functional nexus between the investor and the investment. There are indeed examples of 'thicker' jurisdictional clauses in investment treaty practice imposing additional jurisdictional requirements for natural or legal persons to qualify as "*investors*". For example, the "*investor*" definition in the Austria-Slovenia BIT requires that investors be persons "*making or having made an investment in the other Contracting Party's territory*" {**ref**}.[7] {TAB29.4/2141} Establishing jurisdiction *ratione personae* under a provision of this kind will involve determining if the putative investor is making or has made an investment in the other State's territory. The BIT, however, contains no such additional qualifying requirement for an "*investor*". Under its terms, the connection between the investor and the investment is not a jurisdictional matter within the scope of the "*investor*" definition.

33. In addition, the CA justified its analysis of the function of the "*investor*" definition by reference to "*the principle of reciprocity*". It reasoned that, given that Article 1(1)(c) extends the protection of the Treaty beyond natural persons and legal entities of one of the Contracting States, "*the interpretation of [1(1)(c)] should not be approached ... to give an*

[7] The *Korea-US Free Trade Agreement*, which the CA has considered in *Elliott v. Korea* [2025] EWCA Civ 905 {**ref**}, is another example of a treaty imposing more substantive jurisdictional limitations than the Treaty at issue here. {TAB27.13/1964}

extended meaning to the concept of control" (CA Judgment/[158]-[159]). Again, there was no basis for these assumptions to be made. There is nothing non-reciprocal in the obligations in Article 1(1)(c). Nationals of each Party can benefit equally from the extension of treaty protection to non-national legal entities. {TAB6/287}

34. In sum, the CA's reliance on the supposed "*function*" of the definition was misplaced. It proceeded from the wrong premise that Article 1(1)(c) could operate only if there was a particular connection between the investor and the investment, and treated ownership, rather than control, as the organising principle of that provision. However, the proposition that the concept of ownership "*is inherent in the function of the definition of 'investor'*" (CA Judgment/[157]) finds no support in the Treaty, and the term "*controlled*" in Article 1(1)(c) should not be artificially read down on that basis. {TAB6/287}

(b) It wrongly assumed that a *'de facto'* test would be "*vague and unmanageable*"

35. The CA further erred in considering that a test which encompassed any form of *de facto* control would be "*vague and unmanageable*" (CA Judgment/[175], [192]). {TAB6/292} {TAB6/296}

36. There is no evidence, in the investment treaty context or more generally in international law, that supports the notion that States view *de facto* control tests in this way. In fact, the evidence shows the opposite: (a) investment treaty tribunals have applied the *de facto* control test and carried out detailed factual and evidential inquiries under similar provisions in various cases (e.g. see **Section B.4** below); (b) States, including Switzerland and the Czech Republic, have explicitly adopted this test under the ECT (see paragraph 80 below) and under other treaties (e.g. Macao-PRC BIT (2008) Article 1(b), stating that "*control means de facto control, determined after an examination of the actual circumstances*" {**ref**}); (c) *de facto* control tests, involving highly complex factual inquiries, are far from uncommon in general international law, e.g.: under the customary international law rules on attribution of conduct to States (e.g. for the purposes of establishing whether an organ of the State is a *de facto* organ under Article 4 of the International Law Commission's Articles on State Responsibility {**ref**}, or whether a {TAB29.16/2248} {TAB29.15/2234}

person is under the control of the State under Article 8{**ref**}),[8] or under international humanitarian law to establish whether a territory is under belligerent occupation. {TAB29.15/2235}

37. In any event, a *de jure* test is not free from practical difficulties either. For example, C argued in the alternative that, while a majority shareholding would ordinarily be required for purposes of *de jure* control, "*relative control*" by a non-majority shareholder might suffice, where, for example, "*you have 45% [shareholding], but there's some other feature which enables you to say that you control it"* (CA Transcript, Day 5, p. 147:17-18 {**ref**}). The CA said that it did not need to decide on "*relative control*" but accepted that much of its reasoning favoured C's "*primary case*", i.e. that "*controlled by*" means majority shareholding (CA Judgment/[194]). {TAB25.2.2/1566} {TAB6/297}

38. As C's alternative case illustrates, the CA's approach leaves no room for even a minor degree of flexibility. Moreover, even a *de jure* test based on "*majority shareholding*" is unlikely to be a simple exercise given (for example) the complexities of modern financing arrangements. This is even more so given that Article 1(1)(c) expressly refers both to direct and indirect control. As for the "*relative control*" approach, identifying the specific "*circumstances*" and "*other factors*" contemplated by the Court would often require both evidence of foreign law and factual evidence - i.e. an exercise which is, in practice, similar to what a factual control test would require, with no (or no significant) gains in terms of simplicity or clarity. In addition, applying such a *de jure* test to assess whether there is indirect control over a legal entity (a form of control which is expressly covered by the Treaty) is likely to add to the complexity of such an exercise.

39. Furthermore, the *de jure* rights of a majority shareholder are often quite limited. For example, viewed through the prism of an English limited company (as the CA did), the control which a majority shareholder can exert over the direction of the company or, indeed, the economic interests of the company is typically quite limited.

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[8] Investment treaty tribunals have often considered questions of attribution under Articles 4 or 8 of the Articles on State Responsibility: J Crawford, *State Responsibility: The General Part* (2013), at pp. 161-165 {**ref**}. Foxton J examined Articles 4 and 8 in an investment treaty context in *Elliott Associates L.P. v. Republic of Korea* [2026] EWHC 368 Comm, finding that establishing the "*complete dependence*" of the *de facto* organ on the State under Article 4 would require a "*multi-factorial enquiry*" ([126(iii)], [117]-[148]) {**ref**}, while attribution under Article 8 requires evidence of effective control ([179]-[187]) {**ref**}. {TAB31.5/3115} {TAB27.3/1693} {TAB27.3/1690} {TAB27.3/1705}

(1) A majority shareholder may be able to appoint or remove directors. However, those directors owe fiduciary duties to the company as a whole and they cannot simply follow the instructions of a majority shareholder that appointed them.

(2) A majority shareholder will be able to pass ordinary resolutions. However, a (bare) majority shareholder is (usually) not sufficient to require the board of directors to take or refrain from a particular course of action. A special resolution and a majority of 75% is usually required for this.[9]

40. Indeed, it is by no means clear which rights a (bare) majority shareholder has which would give it control and which a minority shareholder (or a person in Mr Stava's position) would lack. A majority shareholder may, for example, be able to approve payment of dividends. However, it seems unlikely that it was this type of "*control*" which the Contracting Parties to the Treaty either contemplated or considered significant when drafting Article 1(1)(c) of the Treaty.

ii. The correct application of the principles on treaty interpretation to Article 1(1)(c)

(a) Ordinary meaning of the terms

41. In accordance with the applicable principles on treaty interpretation, the analysis should commence with the ordinary meaning of the terms, in light of the object and purpose of the Treaty as a whole.

42. "*Control*" is commonly defined as "*the fact or power of directing and regulating the actions of people of things; direction, management; command*" (oed.com definition {**ref**}).[10] However, the "*meaning of "control" is contextual, and "control" is not a term of art with a fixed meaning ... It covers not only who performs a particular act on behalf of the company but also who directs that person to perform that act*": *Bermuda Bar Council v. Walkers (Bermuda) Ltd (Bermuda)* [2019] 3 W.L.R. 391; [2019] UKPC 25, per Lord Hodge JSC at [40] {**ref**}. {TAB31.12/3215} {TAB27.2/1656}

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[9] See for example Palmer's Company Law at ¶8.2101: "*The typical general clause in the articles vesting the management of the company in the directors is of great practical importance: it means that the directors have full powers of management, and are only subject to control by the shareholders in the manner laid down by statute and in the articles. It also means that the shareholders cannot, by ordinary resolution of the general meeting, exercise a power given to the directors by the articles or overrule the directors when exercising such a power.*" {**ref**} See also Model articles for private companies limited by shares at Article 4 {**ref**}. {TAB31.13/3218}

[10] The German, Czech and English versions of the Treaty are equally authentic but the English text "*shall prevail*" in case of divergency (see concluding sentence of the Treaty after Article 12) {**ref**}. {TAB32.1/3350} {TAB21.1/661}

43. The ordinary meaning of "*control*" or "*controlled*" can encompass control in any manner or form, i.e. it encompasses both *de jure* and *de facto* control, with either alone sufficing.

44. Whether "*control*" exists, and how it is exercised, will depend on the particular facts. There is no specific manner or form that "*control*" must take (*B-Mex* at [212] {**ref**}; *Thunderbird* at [106] {**ref**}). This is confirmed by numerous investment treaty awards, which have sought to capture the notion of control in the following terms: {TAB30.4/2572} {TAB30.23/2906}

    (1) "*The power to effectively decide and implement the key decisions of the business activity of an enterprise and, under certain circumstances, control can be achieved by existence of one or more factors such as technology, access to supplies, access to markets, access to capital, know how, and authoritative reputation*": *Thunderbird* at [108] {**ref**}; {TAB30.23/2907}

    (2) "*a role which determines the overall character and direction of an enterprise*": *MAKAE* at [135] {**ref**}; {TAB30.14/2775}

    (3) "*any ability 'to exercise restraining or directing influence over' or to 'have power over' a company*": *B-Mex* at [212] {**ref**}; and {TAB30.4/2575}

    (4) in assessing the question of control, "*[t]he particular nature of the influence exerted by the [claimant] over the domestic entity [i.e. the investment] may be considered*": *United Utilities* at [370] {**ref**}. {TAB30.25/2920}

45. The CA accepted that the words "*control*" or "*controlled*" are "*capable of referring to de jure or de facto control*" (CA Judgment/[161]). Similarly, Foxton J held: "*as many ITA Awards have concluded that the concept of control can, as a matter of its ordinary meaning in general usage and in the legal lexicon, embrace both* de facto *and* de jure *control. All will depend on the context in which it is used*" (HC Judgment/[176]). {TAB6/287} {TAB13/535}

46. Under "*ordinary meaning*" the CA found that "*there are several indications*" in Article 1(1) "*that paragraph (c) is concerned with legal control*" (CA Judgment/[161]). The indications on which the CA relied in sub-paragraphs (a) and (b) of Article 1, are, however, properly characterised as the context of the term "*control*", rather than its ordinary meaning, and are examined below. {TAB6/287}

(b) The context

47. The "*context*" for the purposes of interpretation can include other provisions of the Treaty, including its preamble and title. Three contextual elements are addressed: Article 1(1); Article 1(2); and the Protocol.

48. Article 1(1): Article 1(1)(c) extends coverage to legal entities that are "*directly or indirectly*" controlled by nationals or legal entities of contracting parties. Commonly, investment treaties will not specify that indirectly held or controlled legal entities are covered; but here the Contracting Parties elected to cast the net broadly to cover indirectly controlled legal entities. That suggests that a narrow approach to defining "*controlled*" legal entities was not intended by the Contracting Parties.

49. As noted, the CA placed particular emphasis on Articles 1(1)(a) and (b), specifically, the requirement that a natural person qualifying under Article 1(1)(a) be a national of a Contracting Party "*in accordance with its laws*" (CA Judgment/[161]) and that an entity qualifying under Article 1(1)(b) be of a "*legal*" nature, and be recognised as such by the law of the Contracting Party in which they have their seat, which is also a legal concept (CA Judgment/[162]). As to those points: {TAB6/287} {TAB6/288}

    (1) The definitions of "*investor*" in the three sub-paragraphs of Article 1(1) are independent of each other and the requirements of one are not imported into the other. See: *Pawlowski AG and Projekt Sever v. Czech Republic*, ICSID Case No. ARB/17/11, Award, 1 November 2021 (Fernández-Armesto (P), Beechey, Lowe) at [215]-[218] {**ref**}, where the Tribunal rejected an argument that the requirements for legal entities in Article 1(1)(b) and for legal entities in Article 1(1)(c) applied also to nationals in Article 1(1)(c). See also: *Nova Group Investments v. Romania*, ICSID Case No. ARB/16/19, Award, 13 June 2024 (Kalicki (P), Clay, Reichert) at [510] {**ref**}); *von Pezold*, where there was a "*seat*" requirement for legal entities under Article 1(1)(b) of the applicable BIT, but no connection requirement for the nationals limb of Article 1(1)(c), and the Tribunal considered that a national could qualify under Article 1(1)(c) by having *de facto* control or legal control at [324] {**ref**}. {TAB30.18/2829} {TAB30.16/2802} {TAB30.5/2611}

    (2) As to Article 1(1)(a) (nationals "*in accordance with its laws*"), the only significance of the reference to "*its laws*" is to clarify that nationality is governed by the laws of the State of nationality. This (unsurprising) clarification provides no contextual support for the proposition that Article 1(1)(c) should be concerned with legal control. {TAB21.1/653}

The same language appears in other investment treaties which explicitly cover investors having control in fact (e.g. the ECT, Article 1(7) (read together with the Understanding adopted with respect to Article 1(6)) {**ref**}; Macao-PRC BIT (2008) Article 1(b) {**ref**}). {TAB29.12/2228} {TAB29.16/2248}

(3) As to Article 1(1)(b), it refers to both factual matters and legal matters. The requirement in Article 1(1)(b) that a legal entity have "*real economic activities*" in a Contracting State necessarily involves a factual enquiry. As an element forming part of the proximate context of Article 1(1)(c), it therefore supports Ds' interpretation that, consistently with its ordinary meaning in both general usage and legal lexicon, the term "*control*" in Article 1(1)(c) should be read as including both factual and legal control. It also shows that, in defining the term "*investor*", the Parties to the Treaty contemplated purely factual enquiries. The point is not, as the CA suggested, that the factual requirement in Article 1(1)(b) limits the category of protected investors under that definition (CA Judgment/[162]), but rather, that, even where they could have adopted a simple and straightforward legal test (i.e. place of incorporation), the Parties inserted a factual element. As Foxton J found, Article 1(1)(b) does not tell against a broad concept of control in Article 1(1)(c): HC Judgment/[173(ii)]. {TAB6/288} {TAB13/534}

(4) The CA concluded that these aspects of Article 1(1)(a) and (b) gave "*some indication ... that the control to which [1(1)(c)] refers is control which exists by virtue of a legal right under the law applicable to the legal entity in question*" (CA Judgment/[163]). However, when viewed in their entire context, these provisions give no such indication. Rather, the language of Article 1(1)(a) is neutral and is not reproduced in Article 1(1)(c), while Article 1(1)(b) militates against the view that factual matters should somehow fall outside the purview of Article 1(1). {TAB6/288}

50. Article 1(2): The term "*investments*" is defined in very broad terms in Article 1(2) to "*include every kind of assets [sic]*" {**ref**}. As noted in paragraph 29 above, tribunals have rejected the view that, even where a treaty contains a more restrictive definition of investment, that should have a bearing on the interpretation of the provisions governing jurisdiction *ratione personae*. Moreover, the Treaty defines "*investments*" in the broadest way. {TAB21.1/653}

51. The Protocol: Paragraph 1 of the Protocol sets out a "*clarification*" in relation to Article 1, by which an investor "*according to Article [1(1)(c)] may be required to submit proof of*

such control in order to be recognized by the Contracting Party in the territory of which the investment has been or is to be made as an investor" {**ref**}. As to this: {TAB21.1/662}

(1) There is no indication in the terms of the Protocol itself that suggests or indicates "*proof of control*" means "*legal control*".

(2) The Protocol contemplates verification *ex ante* or *ex post* as it refers to an investment which "*has been or is to be made*".

(3) The process of analysing the existence of legal control (or even ownership) can be complex, as the investment treaty cases demonstrate.

52. This type of Protocol, while not common, is not unique to the Treaty (see below at paragraph 63). Its function is best understood against Article 25(2)(b) of the ICSID Convention, the principal multilateral instrument on foreign investment protection (which entered into force in 1966). That provision allows a foreign investor and a host State to agree that a company possessing the nationality of that host State should "*because of foreign control ... be treated*" as a national of another Contracting State for the purposes of the Convention. Protocols of this kind pursue a similar objective by expressly allowing investors to obtain recognition upon submission of "*proof of control*". As discussed below (see paragraph 81), the "*foreign control*" requirement in the ICSID Convention has consistently been understood as meaning control in fact. This is a relevant circumstance under Article 32 of the VCLT for the interpretation of the term "*control*" in a bilateral treaty adopting a mechanism analogous to the ICSID Convention. {TAB29.14/2232} {TAB29.32/2421}

53. Foxton J rightly considered that "*de facto as well as de jure control can be 'proved', and I regard the reference as neutral*" (HC Judgment/[175]). However, the CA treated paragraph 1 of the Protocol as carrying conclusive weight in favour of construing Article 1(1)(c) as requiring legal control. Its reasoning developed in four steps which are considered in turn below. {TAB13/535}

54. ***First***, the CA, having noted that the Treaty does not specify the legal consequences of being "*recognised*", considered it to be "*fairly obvious ... that the purpose of this provision is to provide a procedure to give comfort to an existing or potential investor that they do or will benefit from the protection provided by the [Treaty]*" (CA Judgment/[165]). {TAB6/289}

55. However, no such consequences are specified in the Protocol itself. While it refers to an investor being "*recognised*", the consequences of that for any future claim under the Treaty are not specified, either for the investor or for the State.

56. C declined to confirm that any such consequences would follow from the submission of proof under the Protocol; disavowed any "*interest*" in "*the consequences of the operation*" of paragraph 1 (CA Transcript, Day 3, p.88:25 – p.89:2 {**ref**}); suggested that, at the very highest, it could "*give rise to abuse of rights or good faith argument*" at some later undefined stage (CA Transcript, Day 5, p.134:14-19 {**ref**}); and avoided answering the CA's question about whether such recognition would give rise to some estoppel binding on the State (CA Transcript, Day 3, p.83:9-p.85:2 {**ref**}). {TAB25.2.1/1290} {TAB25.2.2/1553} {TAB25.2.1/1285}

57. Yet the CA concluded that recognition "*must mean that the host state cannot renege on the recognition which is given, at any rate unless the position changes materially*" (CA Judgment/[166]) and it further suggested that the host State's response to a request for recognition under the Protocol would have a substantial influence on whether an investment would be made at all (CA Judgment/[168]). But this conclusion, which is contrary to C's own position and unsupported by any other evidence or authority, cannot be sustained. {TAB6/289} {TAB6/289}

58. ***Second***, building on this first step, the Court considered that the recognition is "*meaningful if the proof of control to be provided is concerned with the legal structure*", which "*will be fixed and, unless the investor chooses to change it, the investor can rely on the recognition which has been given throughout the life of the investment*" (CA Judgment/[166]). This suggests, according to the CA, that what is contemplated is proof of legal control, not proof of factual control "*as the facts amounting to de facto control are always susceptible to change over the life of the investment*" (CA Judgment/[166]). {TAB6/289} {TAB6/289}

59. As the CA accepted, however, the facts underlying *de jure* control too can change, and so the recognition under the Protocol could only ever be based on the circumstances prevailing at the time, and are susceptible to change. Moreover, in making these assumptions, the CA disregarded the fact that both C and Switzerland agreed to the terms of the ECT, which explicitly provided that "*control in fact*" was sufficient, and which also contains a provision concerning proof of control.

60. ***Third***, the CA reasoned that for the Protocol to be "*workable, it must contemplate a relatively straightforward administrative procedure*", which "*will be viable, at least in typical cases, if what is required is proof of de jure control*", and "*will not be viable if an investor can satisfy the requirement by having only de facto control which is not readily verifiable*" (CA Judgment/[167]). {TAB6/289}

61. This conclusion is contradicted by C's and Switzerland's own practice in committing to the ECT, which provides for proof of "*control in fact*" to be provided. It is also contradicted by the fact that under the ICSID Convention, which provides for a similar mechanism (albeit one based on agreement rather than recognition) for which control is the gateway, control is also interpreted as control in fact.

62. Furthermore, the evidence required to establish legal control may in reality be just as complex and detailed as the evidence required to establish factual control: the CA acknowledged that its own approach was focussed on what it considered to be a 'typical' case, being one where returns consist only of profits (rather than any of the myriad other forms of returns) which accrue only to a shareholder (rather than other persons who might be entitled to the benefit of returns). The CA's own analysis acknowledged that 'atypical' cases (e.g. the minority shareholder who still has control or indirect control through different companies) exist where this is not so, which negates the supposed universality of its *de jure* test. Furthermore, the frequency of complex ownership structures for foreign investments suggests 'atypical' cases are unlikely to be atypical at all. This demonstrates the error in the CA's conclusion that legal control can be proved by a "*straightforward administrative procedure*", whereas factual control will be relatively complex and difficult. In any event, given that the Protocol does not set out any procedure, it is difficult to see how the nature of the procedure can assist with its interpretation.

63. Further and in any event, the CA's logic – that a factual enquiry would be inconsistent with the procedure provided by the Protocol – is undermined by other BITs with similar provisions for proof of control (including in protocols) which, e.g., specifically provide: that control "*will depend on the factual circumstances of the particular case*" (e.g. Argentina-Australia BIT (1995), Protocol Article (1) {**ref**}); or that certain facts shall be accepted as evidence (e.g. Chile-Sweden BIT (1993), Protocol Ad. Article (2)(b) {**ref**}; Argentina-Israel BIT (1995), Protocol Ad. Article (3)(b) {**ref**}; Switzerland-Argentina BIT (1991), Protocol Ad. Article 1(1)(c)(2) {**ref**}); or that acceptable proof may be provided by matters which would clearly involve factual investigation, most likely of some complexity (e.g. Switzerland-Uruguay BIT (1988), Protocol Ad. Article 1(1)(c)(ii) {**ref**}, referring to "*[b]eing economically subordinated*" to a legal entity). {TAB29.1/2114} {TAB29.6/2193} {TAB29.2/2127} {TAB29.22/2308} {TAB29.30/2402}

64. **Fourth**, the CA considered that, because the Protocol contemplates recognition before an investment has been made, this suggests that it requires legal control since "*there may be*

no 'facts' in existence which can be provided to prove de facto control" (CA Judgment/[168]). {TAB6/289}

65. The Protocol contemplates the possibility of investors submitting proof of control in respect of an investment which "*has been or is to be made*", and so where proof of *de facto* control is not available before the investment has been made, it could be submitted thereafter. In any event, the assumption that no facts would be in existence before an investment is made is incorrect. The control in Article 1(1)(c) is not the control over the investment, but control by a natural person or legal entity over another legal entity. This control exists irrespective of whether any investment has been made. Thus, a Swiss entity controlling a German entity that has not yet made an investment in the Czech Republic already satisfies the jurisdictional requirements *ratione personae* in Article 1(1)(c), albeit obviously not the requirements for jurisdiction *ratione materiae* as an investment is yet to be made.

66. Before turning to the object and purpose of the Treaty in the next subsection, it is worth mentioning that the CA's flawed conclusions on the Protocol also spilled over into its analysis of the object and purpose of the Treaty. The Court found that *"[c]ertainty and predictability are precisely what the Protocol is intended to provide, and that object is best achieved by interpreting control as meaning* de jure *control*" (CA Judgment/[180]), and {TAB6/293} considered that the procedure envisaged by the Protocol "*furthers the achievement of the object and purpose of the BIT*" (CA Judgment/[172]). {TAB6/290} As explained further in **subsection (c)** immediately below, the CA erred in its very narrow focus on *"certainty and predictability"* as the object and purpose of the Treaty.

(c) Object and purpose of the Treaty

67. As noted in paragraph 22 above, the Preamble expresses the object and purpose of the Treaty as *"[i]ntending to create and maintain favourable conditions for investments by investors*" and encouraging, protecting and promoting foreign investments {**ref**}. {TAB21.1/652} This object and purpose has led investment tribunals to interpret provisions on the coverage of treaty protection generously. (See, e.g. *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, 31 January 2014 (Júdice (P), Conthe, Vinuesa) at [352], [353] {**ref**}, relying on the object and purpose of the BIT {TAB30.10/2661} "*to promote and protect foreign investment*" to conclude that "*the BIT would require clear language in order to exclude coverage of indirect investments*").

68. The CA accepted that the object and purpose of the Treaty was set out in the preamble, and involved "*intensifying economic cooperation and fostering the economic prosperity of both states*" (CA Judgment/[172]), but then took a narrow focus on the promotion of "*certainty and predictability*" as the object and purpose of the Treaty (CA Judgment/[172]), and found that "*that object is best achieved by interpreting control as meaning* de jure *control*" (CA Judgment/[180]). The CA did not specifically address other aspects of the preamble, notably "*Intending to create and maintain favourable conditions for investments by investors*", which suggests that the object and purpose of the Treaty was much broader than "*certainty and predictability*": it was to intensify and foster investments, and to create favourable conditions for investments. {TAB6/290} {TAB6/290} {TAB6/293}

69. In taking this very narrow focus of the object and purpose of the Treaty, the CA erred, and that error led it to take the narrowest approach to the interpretation of "*controlled*" in Article 1(1)(c). It acknowledged that its reasoning on "*the importance of certainty and predictability*" favoured the extreme case of *de jure* control, i.e. requiring ownership of a majority of the shares. In this way, the CA's interpretation assimilated control with ownership, a result which is inconsistent with (a) the ordinary meaning of "*controlled*" (see *MAKAE Europe v. Saudi Arabia* at [132] {**ref**}); (b) the different ordinary meanings of "*owned*" and "*controlled*"; and (c) the contemporaneous treaty practice of both Switzerland and the Czech Republic discussed in the next subsection, which uses "*owned*" or "*controlled*" as distinct and often alternative qualifying criteria (see, e.g. Australia-Czech BIT (1994), Article 1(d)(ii) {**ref**}; Swiss-Mexico BIT (1995), Article 1(4) {**ref**}; and Switzerland's BITs with Jamaica (1990), Article 1(b)(i) {**ref**}), and Ghana (1991), Article 1(1)(c) {**ref**}), and which expressly states if substantial ownership is required alongside control (see, e.g. Switzerland-Turkey BIT (1988), Article 1(a)(ii) {**ref**}; Switzerland-Poland BIT (1989), Article 1(1)(c) {**ref**}). {TAB30.14/2775} {TAB29.3/2129} {TAB29.27/2348} {TAB29.23/2311} {TAB29.26/2337} {TAB29.29/2381} {TAB29.28/2366}

70. Investment treaty tribunals have cautioned against relying on the object and purpose as expressed in a preamble to effectively rewrite specific provisions of a treaty, including those which define nationals. See *KT Asia Investment Group B.V. v. Kazakhstan,* ICSID Case No. ARB/09/8, Award, 17 October 2013 (Kaufmann-Kohler (P), Glick, Thomas) at [120]:

> "*The crux of the Respondent's argument in this connection is that the fundamental object and purpose of the BIT and the ICSID Convention is to encourage and protect foreign investment. Although the BIT does not expressly*

*state so, its Preamble stresses the Contracting Parties' desire to "extend and intensify the economic relations between them, particularly with respect to investments by the nationals of one Contracting Party in the territory of the other Contracting Party" and their recognition that "agreement on the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties…". The BIT is thus premised on the making of investments by the nationals of one Party in the territory of the other with the consequent stimulation of the flow of capital and technology. Yet, this says nothing about the definition of nationals, which is precisely the subject of Article 1(b)." {**ref**}* {TAB30.12/2713}

71. See also *Nova Group Investments v. Romania*, ICSID Case No. ARB/16/19, Award, 13 June 2024 (Kalicki (P), Clay, Reichert) at [522], referring to *KT Asia* and noting that "*Nothing in the preamble of the Treaty suggests that terms specifically defined therein should not be taken at face value as reflecting the Contracting Parties' considered intentions*" {**ref**}. {TAB30.16/2805}

72. In summary, the CA erred in narrowly construing the object and purpose of the Treaty as "*certainty and predictability*". The object and purpose of the Treaty is to intensify and foster investments, and to create favourable conditions for investments, and does not suggest that "*control*" in Article 1(1)(c) should be interpreted narrowly, to the exclusion of one of its ordinary meanings, and as requiring control *de jure*.

73. In any event, even if the correct test under Article 1(1)(c) were *de jure* control this would not result in the "*certainty and predictability*" envisaged by the CA.

    (1) *A de jure* control test may not be easy to apply particularly when assessing whether there is indirect control over a legal entity (see paragraph 38 above); it may in reality be no less straightforward than a *de facto* control test.

    (2) Under Article 1(1)(c), a legal entity established under the laws of any country falls to be treated as a national of a Contracting Party if it is controlled by legal entities having their seat, together with "*real economic activities*", in the territory of that Contracting Party. In many cases it may be less than clear that the "*real economic activities*" test

is satisfied, and it is entirely possible that a legal entity may meet this test in respect of some periods of time but not in respect of other periods.[11]

74. Therefore, in many cases there would not be the type of "*certainty and predictability*" envisaged by the CA as to whether a putative investor is actually a covered "*investor*" even if a *de jure* control test were adopted. Instead, the inclusion of the "*real economic activities*" test suggests that in defining covered "*investors*" the Contracting Parties intended to focus on the substance of matters rather than setting down a bright-line test.

(d) Other interpretative aids (Article 31(3)(c)/Article 32 VCLT)

75. Under Article 31(3)(c) of the VCLT "[a]*ny relevant rules of international law applicable in the relations between the parties*" shall be taken into account when interpreting a treaty, while Article 32 provides that "[r]*ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31*" {**ref**}. {TAB29.32/2421} {TAB29.32/2421}

76. As to Article 31(3)(c), in the recent *Advisory Opinion on Right to Strike under ILO Convention* No. 87, 21 May 2026, the International Court of Justice said at [90]: "*A rule may be 'applicable in the relations between the parties' if it expresses their common understanding regarding certain provisions of the treaty under interpretation*" {**ref**}. The ICJ concluded at [98] on the basis of Article 31(3)(c) that "*an interpretation taking into account the relevant rules of international law contained in the ICESCR and the ICCPR indicates that the protection of the right to strike is encompassed in the protection of the* {TAB28.4/2024}

[11] In *Alps Finance and Trade AG v. The Slovak Republic*, Award, 5 March 2011 (Crivallero, Klein, Stuber), a tribunal considered (at [219] {**ref**}) that the following may be relevant in assessing whether a legal entity has "*real economic activities*" in a Contracting Party: number and type of clients, type of operations, the kinds of contract it enters into it, the quantity and type of personnel and the nature and composition of its managing bodies. {TAB30.3/2532}

freedom of association provided by Convention No. 87" {**ref**} (ILO Convention No. 87 was concluded before the ICESCR and the ICCPR). [12] {TAB28.4/2026}

77. As to Article 32, in the same Advisory Opinion, the International Court of Justice said at [102]:

> "*[t]he Court further observes that the use of the term 'including' in Article 32 of the Vienna Convention on the Law of Treaties indicates that the means mentioned therein do not constitute an exhaustive list. The Court may therefore have recourse to other supplementary means of interpretation that it considers relevant in the circumstances of the case. This may include any subsequent practice of the parties that does not meet the conditions of Article 31, paragraph 3 (b), of the Vienna Convention, and pronouncements of competent supervisory bodies.*" {**ref**} {TAB28.4/2027}

78. As supplementary means to the interpretation of the ILO Convention, the ICJ considered subsequent treaty practice as reflected in various regional instruments (at [103], [120] and [137] {**ref**}). Contemporaneous or subsequent treaty practice common to both state parties may thus provide a useful supplementary aid to the interpretation of the provisions of a bilateral investment treaty: see also *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012 (Dupuy (P), Brower, Janeiro) at [261]ff {**ref**}. {TAB28.4/2027} {TAB28.4/2032} {TAB28.4/2028} {TAB30.7/2629}

79. It is proper (under either or both of the VCLT rules above) to have regard to the relevant treaty practice of Switzerland and the Czech Republic. Three aspects of that practice are relevant.

80. ***First***, both States became parties to the Energy Charter Treaty, which was concluded four years after the Treaty under consideration here. The ECT defines "*investment*" to include any asset "*owned or controlled directly or indirectly by an investor*" (Article 1(6) {**ref**}). It contains an Understanding adopted with respect to Article 1(6) of the ECT which specifies that "*control of an investment means control in fact, determined after an* {TAB29.12/2227}

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[12] See also *Basfar v. Wong* [2022] UKSC 20 at [67] noting that: "*The principle that developments in international law since the conclusion of a treaty should be taken into account in interpreting its terms is not only supported by the general presumption in favour of evolutionary interpretation; it is also required by article 31(3)(c) of the [VCLT]. In terms of structure, article 31 progresses from terms to context, through any agreements at the time of conclusion of a treaty, to subsequent agreements, subsequent practice, and thence to relevant rules of international law. The juxtaposition, in particular, in article 31(3) of the obligations to take into account (a) subsequent agreements, (b) subsequent practice and (c) "any relevant rules of international law applicable in the relations between the parties" logically indicates that developments in international law subsequent to the conclusion of the treaty are included".* {**ref**} {TAB27.1/1652}

examination of the actual circumstances in each situation" {**ref**}.[13] The Understanding also provides that "*Where there is doubt as to whether an Investor controls ... an Investment, an Investor claiming such control has the burden of proof that such control exists*" {**ref**}. This suggests that *de facto* control can be proved. The Tribunal in *Thunderbird* considered the ECT Understanding provided guidance in interpreting the phrase "*owns or controls directly or indirectly*" in Article 1117(1) of NAFTA (at [106], footnote 3 {**ref**}).

{TAB29.12/2228}

{TAB30.23/2906}

81. ***Second***, both Switzerland and the Czech Republic are parties to the ICSID Convention: Switzerland since June 1968, and the Czech Republic as part of Czechoslovakia since March 1992 and as an independent State since March 1993.[14] The Convention contains a requirement of "*foreign control*" in Article 25(2)(b) which has been the object of extensive analysis in the case-law (including some of the cases discussed in **Section 4** below). In essence, since the drafting of the Convention in the 1960s and the very first cases decided under it in the 1980s, it has been clear that control "*is not a simple phenomenon... [d]ifferent voting rights attached to different types of shares, decision-making procedures and the exercise of management all contribute to a complex picture of control*"; and that "*mere majority holding of shares would not necessarily be decisive ... and ... even a minority holding of as little as 25 percent or even 15 percent might amount to control*" (*Schreuer* [1381-1382] {**ref**}; see also [1263-1264]{**ref**} and [1383-1385] {**ref}**). In these circumstances, it is difficult to imagine that Switzerland and Czechoslovakia (as it then was) would have chosen to give the term "*control*" a fundamentally narrower meaning in the BIT than the meaning it had in the leading multilateral instrument on foreign investment protection, particularly given that the ICSID Convention is expressly referred to in the dispute settlement provision at Article 9(3) of the BIT. Had that been their intention, it was open to them to use different language (e.g. "*ownership*" or "*legal control*").

{TAB31.16/3268}
{TAB31.16/3250}
{TAB31.16/3269}

82. ***Third***, the contemporaneous bilateral investment treaty practice of both Switzerland and C supports control in a *de facto* sense:

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[13] The ECT was concluded in December 1994; Switzerland signed it on 17 December 1994 and the Czech Republic signed it on 8 June 1995. Neither raised any issue about either "*control in fact*" being the applicable test or the burden of proof being imposed on the investor claiming control.

[14] See List of Contracting States to the ICSID Convention, https://treaties.un.org/pages/showDetails.aspx?objid=080000028012a925 {**ref**}.

{TAB32.2/3366}

(1) There are examples of treaties from the same period using "*owned*" or "*controlled*" as distinct qualifying criteria (see, e.g. Australia-Czech BIT (1994), Article 1(d)(ii) {**ref**}; Swiss-Mexico BIT (1995), Article 1(4) {**ref**}; and Switzerland's BITs with Jamaica (1990), Article 1(b)(i) {**ref**}), and Ghana (1991), Article 1(1)(c) {**ref**}); {TAB29.3/2129} {TAB29.27/2348} {TAB29.26/2337} {TAB29.23/2311}

(2) Some treaties specifically provide that substantial ownership is required alongside control (see Switzerland-Poland BIT (1989), Article 1(1)(c) {**ref**}; Switzerland-Jamaica BIT (1990), Article 1(b)(i) {**ref**}); Switzerland-Ghana BIT (1991), Article 1(1)(c) {**ref**}). {TAB29.28/2366} {TAB29.26/2337} {TAB29.23/2311}

83. Ownership and control also regularly appear as distinct criteria (whether in relation to the "*investor*" definition or other provisions in an investment treaty) in the subsequent treaty practice of both countries: see, e.g., Mexico-Czech BIT (2002), Article 10(1) {**ref**}; Saudi Arabia-Czech BIT (2009), Article 1(1) {**ref**}; Canada-Czech BIT (2009), Article I(g), X(5)(a) {**ref**}; Serbia and Montenegro-Switzerland BIT (2005), Article 2 {**ref**}; Switzerland-Iran BIT (1998), Article 1(1)(c) and Protocol Ad. Article 1(a) {**ref**}. {TAB29.17/2261} {TAB29.18/2272} {TAB29.5/2156} {TAB29.19/2284} {TAB29.25/2326}

(4) Investment treaty jurisprudence and academic commentary support the conclusion that "*control*" encompasses *de facto* control {TAB29.25/2334}

84. At first instance, the Judge engaged in a detailed analysis of investment awards that address the meaning of "*control*" (or "*controlled*") in contexts similar to the present one and in others (HC Judgment/[180]-[210]). He concluded that interpreting "*control*" as embracing control *in fact* is supported by the majority of that jurisprudence (HC Judgment/[215]). In contrast, while accepting that the Judge "*may well be right that the majority of the awards cited do not insist that control should exist by virtue of a legal right*" (CA Judgment/[186]), the CA considered that a review of that jurisprudence would be "*neither necessary nor helpful*" (CA Judgment/[185]) because of: (a) the absence of a rule of precedent in public international law; (b) the lack of a settled consensus on the point; (c) the "*important distinguishing feature*" of the Protocol in the present case; and (d) the fact some of the authorities applied treaty provisions requiring "*effective control*" or containing some definition of control (CA Judgment/[186]). {TAB13/536-547} {TAB13/548} {TAB6/294} {TAB6/294} {TAB6/294}

85. It is respectfully submitted that the CA fell in error for the following reasons developed in full below: while there is no rule of precedent in international law which operates in the same way as in domestic legal systems, investment tribunals will follow a consistent line of earlier case law (or *jurisprudence constante)* unless there is a good reason to distinguish

or depart from it (**subsection i**); an analysis of the investment treaty jurisprudence establishes that there is a *jurisprudence constante* in favour of interpreting control as encompassing *de facto* control, and the terms of this Treaty offer no good reason for departing from that jurisprudence (**subsection ii**); and academic commentary provides further support for the conclusion that "*control*" encompasses *de facto* control (**subsection iii**).

i. International investment tribunals will ordinarily follow consistent precedent

86. An investment tribunal will follow a consistent line of earlier case law unless there is good reason to distinguish it:

(1) International courts and tribunals are required to apply previous judicial (including arbitral) decisions as subsidiary means for the determination of rules of law: ICJ Statute, Article 38(1)(d) {**ref**}; R. Jennings, "The Judiciary, International and National, and the Development of International Law" 45 *ICLQ* (1996) 1, at 2 {**ref**}. {TAB29.20/2294} {TAB31.8/3141}

(2) Tribunals will ordinarily follow the reasoning of earlier judicial decisions unless there is cause not to: *Land and Maritime Boundary between Cameroon and Nigeria* [1998] ICJ Rep 275 at [28] {**ref**}. {TAB28.3/2021}

(3) Where a series of consistent and cogent arbitral awards emerges (establishing a *jurisprudence constante*), an investment treaty tribunal will decide a matter in which similar issues arise in a manner which is consistent with the direction of those previous cases: McLachlan, *International Investment Arbitration: Substantive Principles* (2nd Ed., 2017) at 5.39–5.48 {**ref**}; Kaufmann-Kohler, "Arbitral Precedent: Dream, Necessity or Excuse?" (2007) *Arbitration International* 23(3) at p.374 {**ref**}. {TAB31.10/3171-3173} {TAB31.9/3165}

(4) Accordingly, when interpreting the language of a treaty, investment treaty tribunals frequently rely on the principle that "*like cases should be decided alike*" to reach an interpretation which is consistent with the earlier decisions of other tribunals: see, for example, *Daimler Financial Services* at [52] {**ref**}; *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010 (Salacuse (P), Kaufmann-Kohler, Nikken) at [189] {**ref**}. {TAB30.7/2628} {TAB30.22/2888}

ii. There is consistent precedent on "control" encompassing de facto *control*

87. There is a consistent line of investment treaty case law which favours the interpretation of "*control*" as encompassing *de facto* control, in accordance with its ordinary meaning. While the CA criticised the "*cogency of their reasoning*", that criticism was misplaced.

88. Several tribunals have confirmed that *de facto* control is sufficient to meet a requirement of "*control*" such as that in Article 1(1)(c):

(1) In *Thunderbird Gaming v. Mexico*, Award, 26 January 2006 (van den Berg (P), Ariosa, Wälde) {**ref**}, the tribunal considered the requirement, under Article 1117 of NAFTA, that an investor may submit a claim to arbitration "*on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly*" (at [96] {**ref**}). The tribunal held at [106] that the NAFTA provision did not require "*a showing of legal control*"; that "*[a] showing of effective or 'de facto' control is ... sufficient*", albeit proved to a high standard {**ref**}. In deciding that the investor in that case exercised de facto control over enterprises in which it held a minority shareholding, the Tribunal found at [107]-[108]: {TAB30.23/2889} {TAB30.23/2903} {TAB30.23/2906}

> *"Despite Thunderbird having less than 50% ownership of the Minority EDM Entities, the Tribunal has found sufficient evidence on the record establishing an unquestionable pattern of de facto control exercised by Thunderbird over the EDM entities.* ***Thunderbird had the ability to exercise a significant influence on the decision-making of EDM and was, through its actions, officers, resources, and expertise, the consistent driving force behind EDM's business endeavour in Mexico.***
>
> *It is quite common in the international corporate world to control a business activity without owning the majority voting rights in shareholders meetings. Control can also be achieved by the power to effectively decide and implement the key decisions of the business activity of an enterprise and, under certain circumstances, control can be achieved by the existence of one or more factors such as technology, access to supplies, access to markets, access to capital, know how, and authoritative reputation. Ownership and legal control may assure that the owner or legally controlling party has the ultimate right to determine key decisions. However, if in practice a person exercises that position with an expectation to receive an economic return for its efforts and eventually be held responsible for improper decisions, one can conceive the existence of a genuine link yielding the control of the enterprise to that person."* (**emphasis added**). {**ref**} {TAB30.23/2907}

(2) In *B-Mex LLC and others v. United Mexican States*, Partial Award, 19 July 2019 (Verhoosel (P), Born, Vinuesa) {**ref**}, the tribunal, applying the same NAFTA provision, upheld the *Thunderbird* approach, specifically the principle that the ability to exercise significant influence on the decision-making and being the "*driving force*" in the company would be significant evidence of *de facto* control (at [239] {**ref**}). A key factual finding in that case was that the board directors acted "*subject to the instructions of the Claimants*" and the reality was that in no case did they act without their knowledge (at [240a] {**ref**}). As Foxton J noted, the *B-Mex* tribunal affirmed that control could be established where "*the investor does not own a number of shares sufficient to confer the legal capacity to control but is otherwise able to exercise de facto control*" (at [205] {**ref**}; HC Judgment/[193(ii)]).

{TAB30.4/2536}
{TAB30.4/2583}
{TAB30.4/2583}
{TAB30.4/2573}
{TAB13/541}

(3) In *MAKAE Europe v. Saudi Arabia*, Award, 30 August 2021 (Crook (P), Hafez, van Houtte) {**ref**}, the tribunal had to decide the question of control in respect not of its jurisdiction *ratione personae* (as in the present case), but of its jurisdiction *ratione materiae* as the investment definition in the Franco-Saudi bilateral investment treaty required that an investment be "*owned or controlled*" ("*détenus ou contrôlés*") by an investor. The tribunal agreed with the parties "*that for purposes of the Treaty, control can be de facto*", and must be assessed "*on the basis of the facts and evidence involved in the particular situation*" (at [118] {**ref**}). The tribunal saw no basis for the contention that a higher standard of evidence was required to establish *de facto* control (at [122] {**ref**}). The tribunal also rejected the contention that "*de facto control requires a claimant to demonstrate some ownership or other form of economic interest in an investment*" (at [132] {**ref**}); (HC/Judgment [209]). In the particular context of that case, the French-registered claimant contended that it controlled a retail and restaurant business in Saudi Arabia, carried out by a Saudi-registered company. The claimant had no ownership interest in the Saudi company, but it was part of the same group, and it argued that it served the function of making strategic decisions that steered the direction of the group, including the Saudi company. The tribunal stated at [134]-[137]:

{TAB30.14/2755}
{TAB30.14/2768}
{TAB30.14/2770}
{TAB30.14/2775}
{TAB13/546}

> *"134. The heart of the Claimant's case for de facto control is its contention that in situations such as the MAKAE retail and restaurant businesses in the Kingdom of Saudi Arabia, brand and product acquisition drive a retailer's overall strategy, making the Claimant's activities in France "critical to the success of the entire group, including the Saudi entity." Hence, the Claimant*

contends, the role of MAKAE Europe SARL in identifying the brands and products to be offered to customers in Saudi Arabia gave it de facto control of the investment.

135. The Tribunal's task is to interpret the words of the Treaty: what does it mean for an investment to be "controlled"? The Tribunal accepts that the conception of control advanced by the Claimant, while unusual in the context of international investment law, does correspond to some of the ordinary dictionary meanings of "control" advanced by the Parties. There can be de facto control where the evidence establishes that a small and specialized component of a corporate family performs a role or roles that determine the overall character and direction of an enterprise.

...

137. The Tribunal accepts that, in appropriate circumstances, the Claimant's core proposition may hold true. The question is whether the evidence here establishes to the necessary degree that the Claimant played this role in relation to its claimed investment in the Kingdom of Saudi Arabia. This requires close analysis of the evidence regarding the Claimant's characteristics and activities." *{***ref***}* {TAB30.14/2775-2776}

The tribunal then embarked upon a detailed examination of the factual evidence in that case.

(4) In *Bernhard von Pezold and others v. Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015 (Fortier (P), Williams, Hwang) {**ref**}, the relevant treaty provision, Article 1(1)(c) in the Switzerland-Zimbabwe BIT, referred to legal entities "*effectively controlled*" by natural persons or legal entities of a contracting party, and the tribunal was also considering Article 25(2)(b) of the ICSID Convention, which refers to "*foreign control*". The tribunal confirmed that "[c]*ontrol of a company may be factual or effective ('de facto') as well as legal*", and *de facto* control was sufficient in circumstances where minority shareholders exercised factual control over the relevant company (at [324] {**ref**}). Even though there were nine von Pezold claimants, the tribunal based its finding of control on evidence that "*clearly demonstrates that Elisabeth exercises overall control of the Border Companies and that Rüdiger, the Adult Children Claimants and Adam abide by Elisabeth's exercise of ultimate control over those companies*" (at [215] {**ref**}; HC Judgment/[189]). {TAB30.5/2587} {TAB30.5/2611} {TAB30.5/2603} {TAB13/539}

(5) In an award rendered in March 2025, *Leshkasheli and Rosserlane v. Azerbaijan*, ICSID Case No. ARB/20/20, Award, 21 March 2025 (Lévy (P), Haigh, Silva Romero) {**ref**}, a case that also involved a trust arrangement, the tribunal endorsed the {TAB30.13/2719}

statement of principle concerning *de facto* control from *Thunderbird* at [108] (cited in sub-paragraph (1) above). The tribunal held that "*where* de jure *control is vested in another entity or person,* de facto *control can only be demonstrated by facts showing that the decision-making power over the company does not lie with the entity or person having* de jure *control*" (at [406]-[407] {**ref**}). On the facts of that case, the tribunal concluded that control was exercised by the trustee. But those facts are distinguishable from the present case, including because: a) the governance arrangements were more complex; b) Dr Leshkasheli, one of the claimants, failed to show that he "*exercised substantial influence over CEG's management and operations, other than in his capacity*" as President (and then only for part of the relevant period, and the activities he carried out in that capacity were normal management duties of a CEO) (at [417] {**ref**}); and c) the tribunal did not accept that the evidence showed that Dr Leshkasheli "*exercised any influence, let alone substantial, over the selection of the members of CEG's board of directors or any other management body*" (at [420] {**ref**}). Further, and importantly for present purposes, the fact that the shares in the relevant company were held in trust and owned by a trustee was not considered to be a complete bar to the existence of qualifying *de facto* control by a person other than the trustee.

{TAB30.23/2907}
{TAB30.13/2747-2748}
{TAB30.13/2752}
{TAB30.13/2753}

(6) In a decision on bifurcation rendered in April 2025 in *Fotowatio Renewable Ventures S.L.U. and others v. United Mexican States*, ICSID Case No. ARB/24/5, Decision on Bifurcation, 14 April 2025 (Greenwood (P), Alvarez, Pinto) {**ref**}, the tribunal referred to the *Thunderbird* tribunal's finding that a similar provision "*embraced both legal control and* de facto *control*", and concluded that ruling upon an objection based on control "*is likely to involve detailed inquiry into evidence which would also be material to the merits of the case*" (at [80] {**ref**}).

{TAB30.8/2635}
{TAB30.8/2647}

89. Further, several tribunals, while not explicitly stating that the test is *de facto* control, have applied that test to the facts:

(1) In *Italba Corporation v. Uruguay*, ICSID Case No. ARB/16/9, Award, 22 March 2019 (Oreamuno (P), Beechey, Douglas) {**ref**}, the definition of "*investment*" in the applicable treaty referred to assets that "*an investor owns or controls, directly or indirectly*". The tribunal noted that "[t]*he omission of a definition for "control" accords with long-standing U.S. practice, reflecting the fact that determinations as to whether an investor controls an enterprise will involve factual situations that must be evaluated on a case-by-case basis*" (at [254] {**ref**}). Having found that Italba did not

{TAB30.11/2665}
{TAB30.11/2696}

own the putative investment in any sense and to any extent (at [201]-[253] {**ref**}), the tribunal proceeded to consider whether Italba controlled it by looking at Italba's role in a number of areas (negotiation of contracts, capital contributions and funding of transactions). The tribunal concluded, however, that there was "*no evidence of Italba's control*" in any of these areas (at [264] {**ref**}). {TAB30.11/2681-2691} {TAB30.11/2605}

(2) In *Vacuum Salt v. Ghana,* Award, 1 February 1994 (Jennings (P), Brower, Hossain) {**ref**}, the tribunal had to interpret the "*foreign control*" in Article 25(2)(b) of the ICSID Convention. The tribunal referred to voting rights in respect of shares, but also emphasised there was no set formula (at [43] {**ref**}); noted "*other elements*" were relevant (at [44] {**ref**}); and examined the personal contributions made by the claimant to the company, including in relation to his expertise, ultimately concluding that he was not in any sense "*in charge*" (at [47]-[53] {**ref**}). The first instance Judge considered this award at some length (HC Judgment/[181]-[183]), and concluded that he did not understand the tribunal to find that a shareholding was a prerequisite to a finding of control. {TAB30.26/2937} {TAB30.26/2955} {TAB30.26/2955} {TAB30.26/2956-2958} {TAB13/536-538}

(3) In *United Utilities (Tallinn) v. Estonia,* ICSID Case No. ARB/14/24, Award 21 June 2019, (Drymer (P), Stern, Williams) {**ref**}, the tribunal, applying a similar provision to Article 1(1)(c) of the BIT, held that: {TAB30.25/2912}

a. Control is a "*flexible concept*" (at [366] {**ref**}) and that attempting to circumscribe its meaning "*through the identification of essential factors, or bright-line rules ... appears unnecessary, if not inappropriate. Doing so could prevent tribunals from fulfilling their duty to conduct a full factual and legal assessment of the case at hand*" (at [367] {**ref**}). {TAB30.25/2919} {TAB30.25/2919}

b. The determination of control is "*context-specific*" (at [368] {**ref**}), to be determined on a case-by-case basis (at [366] {**ref**}). {TAB30.25/2919}

c. Relevant factual matters included dominant influence over operational management and strategic decision-making (at [414], [420] {**ref**}; HC Judgment/[192]). {TAB30.25/2930-2931} {TAB13/540}

90. The CA considered that some of the relevant awards could be distinguished because they referred to "*effective control*", "*which is clearly capable of permitting factual enquiry but which in any event is different from control* simpliciter" (CA Judgment/[186]). That conclusion is, with respect, wrong. Specifically: {TAB6/294}

{TAB30.23/2903}

(1) None of the relevant treaties in *Thunderbird* at [96] {**ref**}; *B-Mex* at [148] {**ref**}; *MAKAE* at [112] {**ref**}; *Leshkasheli* at [356] {**ref**} (referring to Article 1(6) of the ECT {**ref**}); or *Fotowatio* at [22] {**ref**} contained the word "*effectively*": all of them referred only to "*control*"/"*controlled*". The word "*effectively*" did appear in the BIT in *von Pezold* but nothing turned on the word effective: the tribunal applied the same analysis to Article 25(2)(b) of the ICSID Convention, which it was also interpreting, and which used "*foreign control*" simpliciter. None of the awards suggest that the critical word to determine whether *de facto* control is covered by a particular BIT is the word "*effectively*". {TAB30.4/2538} {TAB29.12/2227} {TAB30.13/2723} {TAB30.8/2637} {TAB29.14/2232}

(2) Several Swiss treaties expressly cover entities that are "*effectively controlled by ... nationals .... having a substantial part in the ownership*" (e.g. Switzerland-Jamaica BIT (1990), Article 1(b)(i) {**ref**}; Switzerland-Ghana BIT (1991), Article 1(1)(c) {**ref**}), which suggests that the term "*effectively*" was not considered to be decisive as to whether *de jure* control is required. {TAB29.26/2337} {TAB29.23/2311}

91. Furthermore, numerous investment tribunals have found that multiple shareholders in a legal entity can pursue a claim on the basis that they control the legal entity even without showing that there is a binding agreement among them requiring them to vote as a block, confirming that the existence of a legal right to control is not required (*Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008 (Lévy (P), Alexandrov, Ehlermann) at [109], [112]-[113], [115] {**ref**}; *von Pezold* at [126], [127] {**ref**}; *Perenco Ecuador Ltd v. Ecuador and Petroecuador*, ICSID Case No. ARB/08/6, Decision on the Remaining Issues of Jurisdiction and on Liability, 12 September 2014 (Tomka (P), Kaplan, Thomas) at [465], [529] {**ref**}; ~~*Azinian and others v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Interim Decision Concerning Respondent's Motion for Directions, 22 January 1998 (Paulsson (P), Civeletti, von Wobeser) at [16] {**ref**}~~. {TAB30.15/2792-2793} {TAB30.5/2597} {TAB30.19/2835} {TAB30.19/2846}

92. The decision which is commonly cited as the leading authority on requiring a *de jure* test is the decision of the majority in *Aguas del Tunari v. Republic of Bolivia,* ICSID Case No. ARB/2/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005 (Caron (P), Alberro-Semerena, Alvarez) ("***AdT***") {**ref**} where a provision referring to "*legal persons controlled directly or indirectly*" by nationals was applied. However: {TAB30.2/2476}

(1) If one were to read the majority of the *AdT* tribunal as having supported the view that legal control is required, that decision would have to be regarded as an outlier (see the cases discussed in paragraphs 88-89 above).

(2) The issue in that case was whether evidence of actual or *de facto* control was required beyond proof of legal control, i.e. whether evidence of legal control was sufficient. The Tribunal concluded that evidence of "*legal capacity to control another entity*" was sufficient and that "*the BIT does not require actual day-to-day or ultimate control*" (at [264] {**ref**}). {TAB30.2/2516}

(3) It left open the question whether control could be established on the basis of *de facto* or actual control. Indeed, the statement that "*'control' is a quality that accompanies ownership finds support generally in the law*" (at [245] {**ref**}) has to be viewed in its proper context, i.e. that the *AdT* tribunal was affirming that legal control was sufficient, not that it was necessary. {TAB30.2/2511}

(4) The *AdT* Award was considered at length and with deference by the *B-Mex* tribunal in 2019 (at [215]-[220] {**ref**}): it concluded that *AdT* had "*left open the possibility of establishing control*" on the basis of *de facto* or actual control, and that it "*only opined that a showing of* de facto *control was not required*" (at [218] {**ref**}). {TAB30.4/2575-2577} {TAB30.4/2576}

(5) The *AdT* majority also confirmed that the ordinary meaning of control encompasses "*both actual exercise of powers or direction and the rights arising from the ownership of shares*" (at [227] {**ref**}) and suggested that the past tense "*controlled*" implies a reference to the actual exercise of restraint (at [229] {**ref**}). {TAB30.2/2506} {TAB30.2/2507}

(6) In sum, it is difficult to see how the *AdT* can be viewed as reflective of a "*minority view*" supporting the conclusion that *de jure* control is required (CA Judgment/[186]) – let alone a heightened level of *de jure* control in the form of majority shareholding. {TAB6/294}

93. The CA relied on the distinction in *Gramercy v. Peru*, Final Award, 6 December 2022 (Fernández-Armesto (P), Drymer, Stern) {**ref**} in support of its conclusion that control of the economic interest of the entity, rather than control over its conduct, is what must be meant by control (CA Judgment/[196]-[197]). *Gramercy* concerned control in the "*investment*" definition in Article 10.28 of the US-Peru Free Trade Agreement ("*investment means every asset that an investor owns or controls, directly or indirectly...*" cited at [622] {**ref**}) and was focussed on the question whether an ownership interest was {TAB30.9/2648} {TAB6/297} {TAB30.9/2650}

a requirement for control of an investment. This tribunal's analysis is of limited assistance for present purposes because:

(1) In discussing an ownership interest as a requirement of control, the tribunal relied on other provisions of the applicable treaty which referred to "*control*" (at [623] {**ref**}); analogous provisions do not appear in the BIT. {TAB30.9/2651}

(2) The tribunal found that those provisions on control "*show that, when the Treaty uses the term 'control', it is referring to the investor exercising control over an enterprise in the form of a corporation*" and then referred to control "*through his majority or minority ownership interest and/or by other means*" (at [628] {**ref**}) but did not elaborate on what "*or by other means*" entails: it appears to leave open that control may be established on the basis of something other than an ownership interest. {TAB30.9/2652}

(3) In the factual matrix of that case, the tribunal distinguished between owners and administrators on the basis that: *"[o]wners (be they known as partners, shareholders or members) are those who contribute the funds required for the corporation's development, stand to benefit or suffer the entity's activities, and receive the remaining funds upon the corporation's liquidation*" (at [633] {**ref**}); "*[a]dministrators and officers are both the corporation's servants .... normally receive a remuneration for their services and may or may not be subject to dismissal by the owners*"; and "*what separates owners and administrators/officers is the business risk; that ultimate risk is always borne by the owners*" (at [634] {**ref**}). {TAB30.9/2653} {TAB30.9/2653}

(4) It is difficult to see how the above analysis could be applied to a legal owner like a trustee who does not contribute funds, does not stand to benefit, and bears no business risk. And, even if it could, the vast majority of cases militate against the proposition that control over business activities should be simply irrelevant to the determination of control.

94. This survey of the relevant case law demonstrates that:

(1) There is a clear and consistent line of authority to support the conclusion that "*control*" in Article 1(1)(c) embraces control in fact as well as control through the exercise of legal rights, and a majority of the investment treaty jurisprudence supports that conclusion, as Foxton J found (HC Judgment/[215](ii)). {TAB13/548}

(2) There is no reason not to follow that line of jurisprudence, or *jurisprudence constante*. While the CA considered that "*the awards cited are only as valuable as the cogency*

of their reasoning" (CA Judgment/[186]), investment treaty tribunals have consistently set out a principled basis for "*control*" embracing its ordinary meaning of *de facto* control. That is "*cogent*" reasoning, and it is furthermore consistent with the ordinary meaning of control, as both Foxton J and the CA acknowledged. {TAB6/294}

(3) Tribunals have repeatedly accepted the principle that *de facto* control can be established absent any degree of legal control.

(4) The *Thunderbird* test for *de facto* control - exercising "*significant influence on decision-making*" and being the "*consistent driving force*" - has been accepted by numerous tribunals (including those that, on the facts, concluded that the test was not satisfied). This test is consistent with the ordinary meaning of the term "*control*", i.e. "*the fact or power of directing and regulating the actions of people or things; direction, management; command*" {**ref**}. {TAB31.12/3216}

iii. Relevant academic commentary

95. In the leading commentary on the ICSID Convention (*Schreuer*), Professor Schill accurately summarises the case law as follows at [322] and [330]:

> *"While control is often the consequence of sole or majority ownership of an investment, ownership is not the only determining factor for control. The ordinary meaning of the word also encompasses other factors, such as special voting rights and powers of operation and management, often conferred through contractual arrangements. Provided the other requirements for the jurisdiction of the Centre under Art. 25(1) are met, the Convention accepts control as a form of holding an investment.*
>
> ...
>
> *Overall, the case law on these various provisions dealing with the concept of control demonstrates that arbitral tribunals have shown a high degree of flexibility. In order to determine control, they have, in addition to formal ownership, looked at criteria such as powers of management and operation of the investment, as well as expertise. What matters to establish control are not formal parameters, like the existence or amount of ownership, but the actual ability to direct the action of the controlled investment."*{**ref**} {TAB31.16/3247}

{TAB31.16/3249}

96. As noted above at paragraph 81, this approach to the meaning of "*foreign control*" in Article 25(2)(b) is not a recent development in the case-law. Foxton J was thus correct to place emphasis on the fact that his conclusion that the word "*control*" embraces *de facto* control was supported by *Schreuer* as well as by the majority of the relevant investment treaty jurisprudence (HC Judgment/[215(ii)]). The CA accepted that it may have {TAB13/548}

accurately stated what "*perhaps the majority*" of arbitral tribunals had done, but considered this was problematic, because it "*takes no account of the function of such a definition in a BIT*" (CA Judgment/[191]). Thus the CA returned to the impermissible and flawed starting point of its analysis – its conception of the "*function*" of the definition of "*investor*" in Article 1(1). For the reasons explained in paragraphs 25-34 above, in this respect the CA erred, and that error infected (*inter alia*) its analysis of relevant academic commentary. {TAB6/296}

97. The CA also placed significant emphasis on an extract from Professor Douglas's 2009 book, in the commentary to his proposed rules addressing nationality (Rule 31) and the link between the investor and the investment (Rule 32) (Douglas, *The International Law of Investment Claims* (2009) at [556] {**ref**}; (CA Judgment/[176])). However, (i) when read in full context, it is apparent that Douglas was arguing for "*control*" in the context of control of an "*investment*", not control of an "*investor*", and as an implicit requirement for protection under any investment treaty, rather than focussing on the explicit requirement of "*control*" of an investor, under a provision such as Article 1(1)(c). That aspirational suggestion has not been taken up by a single investment treaty tribunal since 2009. Douglas's argument does not support the conclusion that Ds must demonstrate a legal right to control of an investor under Article 1(1)(c); and (ii) in any event, this book, published in 2009, does not take account of the clear trend that has emerged since. While the CA considered it had "*not been referred to anything in the investment treaty jurisprudence which calls it into question*" (CA Judgment/[177]), it omitted to take account of the fact that Professor Douglas had later sat on a tribunal that assessed the question of control on the basis of evidence of *de facto* control (see the discussion of *Italba Corporation v. Uruguay* in paragraph 89 above), nor the numerous other treaty awards since the publication of this 2009 book, holding that control encompasses *de facto* control. {TAB31.6/3126} {TAB6/292-293} {TAB6/293}

C. GROUND 2: MR STAVA WAS IN *DE FACTO* CONTROL OF DIAG SE AT THE RELEVANT TIME

(1) Overview of Ds' case

98. Ground 2 proceeds from the premise that the appeal on Ground 1 is allowed, i.e. that "*control*" in Article 1(1)(c) of the Treaty can in principle be established by *de facto* control. In those circumstances, Ds' case is that the CA erred in reaching its *obiter* conclusion that Mr Stava was <u>not</u> in *de facto* control of Diag SE at the relevant time (CA Judgment/[208]). {TAB6/302}

99. The appeal in respect of Ground 2 arises out of Mr Stava's transfer of title to the Diag Shares from himself to a Liechtenstein trust[15] called the 'Koruna Trust' (the "**Koruna Trust Transfer**"), whilst (with the trustee's consent) retaining possession of the (bearer) share certificates themselves (SOFI/[42] and [45.2]). {TAB1/25} {TAB1/27}

100. At first instance, after hearing the evidence of two experts in Liechtenstein law over the course of a two-week trial, the trial Judge concluded that Mr Stava was in *de facto* control of Diag SE at the relevant time, namely **31 December 2011**. This was the date by which, if the Lawbook Transaction had not completed (which it was never intended to), ownership of the Diag Shares would be vested in the Koruna Trust (SOFI/[42.3]). The parties therefore agreed that Mr Stava's control should be assessed by reference to the state of affairs in place at the stroke of midnight. Indeed, C has been barred by operation of s.73 of the AA 96 from contending that Mr Stava lost control of Diag SE at any later date (see HC Judgment/[168]). {TAB1/26} {TAB13/531}

101. The trial Judge's assessment of Mr Stava's control was based on an extremely close and detailed analysis of the various capacities in which Mr Stava was able to "*influence Diag SE's actions and decisions*" at that date (HC Judgment/Annex 3/[45]ff.). In the Judge's view, Mr Stava was both Diag SE's "*determinant voice*" (HC Judgment/Annex 3/[52]) and "*guiding hand*" (HC Judgment/Annex 3/[46]). {TAB13/591} {TAB13/593} {TAB13/592}

102. The CA disagreed with the trial Judge's conclusion in respect of Mr Stava's *de facto* control (CA Judgment/[206]-[207]). In so doing, Ds submit that the CA fell into error. In particular, Ds contend that the CA failed to apply the correct test for conducting an assessment of *de facto* control in the circumstances of this case. {TAB6/301}

103. The CA did not look at the overall picture and ask whether, as a matter of fact, Mr Stava was in control. Instead, it focussed on Mr Stava's powers of coercion/sanction over the trustee, namely his power as Protector of the Koruna Trust to replace the trustee with himself and his wholly-owned Liechtenstein company[16] and, further, asked the wrong question in that regard. The CA reasoned that, because Mr Stava had not yet exercised that

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[15] Since the Koruna Trust is central to Ground 2, Ds emphasise that it would be erroneous to assume that it is akin to an English trust. As has been observed by the Privy Council, "*Liechtenstein trusts law is not closely modelled on English law*": *Perry v. Lopag Trust Reg. & Ors* [2023] 1 W.L.R. 3494; [2023] UKPC 16 per Lord Hodge at [45] {**ref**}. {TAB27.12/1960}

[16] It is common ground that there is a requirement of Liechtenstein law that at least one trustee must be resident/domiciled in Liechtenstein. Thus, unless Mr Stava changed his personal residence, he would have to be appointed alongside a Liechtenstein company under his control.

power by 1 January 2012, he was not in *de facto* control of Diag SE (CA Judgment/[205]-[206]). {TAB6/301}

104. In other words, the CA concluded that, in order for Mr Stava to have been in *de facto* control by 1 January 2012, it was necessary for him to have already exercised his power of coercion/sanction over the (then) *de jure* controller by becoming the *de jure* controller himself.

105. This was an unduly narrow test. Quite aside from the fact that it was impossible for Mr Stava to fulfil, since it required him to exercise his power as Protector to replace the trustee prior to the date by which the Koruna Trust Transfer completed (and therefore prior to the date on which the Koruna Trust had obtained ownership of the Diag Shares), it also erroneously conflated the test for *de facto* control with the test for *de jure* control. The former cannot depend upon establishing the latter. What is more, the only reasonable inference which can be drawn from the fact that Mr Stava had not exercised his power to replace the trustee is that he had not needed to, because his wishes were being fulfilled: he was in fact in control. A dog kept on a lead is no less under control because the owner has not needed to pull.

106. Had the CA asked the correct question, namely (in summary) whether Mr Stava could procure that his wishes in respect of Diag SE be carried out, the answer would have been an emphatic "*yes*". Amongst other things:

(1) The trustee of the Koruna Trust had delegated the exercise of the voting rights attached to the Diag Shares to Mr Stava. Thus, this is an *a fortiori* case from one in which the *de facto* controller is able to give instructions to the *de jure* controller which are then followed (as discussed at [21] of Ds' Grounds). On the facts of this case, Mr Stava did not even need to give the trustee instructions; he was in a position where he could carry out his wishes himself. {TAB17/629}

(2) And insofar as the trustee sought to frustrate Mr Stava's will, the CA held (as had the trial Judge) that Mr Stava was in a position to exercise his power as Protector of the Koruna Trust to replace the trustee with himself and his Liechtenstein company (SOFI/[60.11]). Should it have proved necessary (which it never was, since he was able to exercise control through the arrangements as they stood), he could thereby (re)obtain legal title to the shares and carry out his wishes as the *de jure* owner. {TAB1/36}

107. For these reasons and for those developed below, this Court is asked to allow the appeal on Ground 2 and restore the trial Judge's assessment of Mr Stava's control as a matter of fact over Diag SE.

(2) *De facto* control: what is it?

108. In this case *de facto control* constituted the ability of Mr Stava to procure that his wishes in respect of Diag SE be carried out. Precisely how *de facto* control is demonstrated in a given case will depend upon the circumstances of the case. As discussed above (at paragraph 81), since the emergence of the modern international law on foreign investment the concept of "*control*" has been understood to be "*not a simple phenomenon*" but a "*complex picture*" requiring consideration of a host of factors - including but not limited to ownership, voting, influence over decision-making, management and so on. See *e.g.*: *MAKAE* at paragraph 44(2) above: "*a role which determines the overall character and direction of an enterprise*" {**ref**}; *B-Mex* at paragraph 44(3) above: "*any ability 'to exercise restraining or directing influence over' or to 'have power over' a company*" {**ref**}; *Thunderbird* at paragraph 88(1) above: exercising "*significant influence on decision-making*" and being the "*consistent driving force*") {**ref**}. It is only by reference to the arrangements in a given case that it is possible to answer the question of whether "x" controls "y" in a *de facto* sense thus understood. {TAB30.14/2755} {TAB30.4/2536} {TAB30.23/2889} {TAB17/629}

109. As stated in Ds' Grounds of Appeal at §21, in a case such as the present where there is one *de jure* controller (*viz.* the trustee), it is submitted that *de facto* control by A can be established by: (a) A's ability to give instructions to the *de jure* controller; (b) the *de jure* controller's willingness to follow those instructions; and (c) the existence of a method of coercion or sanction which would enable A's instructions to be carried into effect if the *de jure* controller refused to follow them. In other words, the question is whether, as a matter of fact, A can procure that their wishes are carried into effect.

110. This is also, incidentally, the critical question in another context where *de facto* control is important, namely sanctions law. The UK Office of Financial Sanctions Implementation's Guidance provides at §4.1 that an entity can be "*owned or controlled directly or indirectly by another person ... if it is reasonable to expect that the person would be able to ensure the affairs of the entity are conducted in accordance with the person's wishes*" (emphasis added) {**ref**}. Ds note that a (seemingly) lower threshold is applied when determining whether a person is a "*person with significant control*" of a company for the purposes of {TAB32.4/3376}

the Companies Act 2006: §5 of Schedule 1A to the Companies Act 2006 simply requires the "*actual exercise*[e]" of "*significant influence or control*" over the company {**ref**}. {TAB26.2/1649}

(3) *De facto* control: how did Mr Stava have it?

111. As at the stroke of midnight on 31 December 2011, the position was as follows:

(1) The Koruna Trust (see further SOFI/[42]-[44]): {TAB1/25-27}

a. The trustee of the Koruna Trust (a corporate vehicle established by Mr Stava's personal lawyer called 'LNR Trust Reg.' (SOFI/[43])) held the title to the Diag Shares (SOFI/[42.4]). {TAB1/27} {TAB1/26}

b. Mr Stava was the Settlor, the Protector and (along with his three daughters and their children) a discretionary beneficiary of the Koruna Trust (SOFI/[43]). {TAB1/27}

c. The Diag Shares were held in the Koruna Trust "*essentially on* [their] *own*" (HC Judgment/Annex 3/[20]). {TAB13/582}

d. The Koruna Trust's trust deed provided that the trustee was not required to "*interfere in the management or conduct of the business of*" Diag SE (HC Judgment/Annex 3/[25]). {TAB13/584}

e. Whilst LNR Trust Reg. was the trustee, Mr Stava was (at least) a "*very important voice*" in matters of Koruna Trust administration (HC Judgment/Annex 3/[57]) and was "*uniquely placed to assess the value of Diag SE and how best to realise [it]*" (HC Judgment/Annex 3/[54]). {TAB13/594} {TAB13/593}

f. Mr Stava was also "*uniquely placed*" to administer the Koruna Trust given its "*very limited and particular asset base*" (HC Judgment/Annex 3/[55]). {TAB13/593}

g. As Settlor of the Koruna Trust, Mr Stava would have had "*significant influence*" over any decisions by the Trustee to change the class of beneficiaries and make distributions (HC Judgment/Annex 3/[61(ix)]). {TAB13/596}

h. As explained above, the transfer of the Diag Shares into the Koruna Trust was effected as part of the Lawbook Transaction. This was designed (at C's instigation) to "*create the illusion of non-involvement with Diag SE* [by Mr Stava] *while retaining it*" (HC Judgment/Annex 3/[19], SOFI/[42.2]). {TAB13/581} {TAB1/26} {TAB1/27}

(2) Diag SE (see further SOFI/[45]):

a. The success or failure of Diag SE inured to Mr Stava and his family as members of the class of discretionary beneficiaries, not to the trustee (HC Judgment/[216(iv)]). {TAB13/550}

b. Mr Stava was a member of the board and the President/Chairman of Diag SE (HC Judgment/Annex 3/[50]). {TAB13/593}

c. Mr Stava was able to influence the two other board members of Diag SE (being his daughter and his personal lawyer) (HC Judgment/Annex 3/[51]). {TAB13/593}

d. Mr Stava held sole signatory rights in respect of Diag SE (which had to be exercised in the best interests of the company) (HC Judgment/Annex 3/[50]). {TAB13/593}

e. Diag SE was "*non-trading*" and its only asset was its claims against the Czech State (HC Judgment/Annex 3/[20]); "*it had no business other than seeking to recover under its commercial arbitration award*" (HC Judgment/Annex 3/[46]). {TAB13/582} {TAB13/592}

f. Mr Stava "*and only Mr Stava*" had the relevant knowledge in respect of those claims (HC Judgment/[216(i)]). {TAB13/549}

g. Mr Stava was the sole source of funding for those claims (HC Judgment/Annex 3/[46]). {TAB13/592}

h. The trustee was "*necessarily… dependent*" on Mr Stava to conduct Diag SE's business and was "*not in a position*" to direct him in that regard (HC Judgment/[216(ii)]). {TAB13/549}

i. The trustee had delegated the conduct of that business to Mr Stava (HC Judgment/Annex 3/[53]). {TAB13/593}

j. In conducting that business "*there was no scope for any conflict between Mr Stava and the Trustee (the interests of Mr Stava and the Koruna Trust which he had had established, of which he, his daughters and their children were in the Class of Beneficiaries, and into which he had settled Diag SE were perfectly aligned in that respect)*" (HC Judgment/Annex 3/[47]). {TAB13/592}

k. Mr Stava therefore had the same scope for decision making in relation to Diag SE's business as he did when he owned the shares in Diag SE (HC Judgment/[216(vi)(b)]). {TAB13/550}

(3) The shares in Diag SE (see further SOFI/[60.10-11]): {TAB1/36}

a. As the holder of the bearer shares (which were held by him as agent for the trustee), Mr Stava had the right to exercise the voting rights attached to those shares (HC Judgment/Annex 3/[51]). {TAB13/593}

b. Those rights had to be exercised in what he believed to be the best interests of the Koruna Trust (HC Judgment/Annex 3/[51]). However, there was no "*realistic possibility*" of a conflict of interest between Mr Stava's own interests and those of the Trust when exercising those rights (HC Judgment/[170(v)-(vi)]). {TAB13/593} {TAB13/532}

c. Mr Stava was in a position to exercise his power as Protector of the Koruna Trust to replace the trustee with himself and his wholly-owned Liechtenstein company, provided that he considered that this was in the best interests of the Trust (which, as above, he was "*uniquely placed to administer*") (CA Judgment/[205]). He could thereby obtain title to the Diag Shares and (consequently) *de jure* control of them. {TAB6/301}

d. If Mr Stava had requested that the trustee transfer ownership of the shares in Diag SE back to his personal ownership via a distribution from the Trust, it is highly likely that the trustee would have complied with that request (HC Judgment/Annex 3/[59]). {TAB13/594}

e. Whilst, as a matter of law, the trustee had the right to sell the shares in Diag SE, in practice the trustee could not exercise that right without Mr Stava's approval (HC Judgment/Annex 3/[54]-[55]). {TAB13/593}

112. In these circumstances, Mr Stava was able to procure that his wishes in respect of Diag SE be carried out. As identified above, this is an *a fortiori* case from one in which the putative *de facto* controller merely provides instructions which are subsequently followed; on the facts of this case, the *de jure* controller (i.e. the trustee) had delegated its powers to Mr Stava, rendering such instructions unnecessary. And in any event, should the trustee disagree with Mr Stava, Mr Stava was able to ensure that his wishes be carried out by exercising his powers as Protector to replace the trustee, alternatively by procuring a distribution of the shares back to his personal ownership.

(4) The CA's error

113. Ds contend that the CA adopted an unduly narrow conception of *de facto* control which, in effect, rendered *de facto* control virtually indistinguishable from *de jure* control. The CA reasoned as follows.

114. ***First***, the CA placed reliance on *Gramercy* (see CA Judgment/[196] and [198]) for the proposition that control of a company's "*business activities*" is in principle irrelevant. However, Ds have explained as part of their case on Ground 1 above that *Gramercy* does not in fact establish this as a generally applicable principle of investment treaty law (see paragraphs 87 to 94 above). {TAB6/297-298}

115. ***Second,*** the central element of the CA's reasoning concerned Mr Stava's power as Protector to replace the trustee with himself and his Liechtenstein company:

(1) At CA Judgment/[205], the CA accepted that "*Mr Stava was in a position to reconstitute the trust with himself and a Liechtenstein company under his control as the trustees, provided always that he considered this to be in the best interest of the trust*". {TAB6/301}

(2) At CA Judgment/[206], the CA concluded that the effect of Mr Stava's ability to replace the trustee with himself and his company was that "*Mr Stava was in a position to acquire control of Diag SE if he wished to do so*". {TAB6/301}

(3) However, also at CA Judgment/[206], the CA considered that the power to acquire control was different to "*actually having control of the company*". Thus, in the CA's view, "*at the relevant time, the end of 2011, Mr Stava had not exercised his power to acquire control of Diag SE and had no intention of doing so…it was important to him that he was not regarded as having such control.*" {TAB6/301}

(4) Accordingly, at CA Judgment/[208], the CA concluded that "*even if there are some circumstances in which de facto control would suffice, Mr Stava did not have de facto control of Diag SE in a sense necessary to qualify as an investor under Article 1(1)(c)*". {TAB6/302}

116. A number of criticisms can be made of the CA's reasoning:

(1) ***First***, it is, with respect, apparent that something has gone wrong with the CA's reasoning given that (as above) the Koruna Trust Transfer was only effected at midnight on 31 December 2011, when the 'purchase' under the Lawbook Transaction failed to complete (SOFI/[42.3]). By requiring Mr Stava to have exercised his power to replace the trustee with himself and his Liechtenstein company <u>prior to that point</u>, the CA applied a test which was futile and impossible to fulfil: {TAB1/26}

a. Until the completion of the Koruna Trust Transfer, full and unencumbered ownership of the Diag Shares had not vested in the Koruna Trust. It is non-sensical to suggest that Mr Stava had to have exercised his control prior to that point.

b. But had Mr Stava replaced the trustee with himself and his Liechtenstein company at 00:00 on 1 January 2012 (i.e. the very second that the Koruna Trust Transfer completed), the CA's judgment is that this would have already been too late.

(2) ***Second***, for the CA, in order for Mr Stava to have *de facto* control it was first necessary for him to obtain or to exercise *de jure* control by replacing the trustee and thereby obtaining legal title to the shares in Diag SE. However, Ds say that this was an erroneous conflation of two very separate tests for control. On the assumption that *de facto* control alone can satisfy the requirement in Article 1(1)(c) (which is the essential premise of Ground 2), it cannot be necessary for a putative controller to obtain *de jure* control in order to establish their *de facto* control. The CA should have viewed Mr Stava's ability to obtain *de jure* control as part of the mechanism by which he was able to ensure that his wishes be carried out.

(3) ***Third***, relatedly, the CA drew the wrong conclusion from the fact that Mr Stava had not exercised his power of replacement by the relevant time. That Mr Stava had not seen fit to replace the trustee should (if anything) give rise to an inference that Mr Stava's wishes were being carried out to his satisfaction. In Ds' submission, it cannot be necessary for a *de facto* controller to actually exercise their power of coercion or sanction in order to establish their *de facto* control. That is not least because:

a. In reality, the more satisfied a *de facto* controller is that their wishes are being carried out, the less likely it is that they will exercise a power of coercion or sanction such as the CA considered necessary to demonstrate the *de facto* control.

b. For the purposes of investment treaty claims, it is sometimes argued that a *de facto* controller must be in control at/by a particular point in time (at the time of the investment, at the time of breach, at the time of the institution of proceedings, etc.). The CA's decision results in a significant degree of randomness as to whether a *de facto* controller will have exercised their power of coercion or sanction in time. For example, if they must have exercised their power of coercion or sanction by the date of breach, the *de facto* controller has a deadline which they will only be aware of when it is already too late.

c. If a *de facto* controller is satisfied that their wishes are being carried out then, in order to fulfil the CA's test, they would need to engineer an artificial dispute in order to exercise their power of coercion or sanction.

(4) ***Fourth***, it is notable that the net effect of the CA's judgment is that if on 1 January 2012 C had asked for proof of Mr Stava's qualifying control, the CA's view is that Mr Stava could have provided satisfactory proof. But C did not ask and Mr Stava is (on the CA's logic) now unable to establish his control.

117. In reaching its conclusion on Mr Stava's power of replacement, it is notable that the CA differed from previous (English) judicial instinct on the nature of the powers of a Protector. In *Independent Trustee Services Ltd v. GP Noble Trustees Limited* [2010] EWHC 1653 (Ch), Peter Smith J considered at [88] that "*the…Protector is…capable of being removed by the Settlor. The Protector has the right to remove trustees*" and "*by that structure the Settlor is able to retain control over the trust*"{**ref**}. Equally, in *Nightingale Mayfair Limited v. Mehta* No. CH 1997 N 3603, Blackburne J considered at p.32 that "*Mr Mehta effectively controlled…the Lotus Trust…through his power, while protector, to appoint new trustees*" {**ref**}. {TAB27.6/1776} {TAB27.11/1931}

118. ***Third***, the CA also considered the impact of Mr Stava's position as agent for the trustee in certain respects:

(1) The CA concluded that "*in everything he did as chairman of the company and holder of its bearer shares, Mr Stava acted as agent of the trustee*" (CA Judgment/[202]). (This conclusion contained an initial error in that it has not been suggested in these proceedings that Mr Stava was acting as agent for the trustee in his role as company Chairman). {TAB6/300}

(2) The CA then proceeded to conclude that the control which Mr Stava exercised as agent for the trustee "*must in law be regarded as control by the trust*" (CA Judgment/[203]). {TAB6/301}

119. This was, however, to erroneously approach the question of control through the lens of *de jure* control. That Mr Stava acted in certain respects as agent of the trustee was at least potentially relevant to the enquiry in relation to *de facto* control. But it was only the beginning of the enquiry and not the end of it.

120. As the trial Judge held, on the facts of this case Mr Stava "*cannot be equated with a conventional… agent…acting on behalf of a principal*" (HC Judgment/[216(vi)(d)]). That is because, in a conventional agency agreement, it is unlikely the agent (A) could say that {TAB13/550}

they are able to ensure that their wishes are carried out. Even if the principal (P) had delegated a degree of decision-making to A, in the event of conflict it is P's wishes that would prevail.

121. But on the facts of this case: (1) when acting as agent, there was "*no realistic possibility*" of a conflict between the interests of P (trustee) and A (Mr Stava) and P was "*not in a position*" to direct A; (2) in any case, P owed a duty to act in the best interests of A and his family; (3) the value in the property with which A was dealing on behalf of P had been created by A, who was also uniquely qualified to manage that property; (4) P was unable to exercise certain of its rights without A's consent; and (5) critically, A was in a position to replace P with himself so that, insofar as P sought to impose its will on A, it is A's wishes that would prevail. The effect of these matters was that, on the facts of this case, it was A who was in *de facto* control, not P.

122. The impact of these errors was that the CA did not at any stage ask whether, as a matter of fact, Mr Stava was able to procure that his wishes in respect of Diag SE be carried out. It did identify certain building blocks which lead to that conclusion (such as Mr Stava's ability to exercise the voting rights attached to the shares and his ability to replace the trustee) but, with respect, there was a failure to consider their cumulative effect.

(5) A red herring

123. Ds note that, when referring to Mr Stava's power to obtain control by replacing the trustee with himself and his Liechtenstein company, the CA expressed the view that, at the end of 2011, it was "*important to* [Mr Stava] *that he was not regarded as having such control*" (CA Judgment/[206]). {TAB6/301}

124. This was a reference to Mr Stava's purposes in establishing the Koruna Trust. It is common ground that the trust deed itself did not contain any express purpose. At first instance, the trial Judge addressed Mr Stava's own evidence that the Koruna Trust was established for the dual purposes of "*succession planning*" and "*asset protection*" (HC Judgment/Annex 3/[20]): {TAB13/582}

(1) As to the former, the trial Judge concluded that he did not find "*succession planning*" to be "*a particularly informative explanation of why a discretionary trust was set up whose sole asset was shares in a non-trading company*" but he accepted that "*Mr Stava had benefitting his family in mind when he established the trust*" (HC Judgment/Annex 3/[20]). {TAB13/582}

(2) As to the latter, the trial Judge accepted that "*asset protection…may have been a reason why this asset – which by this point had had a controversial and troubled history, in which the resources of the Czech state had been deployed to a striking degree in an attempt to prevent the realisation of any value*" had been placed into the Koruna Trust (HC Judgment/Annex 3/[20]). {TAB13/582}

(3) Ultimately, the trial Judge's view was that neither purpose of the trust "*imposed a meaningful limit on the Trustee's responsibilities outside the context of fixing the members of the Class of Beneficiaries and in the distribution of Trust assets*" (HC Judgment/Annex 3/[20]). The purposes of the trust were therefore seen as being relevant (if at all) to the trustee's ability to exercise certain of its powers. {TAB13/582}

125. The CA went somewhat further than the Judge. The CA held that, as at the end of 2011, it was "*important*" to Mr Stava <u>not</u> to exercise his power of replacement, so that he would not be regarded as having *de jure* control of Diag SE (CA Judgment/[206]). This was seemingly a new factual finding at appellate level, but in any event Ds regard it as something of a red herring: {TAB6/301}

(1) It is obvious that the purpose of the Koruna Trust Transfer was to transfer the *de jure* title to the shares in Diag SE. Indeed, the whole raison d'être of the Lawbook Transaction was, at C's encouragement, to create "*distance*" between Mr Stava and Diag SE. However, that tells one nothing about the *de facto* control that Mr Stava possessed and which is clearly established by the matters set out above.

(2) The CA (rightly) did not say that Mr Stava would <u>never</u> have exercised his power to replace the trustee, only that **at the end of 2011** he had "*no intention of doing so*". That is unsurprising: at the end of 2011 there was not even a theoretical possibility of a conflict between Mr Stava and the trustee; the Lawbook Transaction had not yet failed to complete, thus the trustee was not yet the owner. There was therefore no need for Mr Stava to even consider exercising his power of replacement at that stage.

(3) On C's own case, it was critical for Mr Stava to retain *de facto* control in order for the shares in Diag SE to have any value. If Mr Stava did retain *de facto* control then Diag SE had the benefit of an investment treaty claim against C worth c.US$750m (i.e. the sum due under the Award). If Mr Stava did not have *de facto* control then C's case is that Diag SE does not have any claim against C. There would of course be no need to succession plan or to protect assets worth (on C's case) nothing.

(4) Further, the dual purposes of "*succession planning*" and "*asset protection*" in establishing the Trust did not mean that the Diag Shares could never be transferred out of the trust (nor is there any finding to that effect). Indeed, in 2024, following a request by Mr Stava, the trustee made a distribution of those shares to Mr Stava personally.

126. Finally, Ds comment on an unfortunate episode which occurred during the hearing before the CA, in which leading counsel for C ventured a suggestion that Mr Stava may have completed the Koruna Trust Transfer to avoid what he described as Liechtenstein's "*mandatory inheritance laws*". This formed no part of the expert issues ordered by the trial Judge. The content of Liechtenstein's inheritance law is not (and has never been) common ground. It is therefore unfortunate that the CA adopted the suggestion of C's counsel in its judgment at CA Judgment/[183]. The point is ultimately not one which affected the outcome of the CA's order. Given its unsatisfactory provenance, Ds trust that the point will not be repeated before this Court. {TAB6/294}

D. CONCLUSION

127. For the reasons set out above, the Court is respectfully invited to allow the appeal. Specifically,

(1) The appeal on Ground 1 should be allowed. "*Control*" in Article 1(1)(c) can be established by *de facto* control.

(2) The appeal on Ground 2 should be allowed. Mr Stava was in qualifying *de facto* control of Diag SE because, on the basis of the state of affairs in place at the stroke of midnight on 31 December 2011, he was able to procure that his wishes in respect of Diag SE be carried out.

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