UKSC-2025-0176

IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)
[2025] EWCA Civ 588

B E T W E E N:

THE CZECH REPUBLIC

Claimant
(Respondent to this Appeal)

-and-

(1) DIAG HUMAN SE
(2) MR JOSEF STAVA

Defendants
(First Defendant is Appellant on this Appeal)

CLAIMANT'S RESPONSIVE WRITTEN CASE

A INTRODUCTION

1 This appeal is made by Diag Human SE ("DH") in which the Czech Republic ("CR") is Respondent. This Responsive Written Case adopts the abbreviations used in CR's Written Case dated 28 September 2026 on its own appeal. It proceeds on the basis that the Court has already considered that document (including, for example, the principles concerning treaty interpretation under Article 31(1) of the VCLT). {**4/145-188**} {**29.32/2420**}

2 The question raised by this appeal relates to Article 1(1)(c) of the Swiss-Czech BIT, under which a legal entity incorporated anywhere in the world can take advantage of that BIT, provided that it is "*controlled*" by a Swiss or Czech national or nationals. In essence, DH contends that it is not necessary for such Swiss or Czech nationals to have any ownership right or other legal right of control over the legal entity, but instead that it is sufficient if that person could somehow exercise factual control over the company's affairs without any ownership right or other legal right of control. {**21.1/653**}

3 If correct, this startling contention would mean that a company incorporated anywhere in the world, and entirely owned by non-Swiss or Czech interests, could avail itself of the protection of the BIT by appointing a Swiss or Czech national as, for example, CEO, or a

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board composed of mainly Swiss or Czech nationals, or a Swiss asset manager.[1] On DH's case, in order for them to exercise the "*control*" required by Article 1(1)(c), it would not be necessary for such person (or persons) to own a stake in the company or to have any personal legal rights in connection with the direction of its affairs. They would not be personally connected with the investor entity or its control in any meaningful way, as would be the case if they held a legal right of some sort in relation to it. They would be merely servants or agents acting on behalf of those who do hold the legal rights, who on this interpretation, do not need to be of Swiss or Czech nationality. {**21.1/653**}

4 In this particular appeal , the relevant national, Mr Stava, a dual Swiss and Czech national, had previously owned the shares in DH. But, in 2011, he consciously and on legal advice placed them all in the Koruna Trust, the effect of which (as discussed in the next section, **Section B**) was that thereafter he held no ownership right or other legal right of control, although the trust and the company chose to use him as their agent for certain purposes and he remained as chairman of DH. He took that step, according to his own evidence and as found by the Judge, for succession planning purposes and asset protection from third parties – in other words he positively intended to alienate his ownership rights, including his right of control. That step has various legal implications. It is entirely unsurprising that one of them is that DH lost its "*investor*" status, which only existed under Article 1(1)(c) by reason of DH hitherto being controlled by Mr Stava, a Swiss national. The Court of Appeal ("CA") was correct to hold that this was the outcome. {**23.1/ 1109-1124**} {**21.1/653**}

5 DH's appeal is concerned with the agreed questions set out in paragraphs 67.1 and 67.2 of the SFI, namely: {**1/39**}

5.1 *does "controlled" for the purposes of Article 1(1)(c) require that the legal entity in question be controlled de jure, or can it be established by de facto control without de jure control?* and

5.2 *if "controlled" for the purposes of Article 1(1)(c) can be established by de facto control without de jure control, (i) what is the correct test for such de facto control and (ii) on the findings of fact in the present case, was the CA correct to conclude that Diag Human SE was not "controlled" by Mr Stava within the meaning of Article 1(1)(c)?*

[1] The example put by Popplewell LJ during oral argument was an asset manager such as Barclays Asset Management: CA Day5/61. {**25.2.2/ 1480**}

6 To succeed in reversing the CA's disposition of this appeal in favour of CR, DH would need to succeed on *both* issues. Taking them in turn:

7 On the first question, as held by the CA, *de jure* control (i.e. control of a legal entity arising from some legal right in it, or deriving to some extent from a proprietary interest in the legal entity concerned) is required for an entity to qualify for investor status under Article 1(1)(c) of the BIT. *De facto* control (i.e. some form of practical control) without at least some level of *de jure* control is insufficient. As the Judge found (see **Section B**), which finding has not been appealed, Mr Stava did not have any right of *de jure* control. Therefore, the appeal should be dismissed (see further **Section C** below). If that happens, the second issue does not arise. **{21.1/653}**

8 On the second question, DH was not in fact "*controlled*" by Mr Stava for the purposes of Article 1(1)(c) of the BIT. The CA's decision was correct essentially for the reasons which it gave. On this, DH raises a host of points but fails to identify any material error that the CA actually made. It suggests a new test for identifying a controller which is excessively broad – bearing in mind that a corporate entity incorporated anywhere in the world could gain protection by being "*controlled*" by such person, and the use of which is apparently entirely dependent "*upon the circumstances of the case*" (DH Case, [108]). It is also an obvious departure from the test proposed by DH itself when seeking PTA (see Grounds [21], stating the CA "*should have held the test … is as follows*…"), in relation to which public importance was justified on the basis that "*it is vital that States and putative investors are able to understand and apply a workable test*" (see Grounds [30]). See further **Section D** below. **{21.1/653}** **{2/86}** {**17/629-632**}

B THE KEY FACT FINDINGS WHICH PROVIDE THE SETTING IN WHICH BOTH QUESTIONS ON THE APPEAL ARISE

9 The Judge made a comprehensive set of fact findings which were not or not successfully challenged on appeal and are highly material, as they provide the setting in which both questions at issue fall to be understood and answered. In August Judgment, [168]-[169], the Judge explained the basis on which he was approaching his findings on this aspect of the case, namely: (a) that the relevant position was being ascertained as at the end of December 2011, and (b) mutual undertakings had been given by the parties to be bound (in relation to the issue which is the subject of the other appeal before this Court) by the Court's fact findings on the issues with which this appeal is concerned, which *"for the avoidance of doubt covers facts relating to both ownership and control"*. **{13/531-532}**

10 In August Judgment, [170], the Judge stated that he had set out his fact findings, including those on Liechtenstein law, in Annex 3, and that his conclusions were as set out below in that paragraph. Most pertinently, he stated at [171] that the effect of his factual findings was that, if Article 1(1)(c) of the BIT requires *"control of a legal entity to arise from legal rights, or to derive to some extent from a proprietary interest in that legal entity (which I shall refer to by the shorthand "de jure control"), then Mr Stava did not have it*". **{13/532-534}** **{13/579-596}** **{21.1/653}**

11 Thus, the Judge found as facts that: (i) Mr Stava did not have control of DH arising from any legal rights, nor (ii) did he have any proprietary interest in DH from which control was derived. The basis of these fact findings was elaborated in Annex 3, as summarised below. There has been no appeal (either to the CA or to this Court) as against these key fact findings. It follows that, insofar as Mr Stava was exercising any legal right of control, he was not doing so in his own right, but as agent for someone else, as the Judge also held (see below). In [171] (final sentence), the Judge also said: "*If, however, de facto control might in some circumstances be sufficient, then further analysis is required*". Importantly, he did that on the basis of his (unappealed) prior findings in [171] that Mr Stava did not have control arising from *any* legal rights or derived from *any* proprietary interest. It was, one might say, an examination of the question whether purely factual control, untethered to any ownership interest or any legal right of control, could be and was sufficient. **{13/579-596}** **{13/533-534}**

12 The debate as framed in DH's Case poses something of a false dichotomy, between outright *de jure* control (such as 100% or majority ownership), on the one hand, and pure *factual* control, on the other. To the extent they are relevant, most of the previous awards dealing with the issue (discussed below) have involved a mixed position, where the claimant has some level of ownership (albeit not necessarily a majority of the shares), or some other legal right of control, *and* also has in fact exercised some form of control. The present case is unusual, in that at the time which is relevant for this appeal, Mr Stava had no legal or ownership interest in the shares in DH, having disposed of them entirely into the trust, and also had no personal legal right of control over the company.

13 The following findings in Annex 3 (inter alia) formed the background against which the Judge assessed control. **{13/579-596}**

13.1 The Koruna Trust created a valid trust which was intended to and did take effect in accordance with its terms and the applicable principles of Liechtenstein law (i.e. it was never contended to be a sham trust): [20]. **{13/582}**

13.2 The Koruna Trust was a discretionary trust under which the discretionary beneficiaries (one of which was Mr Stava) could be excluded from appointments altogether and had no right to any of the trust fund or its proceeds: [26(i) and (ii)]. **{13/584}**

13.3 The trustee was obliged to comply with the trust deed and had a fiduciary duty of loyalty to act in what the trustee considers the best interest of the trust: [29(i)]. **{13/584-585}**

13.4 The same duties were owed by the protector of the trust (Mr Stava), who cannot hold the trust assets in the trustee's place, or deal with third parties in relation to trust assets by virtue of the office of protector alone: [29(iii)]. **{13/585}**

13.5 A settlor (such as Mr Stava here) cannot retain a continuous right of instruction, which is inconsistent with the existence of the trust: [29(v)]. **{13/585}**

13.6 The beneficiaries do not have any property rights in the trust property (i.e. Liechtenstein recognises no concept of "equitable property" or "beneficial ownership" as a feature of its trusts or property law): [29(ix)]. **{13/585}**

13.7 An agent who acts on behalf of a trustee (as the Judge held applied to Mr Stava here) must act in an orderly, diligent and conscientious manner in what they believe to be the best interests of the trust, must follow any lawful instructions the trustee gives and cannot exercise the rights delegated to them in their own interests or by reference to extraneous considerations: [29(xi)]. **{13/586}**

13.8 The experts' Joint Memorandum referred to Mr Stava acting as an agent or custodian of the Koruna Trust when holding and voting the shares: [39]. **{13/590}**

13.9 Mr Stava was not exercising legal powers of control held by him in his own right and those powers could not be exercised solely in his own interests: [49]. **{13/593}**

13.10 The rights which Mr Stava held in relation to DH (as board member, President and sole signatory) were held on behalf of the company and fell to be exercised in the best interests of the company and in particular its sole shareholder, the Koruna Trust: [50]. **{13/593}**

13.11 Mr Stava's legal decision-making powers as chairman of DH, holder of the bearer shares and as protector of the Koruna Trust: (i) were not, in the first instance, held in his own right; and (ii) in each case, were not exercisable solely by reference to

his own interests, but only in what Mr Stava believed to be the best interest of DH/the Koruna Trust (as appropriate): [61(iv)]. **{13/595}**

14 The Judge's reasons for finding that Mr Stava had pure factual control – i.e. control not tethered to any ownership right or other legal right held by him in his own right – are set out in August Judgment, [216]. He gave permission to appeal in relation to those *secondary* conclusions but not in relation to any of his primary fact findings. The CA came to a different conclusion, based on the Judge's primary findings (and some limited findings of its own[2] additional to and not inconsistent with the Judge's primary findings), and it held that Mr Stava did not exercise *de facto* control at the relevant time. DH's appeal against the CA's decision on *de facto* control is addressed in **Section D** below. **{13/549-551}**

15 One point, however, calls for immediate comment. In his review of *de facto* control, the Judge held that Mr Stava had *"practical control of the pursuit of Diag SE's only assets, whose pursuit was dependent on funding by him"* (Annex 3, [47]; see also Annex 3, [46] and August Judgment, [216]). The Judge's finding of sole funding by Mr Stava was an unpleaded point, on which there had been no document disclosure, which was not mentioned in DH's oral opening at trial and hence was not explored in cross-examination, and to which objection was therefore expressly taken on behalf of CR during oral closing submissions at the trial.[3] In addition it has recently proven to be untrue. **{13/549-551; 592}**

16 It recently came to CR's knowledge, as a result of a letter written by Omni Bridgeway Finance BV dated 23 April 2026 relating to proceedings in Luxembourg, that in fact DH (and/or Mr Stava) had a funding agreement in place with that third-party funder dated 5 December 2013 (amended on 30 April 2014). The parties have corresponded on this,[4] including concerning Mr Stava's misleading evidence to the Judge that "*from its creation in 2006 until the conclusion of the BIT arbitration in 2022, I personally met all of Diag Human SE's needs for external finance*". In that correspondence Mr Stava/DH have refused a request to **{6/294; 301-302}** **{25.1.2/1179}**

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[2] E.g. aspects of [183] and [206]. These were grounded both in common sense and evidence from the trial given by Mr Stava (Day3/20/1-12), DH's Liechtenstein law expert (Day4/140/4-25) and textbook commentary relied upon by DH's own counsel (Day8/146/14-147/8; 148/1-13), which were highlighted by CR in its Supplemental Skeleton argument in response to the changed case advanced by DH in its RN in the CA. **{25.1.3/1193}** **{25.1.4/1197-1199}**

[3] Day9/53/3-15. **{25.1.5/1201}**

[4] A&P letter dated 29 July 2026; MdR letter dated 31 July 2026; A&P letter dated 11 August 2026; MdR letter dated 21 August 2026; A&P letter dated 21 September 2026; MdR letter dated 2 October 2026.

disclose the funding agreement, on the basis that it is irrelevant to this appeal because the position of control (or not) is to be assessed exclusively as at the end of December 2011. The latter point as to the date of assessment is correct: see [9] above. Nevertheless, it is unsatisfactory now that Mr Stava has been caught lying to the Court about being the "*sole funder*" of DH throughout 2006 to 2022 (e.g. Annex 3, [46] and [47]), as part of late arguments below (and still prayed in aid of his case on this appeal: DH Case [111(2)(g)]) as to why he controlled the company, which evidently impressed the Judge, despite the objections that it was an unpleaded point of which no notice had been given, that DH is unwilling to disclose a single document which apparently confirms the lie and evidences the true position. **{24.3}** **{24.4}** **{24.5}** **{24.6}** **{24.7}** **{24.10}** **{13/592}** **{2/88}**

17 First, however, DH's appeal against the CA's holding in relation to the need for there to be *de jure* control is addressed in **Section C**.

C GROUND 1: THE COURT OF APPEAL WAS CORRECT THAT INVESTOR STATUS PURSUANT TO ARTICLE 1(1)(c) REQUIRES *DE JURE* CONTROL

18 It is submitted that the CA was correct to hold that control for the purpose of Article 1(1)(c) requires *de jure* control, or at least it cannot be established by *de facto* control alone without *de jure* control. It is submitted that the relevant qualifying national must have either majority or at least some level of ownership right or other legal right of control. This is a *sine qua non*, without which there cannot be control of a company by that national for the purpose of making it a protected "*investor*" under Article 1(1)(c) of the BIT. **{21.1/653}**

19 It is not necessary to decide on this appeal what precise form or level such *de jure* control must take because of the Judge's finding in August Judgment [171] that "*Mr Stava did not have it*", i.e. he simply had *no* ownership interest and *no* legal right of control in his own right. Nor is it necessary for this Court to decide whether, in addition to possessing a legal right, there must also be an actual exercise of control of the company in question by the putative controller for it to be protected by the BIT as an "*investor*" under Article 1(1)(c). Given that finding (and other facts in **Section B** above), the appeal must fail. **{13/533-534}** **{21.1/653}**

20 It is common ground that, in reaching its decision, the CA began by directing itself correctly as to the principles of treaty interpretation under Article 31(1) VCLT: [154] (DH Case [16]-[18]). DH's contention is that the CA misapplied the well-established approach to Article 31(1). CR addresses this, and the application of Article 31(1), in **Section C(1)**. **{29.32/2420}** **{2/52-53}**

Aside from that, there have also been three developments on the possible application of provisions other than Article 31(1) VCLT since the CA decision.

21 *First*, DH seeks to rely on Article 31(3)(c) ("*any relevant rules of international law applicable in the relations between the parties*"). This is as a gateway enabling reference to supposed subsequent treaty practice, citing the ICJ's recent *ILO Convention No. 87 Advisory Opinion* (DH Case [76], [78]). *Second*, DH also seeks to rely (in the alternative) on Article 32 as a gateway to refer to a range of treaty practice: DH Case, [78]. These two points are addressed in **Section C(2)**. *Third*, there is the "*jurisprudence constante*" point: DH seeks to raise this point to meet the CA's conclusion that an extensive review of investment treaty awards was not necessary or helpful, because, *inter alia*, as international law recognises no system of precedent, "*the awards cited are only as valuable as the cogency of their reasoning*": [185]-[186]. DH now refers to Article 38(1)(d) of the ICJ Statute and the concept of *jurisprudence constante* (DH Case [86]) to say that investment tribunals will "*ordinarily follow consistent precedent*" and, it seems, that this Court should take the same approach to an alleged line of consistent arbitral awards here. CR addresses this argument, and the awards on which DH relies, in **Section C(3)**.[5]

{29.32/ 2420-2421} {28.4/ 2022-2033} {2/69-70; 73} {6/ 294-295} {29.20/ 2294}

22 The *jurisprudence constante* point does not assist DH. There is not a "*consistent*" and certainly not a "*cogent*" body of awards in favour of DH's position, i.e., that pure *de facto* control, not tethered to any right of ownership or other legal right of control, can suffice. There has been no award in which "*control*" has been found to exist in a situation where the facts are akin to those of this case. In the majority of the awards on which DH relies in its Written Case, there was some shareholding or other legal right featuring as part of the analysis of control, so that what was said about *de facto* control was against that background. In fact, a principle that "*like cases should be decided alike*" (on which DH relies at [86(4)]) would be against DH's position. *Yukos Universal Limited v Russian Federation*[6] is the most analogous case factually (being concerned with a discretionary trust). There, the tribunal adopted an approach that supports CR's position. Although CR relied on *Yukos* below, it is not

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[5] In the only case where a tribunal appeared to accept that standalone *de facto* control would suffice (*MAKAE Europe SARL v Kingdom of Saudi Arabia*, ICSID Case No. ARB/17/42, Award, 30 August 2021), the claim failed on the facts. Otherwise, factual control was an added factor supplementing a right of ownership or other legal right of control. {30.14/ 2755-2788}

[6] PCA Case No. 2005-04/AA227, Interim Award on Jurisdiction and Admissibility, 30 November 2009. {30.27/ 2961-3006}

addressed in DH's submissions. *Agarwal v Uruguay*[7] also concerned a discretionary trust and is against DH. *Aguas del Tunari v Bolivia*[8] is the most analogous case in terms of the treaty wording defining who is an "*investor*", and DH is unable persuasively to distinguish it. The awards in *Vacuum Salt Products Ltd v Ghana*[9] and *Gramercy v Peru*[10] – concerning the need for there to exist at least a certain level of share ownership or other legal right (albeit in a non-trust context) are all in point. These cases are discussed below.

23 Before turning to the detail of the VCLT analysis, CR notes that it would be very odd if the nationality of a person who may just happen to be directing the affairs of the company in question as its officer, servant or agent at a particular point in time, but who has no personal link to the investment because he has no ownership or other legal right over it, were sufficient to satisfy the requirement of the company being "*controlled*" by a Swiss or Czech national in order to enable a non-Swiss or Czech company to claim under this BIT. Yet that would be the remarkable consequence of accepting DH's arguments. Thus, for example, if a French-incorporated entity were wholly owned by German interests but run by a board and/or officers of Swiss nationality with no interest of their own in the company, that entity would benefit from protection under the Swiss-Czech BIT. Indeed, management personnel of relevant nationality could be appointed for the purpose of creating such protection. If DH's interpretation of Article 1(1)(c) were correct, it would stand in stark contrast to the preceding Article, 1(1)(b), which requires that in order to be a protected "*investor*" under that provision even a Swiss or Czech incorporated company must have a close connection with that state, in that both its legal "*seat*" and "*real economic activities*" must be located there. **{21.1/653}**

(1) The CA's decision and CR's submissions on Article 31(1) VCLT

24 CR submits that the CA's decision was correct, broadly for the reasons it gave, although it is supported by several further submissions developed below. In this section, CR addresses DH's submissions regarding interpretation by reference to Article 31(1) VCLT (DH Case, [24]-[74]). **{29.32/2420}** **{2/54-69}**

[7] PCA Case No. 2018-04, Award, 6 August 2020. **{44}**
[8] ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005. **{30.2/2476-2529}**
[9] ICSID Case No. ARB/92/1, Award, 16 February 1994. **{30.26/2937-2960}**
[10] ICSID Case No. UCT/18/2, Award, 6 December 2022. **{30.9/2648-2658}**

(a) *Alleged "fundamental error" of looking at the "function" of the investor definition*

25 DH's submissions as to the proper interpretation of Article 1(1)(c) open with the contention that the CA made two "*fundamental errors*". CR addresses one here.[11] DH Case [25]-[32] states that the CA misconceived the function of the "investor" definition. It seems also to contend that the CA was wrong to begin its analysis with a discussion of the function of that definition. DH's sub-points are addressed in turn. **{21.1/653}** **{2/54-56}**

26 As to [25], there is no reason why consideration of the purpose of the definition of "*investor*" cannot form part of ascertaining its ordinary meaning *in its context*. On the contrary, to determine the meaning of a word it is often necessary to know its context, *and* its purpose within the document will often be key context. Given that a "*single combined operation*" is required, this point goes (at most) to one of sequencing. That is an answer to the criticism of the CA for having mentioned this point first. **{2/54}**

27 At [28], DH points out that Article 1(1) is concerned solely with the definition of investor. That is not inconsistent with what the CA did, which was to look at what, on a proper construction of the treaty as a whole, could typically be expected of an investor when seeking to determine what the parties would have intended by the word "*controlled*". The CA was rightly asking what the Article 1(1) provisions are likely attempting to achieve typically in this BIT, so that one can properly understand its meaning. The CA was not departing from the approach required by Article 31(1) of the VCLT, it was following it. **{2/55}** **{21.1/653}** **{29.32/2420}**

28 At [29] DH disclaims the connection between "*investor*" and "*investment*". That disregards key context and the object and purpose here; the BIT is about protecting the "*investments*" by/of "*investors*", hence the need for both terms to be defined in Article 1. DH Case [29] contends that "*Nothing in the terms of Article 1(1)*" so states in terms. But DH ignores the rest of the BIT, its purpose, and its evident meaning and operation. Article 2 certainly does highlight that connection, as do the substantive protections in the BIT. **{2/55}** {**21.1/653-654**}

29 As for DH's reliance on *Nova Group Investments* [517]: that is irrelevant. That case was dealing with something very different – an attempt to read into a treaty provision which expressly required only that a company be constituted under the law of a contracting party, a requirement that such entity *also* be owned / controlled by a national of the contracting

[11] The other – i.e. concerning whether a *de facto* test would be vague and unmanageable (DH Case [35]-[40]) – is addressed below in the context of object and purpose and certainty and predictability. **{2/57-59}**

party: see [509]-[518]. It is not concerned with, and has nothing to say on, the meaning of the expressly included "*controlled*" requirement here. **{30.16/ 2801-2804}**

30 At DH Case [30]-[31], the comparison with Article 1(1)(a) and 1(1)(b) is made but this does not assist DH. DH appears to contend that a person would qualify as an "*investor*" without having to show that he/it had an investment. But, without trespassing on the other appeal, this does not address the CA's point that the investor is, as a matter of operation of the treaty, the person to whom the benefits of an investment will accrue. That is a legitimate point to take into account when reaching a decision on the meaning of "controlled" in Article 1(1)(c). In any event, the most striking point, if drawing a comparison between Article 1(1)(c) and other limbs of the investor definition, is the comparison with Article 1(1)(b), which requires a real connection with the state of incorporation: if Article 1(1)(c) is interpreted as DH suggests, it requires a very weak and possibly transient connection of the investment with that state, namely the nationality of the management. The requirements for a Swiss or Czech company to qualify as an investor (via Article 1(1)(b)) would then be *stricter* than those for companies incorporated elsewhere in the world, which would be strange to say the least. **{2/56}** **{21.1/653}**

31 The point at DH Case [32] – i.e., that other treaties contain definitions of "*investor*" which require someone to have made an investment – again takes aim at the wrong target. The CA was not deciding whether the investor definition *includes* an additional ownership requirement. It was interpreting the meaning and effect of the "*controlled*" requirement. **{2/56}**

32 In any event, the CA was on strong ground – see e.g. an UNCTAD survey, noting that the ownership link is key, and control is a technique used to deal with the indirect ownership issue posed by corporate structures.[12]

33 The CA also correctly identified that bilateral reciprocity in the promotion and protection of investments from parties of one State into the other is inherent in the BIT. It took this into account when interpreting Article 1(1)(c), which defines one of the classes of qualifying investors: CA Judgment [157]-[158]. As the CA noted, Article 1(1)(a) and (b), which concern natural persons and legal entities of the home State respectively, give effect **{21.1/653}** **{6/287}**

[12] UNCTAD, Bilateral Investment Treaties 1995-2006: Trends in Investment Rule Making, pp. 16-17. **{31.20/ 3344-3345}**

to the reciprocity principle as between the two States: [158]. DH's partial quotation at DH Case [33] does not do justice to the CA's reasoning on this point.

34 CR respectfully suggests that the point regarding reciprocity is in its favour. Reading Article 1(1)(c) in context, it should be read in a way which gives effect to the principle of bilateral reciprocity in the same way as the previous subparagraphs. Those, as they operate in the BIT, require a strong tie between investment, investor and home State. This is supplied by a *de jure* control test, rather than the weaker ties supplied by a pure *de facto* control test for which DH contends. That is again consistent with UNCTAD's review of treaty practice.[13] **{21.1/653}**

(b) *The VCLT criteria: text and context*

35 CR now turns to address DH's criticisms of the CA's application of the VCLT criteria. CR emphasises five textual / contextual points, which also address points made at DH Case [41]-[50]. The Protocol is considered separately below at **Section C(1)(c)** ff. **{2/59-62}**

36 *First,* DH Case, [41]-[46], advances an "*ordinary meaning*" argument. The central contention is that "*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*": [43]. DH suggests at [45] that the CA accepted its contention that the words are capable of referring to *de jure* or *de facto* control at [161]. In fact, the CA said that would be the case if "*considered in isolation*" but that considering the meaning in isolation "*would be the wrong approach*". The CA was plainly correct. Identifying ordinary meaning is not a question of identifying ordinary meanings of the words in the abstract (see Gardiner, Treaty Interpretation (3rd edn, 2026), p. 210). DH's use of definitions in dictionaries or different statutory contexts (e.g. *Bermuda Bar Council*), does not assist its argument, nor do similar citations drawn from various awards, cf DH Case [42]-[44]. At best, they could be no more than fleeting reference points; the correct approach is a single combined operation taking in all the factors in Article 31(1). The CA rightly went on to consider whether "*controlled*" meant *de jure* or *de facto* control "*when the word is considered in its place in Article 1(1)*" considering that "*there are several indications in the Article itself that paragraph (c) is concerned with legal control*". It then also went on to consider further context (i.e. the Protocol), and object and purpose. **{6/287-288}** {**50**} **{29.32/2420}**

37 *Second,* DH Case [48] refers to the possibility under Article 1(1)(c) of there being "*indirect*" control. It suggests that this is inconsistent with the CA's approach. That is incorrect. The **{2/61}**

[13] UNCTAD, Bilateral Investment Treaties in the Mid 1990s, p. 37. **{31.19/3337}**

purpose of such language is to ensure that the existence of an intermediary holding company does not prevent investment protection. It also allows an entity incorporated in the host State to be capable of protection (a drafting technique responding to the position in general international law in light of the *Barcelona Traction* case, which refused a claim for diplomatic protection by Belgium in relation to an entity incorporated in the host State (Canada) even though it was principally owned by Belgians).[14]

38 DH wrongly draws from the reference to an entity being controlled "*directly or indirectly*" the proposition that "*a narrow approach to defining "controlled" legal entities was not intended by the Contracting Parties*". That assumes its own conclusion. Clearly the parties did contemplate extending coverage beyond the Article 1(1)(b) situation, but that does not help answer the question of how far it should extend and whether it should be tethered to something concrete such as a legal right. In fact, the inclusion of "*indirect*" control is a strong factor against pure *de facto* control; it is one thing to include as an "*investor*" a holding company where there is a legal holding structure up through which a path of control can be traced, it would be quite another to have to ask the question at each level whether there is *de facto* control (not linked to any legal right of control) by a Swiss or Czech national. Yet this would be the position if DH's argument were correct. **{21.1/653}**

39 *Third,* at DH Case [49] DH criticises the CA's reasoning by reference to Articles 1(1)(a) and (b). The CA correctly noted several indications in those provisions that Article 1(1)(c) is concerned with legal control. This included that a determination of nationality is "*in accordance with its laws*" for the purposes of Article 1(1)(a), with nationality noted as being an inherently legal concept: [161]. Nationality under such laws comprises the most well recognised connection between a natural person and a state. Article 1(1)(b) is also legal in nature as it applies to "*legal entities … which are constituted or otherwise duly organised under the law*" of a contracting party, and it requires it must be the state in which they have their "*seat*", which is also a legal concept. Whilst there is a factual element contained in Article 1(1)(b), i.e. "*real economic activities*", that is a requirement which *narrows* the class of qualifying investors rather than expanding it: [162]. **{2/61-62}** **{21.1/653}** **{6/287-288}** **{31.19/3339-3341}** **{31.20/3344-3345}**

[14] See e.g. UNCTAD, Bilateral Investment Treaties in the Mid 1990s, pp. 39-41; UNCTAD, Bilateral Investment Treaties 1995-2006: Trends in Investment Rule Making, pp. 16-17; *Aguas del Tunari* [236]; *Nova Group Investments* at [513]. **{30.2/2509}** **{30.16/2802-2803}**

40 DH Case [49] seeks to advance three points in response. [49.1] says that the definitions in (a), (b) and (c) are independent. That is nothing to the point. The CA was examining the immediate context seeking indications of the meaning. [49.2] addresses Article 1(1)(a), regarding natural persons: DH misses the point, which is that this definition is tethered to a specific *legal status and rights conferred by such status*, not a generalised factual assessment. [49.3] addresses Article 1(1)(b): DH again fails to meet the main thrust of the CA's point. In particular, Article 1(1)(b) requires establishing a specific legal status and rights (as necessary, not sufficient). The Contracting Parties chose not to elect for mere place of incorporation (a very wide provision, if it had been offered), preferring something which not only narrowed the class of potential investors, but also strengthened the tie between the investor and the home State. This is all context which supports the approach adopted to Article 1(1)(c). The CA simply noted that this gave "*some indication*" that Article 1(1)(c) refers to legal control. It was clear that this was not conclusive: [164]. There is no flaw in that reasoning. **{2/61-62}** **{21.1/653}** **{6/288}**

41 *Fourth*, CR's interpretation coheres naturally with the language in Article 1(1)(c) and is consistent with other parts of the BIT, whereas DH's does not and requires the reference to "*controlled*" to be read in isolation. Returning to that language, namely "*legal entities … which are, directly or indirectly, controlled by nationals of that Contracting Party or by legal entities …*", CR's interpretation views (i) being *directly* controlled as applying where the national or legal entity has its own ownership or legal rights in the qualifying entity, and (ii) being *indirectly* controlled as applying where there is a corporate chain with a traceable legal pathway (e.g. the majority shareholder in the majority shareholder of the local company). DH's interpretation, by contrast, is incoherent. Where there is a corporate chain (relevant because of the reference to "*indirect*" control), there is potentially an unknowable and limitless expansion of potential persons who could 'procure that his wishes be carried out' (DH's new suggested test of *de facto* control) at each level. **{21.1/653}**

42 *Fifth*, DH Case [50] refers to the broad definitions of "*investment*" in Article 1(2). DH's point is unclear. To the limited extent these definitions assist, they support CR's case rather than DH's case, in that they are squarely concerned with legal rights. **{2/62}** **{21.1/653}**

(c) *Article 31(1): further context - the Protocol*

43 Article 1(1)(c) was expressly the subject matter of further clarification in the Protocol, which was signed at the same time as the BIT and as an integral part of it: **{21.1/653}**

"(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."

44 The CA's analysis is set out at [164]-[170]. DH Case [51]-[66] seeks to engage with it. The CA began by correctly noting that the BIT does not spell out the circumstances in which proof of control may be required or the legal consequences of being "*recognised*" as an investor, but stated that it is 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 BIT*": [165]. **{6/288-290}** **{2/62-66}**

45 DH's first point (DH Case [52]) is to assert that the function of the Protocol is best understood against Article 25(2)(b) of the ICSID Convention. There is no basis for that submission. It is mere assertion. There is no mention of the ICSID Convention in the Protocol. The Czech and Slovak Republic was not an ICSID member at that time. The fact that the BIT contemplated the possibility of joining ICSID does not change the analysis. Where a claim is brought under the auspices of ICSID, it must satisfy the 'double keyhole' of being within: (a) the jurisdictional scope of the Centre itself (to which Article 25(2)(b) relates); and also (b) the jurisdictional scope of the applicable treaty in question. The second test which turns *on the terms of that applicable treaty* is not affected by Article 25(2)(b) which serves a different function.[15] Article 25(2)(b) fulfils a specific function related to use of ICSID and was drafted broadly to ensure that the potential jurisdictional scope of the Centre was as wide as possible.[16] Against that background, a broad approach to the former test makes sense: it leaves the maximum possible latitude to States in their bilateral or multilateral agreements. The question here is what the States have agreed in the BIT. **{2/63}** **{29.14/2232}**

46 DH Case [54]-[57] seeks to further challenge the CA's approach at [165]. DH's first point is to note, correctly, that the consequences of being "recognised" by a host State are not stated in the Protocol itself. That is beside the point being made. The consequences would be fact-specific. If an investor went ahead and invested without being "recognised" that **{2/63-64}** **{6/289; 293}**

[15] Cf. the terms of CR's BIT with the United States made in 1991, which did have a specific term not present here addressing control for the purpose of Article 25(2)(b). On the other hand, CR's 1991 BIT with the Netherlands had no such clause. **{29.11/2211-2224}** **{29.9/2200-2207}**

[16] See A. Broches, "The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States" (1972) 136, Recueil des Cours de l'Académie de Droit International, 331 at 358-9 and 361. **{31.2/3043-3044; 3046}**

would be risky for it. On the other hand, as was submitted by CR in the CA, if a host State subsequently denied the status of a "recognised" investor, it would likely face a claim of abuse of rights/not implementing the BIT in good faith (in the absence of a material change of circumstances or having been misled in giving recognition).[17] The CA dealt with the point in terms at [179]: the Protocol process was provided for by the BIT, it must have been intended to be available, and the Contracting States must have contemplated that it would have practical value. In terms of treaty interpretation, this was essentially an application of the principle of effectiveness or *effet utile* - there is a choice between the Protocol meaning something (as it does on CR's case) or having no effect (as DH effectively submits). The CA did not need to resolve the minutiae of exactly how that treaty-based procedure would operate. In any event, it did address consequences at [166].

47 The CA drew three conclusions from the purpose of the Protocol that it had identified. Each is powerful and grounded in common sense.

48 The CA's first conclusion was that, absent a material change of circumstances (such as an investor's decision to restructure), the investor is likely to be entitled to rely on its recognition and thus secure a high degree of certainty for both the State and investor. That suggests the use of a *de jure* control standard, because "*the facts amounting to de facto control are always susceptible to change over the life of the investment and the parties will not know how they stand*": [166]. On DH's preferred interpretation, they could fluctuate as and when senior managers left and were replaced with those of a qualifying nationality, or vice versa. The facts relating to *de jure* control can change too. The difference is between a smaller pool of largely predictable and foreseeable relevant matters on the *de jure* test, and an infinitely various and unpredictable set of relevant facts on the *de facto* test. **{6/289}**

49 The CA's second conclusion was "*if the provision is to be workable, it must contemplate a relatively straightforward administrative procedure by which "proof of such control" is submitted and the host state either confirms or declines to confirm the investor's status*": [167]. It could not mean proof akin to what is required in arbitration, by reference to disclosure and witness statements. It would be a viable procedure if what is required is proof of *de jure* control. Though this might be complex in some cases, in general one would expect it would be proven by reference to **{6/289}**

[17] CA Day5/133/25-134/19.

{25.2.2/ 1552-1553}

relatively few documents. In contrast, *de facto* control is not readily verifiable, as the circumstances of the present case amply demonstrate: [167] (see also [170]). **{6/290}**

50 DH seeks to meet this (and other points) with inapt references to ECT and ICSID provisions, both of which are doing different things for different purposes.[18] DH Case [62] seeks to develop a point about relative complexity of proof. It does so by wrongly suggesting that the CA did not have in mind multi-level corporate control via minority shareholdings to set up a false point on what is an 'atypical' case. But it also fails to acknowledge the force of the point that the type of documents involved in a *de jure* scenario are likely formal ones. DH does not explain how the Protocol process would operate on its *de facto* test. More importantly it does not say how the Protocol process would mean anything at all. The inference is clear: it cannot. As the CA summarised it at [181], "*A Czech official considering whether to recognise Diag SE as an investor could be expected to afford such recognition when shown that Mr Stava, a Swiss national, was the owner of the shares. But he could hardly be expected to do so merely on Mr Stava's assertion that he was in a position to procure the transfer of the shares to himself if he wanted to do so.*" **{2/65}** **{6/293-294}**

51 DH Case [63] then suggests that the CA's logic was that a factual enquiry would be inconsistent with the procedure provided in the Protocol, and seeks to undermine this by referring to other treaties which contain protocols and which DH says allow for proof of *de facto* control. The premise of DH's submission is incorrect. The CA had to decide the better interpretation of this BIT, including its Protocol, as between the alternatives advocated to it. It was not saying that it would not be possible to agree (expressly) a *de facto* standard. Legal control must be proven too, but the universe of relevant factual materials is much more limited. In any event, even if one looks at them, each of the BITs chosen by DH (which do not appear concerned with *ex ante* proof) can be understood as supporting CR's case: e.g., the words "[b]*eing economically subordinated*" can have a narrow reading by reference to domestic corporate standards. Where that phrase is referring to a relationship between *two legal entities*, it is highly unlikely that what is meant does not involve a shareholding of some kind in the other. {**2/65**} {**21.1/651-662**}

[18] The reference at DH Case [59] to the ECT containing provision for proof is hard to understand. That is, for the avoidance of doubt, not a protocol which envisages being able to furnish proof of control at the outset of an investment; it is rather an understanding of a provision of the ECT providing that factual control will qualify. But that takes DH no further than saying that factual control can be proved. That does not address the CA's point. **{2/64}**

52 The CA's third conclusion at [168] was that "*proof of control and thus recognition as an investor may be sought before any investment has been made. That is probably the most obvious circumstance in which this procedure would be invoked: a legal entity not organised under the law of the other Contracting Party is contemplating a potential investment and wants to know whether, as it is currently structured, it will benefit from the protection of the BIT*". At that stage there may be no facts in existence to prove *de facto* control, but it is relatively straightforward to explain the proposed legal structure. The recognition decision would then benefit both parties – the investor having the comfort of recognition, the State knowing that if recognised, the investment is more likely to be made (and vice versa). DH Case [57] asserts that the contention that it would operate to benefit the investor is wrong but offers no reasoning as to why. It is obvious that (at a minimum) the investor has the benefit of *arguments* which it can deploy based on good faith and consistent dealing, regardless of the precise nature of how they are framed, which makes them more secure in their assessment that they will be protected by the BIT. Separately, DH Case [65] argues that where proof of *de facto* control is not available before the investment has been made, it could be submitted after. That point is speculative – it might be one way to run the process, but probably not the most obvious one, where the provision provides for recognition in respect of an investment that "*is to be made*" in the future. An additional criticism made by DH is that the CA assumed that there are no facts in existence before the investment has been made. It did not do so. It said that this "*may be*" the case, and it is clearly correct (e.g., if a structure is yet to be established through which to make the investment).

{6/289-290}

{2/64; 66}

53 Overall, the CA was correct to conclude that "*the Protocol is likely to be of practical value if the control referred to in article 1(1)(c) is de jure control. It is likely to be unworkable if what is referred to is de facto control*" ([169]) – a conclusion that strongly supports CR's position.

{6/290}

(d) *Good faith and object and purpose*

54 As to good faith: the CA did not "*consider that this principle materially advances the resolution of the present issue*": [160]. The extent to which matters are relevant under the label of "good faith" depends somewhat on whether the process of considering the consequences of rival interpretations is properly seen as part of the object and purpose exercise or of the overarching good faith principle (a point on which there is some debate: Gardiner, pp. 183-184, 192-193). Ultimately, this may be a rather academic point, given that it is a "*single combined operation*" of interpretation. It appears to be common ground that the

{6/287}

{38.8/ 4528-4529; 4537-4538}

consequences of rival interpretations are proper considerations, and the CA did examine such points.

55 As to object and purpose: DH contends that "*in summary, the CA erred in narrowly construing the object and purpose of the Treaty as "certainty and predictability"*": DH Case [72]; see also [66] and [68]. This is not a fair reading of the CA Judgment, in particular of [171]-[172]. The CA quoted the preamble in full. The CA did not conclude, as DH seems to contend, that the object and purpose of the BIT was the creation of "*certainty and predictability*". Instead, it noted the preamble; correctly identified that one important aspect was whether investments were more or less likely to be made based on the interpretation under consideration; and viewed certainty and predictability as furthering the object and purpose which it had identified. That is an answer to the various points made by DH at [68]-[72].[19] As for DH Case [67], contending that "*object and purpose*" should lead to treaty provisions being interpreted "*generously*": (a) that is not an appropriate approach to the use of object and purpose when interpreting a jurisdictional provision of a BIT;[20] and (b) in any event, the CA's analysis demonstrates why that is not appropriate here. **{2/66-68}** **{6/290-291}**

56 DH Case [69] contends that the CA's allegedly "*narrow*" focus on certainty and predictability as the object and purpose of the BIT caused it to incorrectly assimilate control with ownership, which is said to be inconsistent with the ordinary meaning of "*controlled*", the different ordinary meanings of "*owned*" and "*controlled*", and the contemporaneous treaty practice of both Switzerland and CR, which DH relies upon to say that different meanings are given to "*owned*" and "*controlled*". As set out above, the CA did not deal with object and purpose in that way. Neither did it incorrectly assimilate control with ownership. The CA's approach is also not inconsistent with the contemporaneous treaty practice – that is addressed below, but in summary, if the Court were to look at it, it actually supports CR's case as to the necessity of *de jure* control, with the BIT providing no indication that it was designed to take a fundamentally different approach. **{2/67}**

57 CR makes the following additional points regarding object and purpose. *First,* DH's focus on the aim of promoting and protecting investments as justifying its position on the **{31.15/ 3225-3226}**

[19] See also J Salacuse, The Three Laws of International Investment (2013 OUP), pp. 355-356.
[20] See e.g. *Gold Reserve Inc v Venezuela* [2016] EWHC 153 (Comm) at [21]-[22]; *Republic of Korea v Elliott Associates LP* [2024] EWHC 2037 (Comm) at [22]-[23]. **{41/ 4669-4670}**

{34.7/ 3437-3438}

interpretation of "*controlled*" is unrealistic. A Swiss investor seeking to protect a non-Swiss company under the BIT is highly unlikely to wish to place his shares in that company in a discretionary trust. The argument about control (or lack of it) would be immediately apparent and the investor's argument to be entitled to protection would always be (at best) highly uncertain. Likewise, an investor who has invested after a careful consideration of the BIT is highly unlikely to restructure his affairs in such a way either.[21] DH's interpretation is a solution in search of a problem. There is no reason to approach interpretation from the premise that BIT protection should be provided to an entity such as DH (as DH does). *Second,* a *de facto* control standard may disincentivise investment. If a high-net-worth individual is called upon not to prove the legal position under the investment structure, but rather to prove the *de facto* position, it would constitute evidence potentially undermining the carefully tailored structures through which the investment may be made (whether this is in the form of an offshore discretionary trust or otherwise). *Third,* a *de facto* standard cuts across the aim of fostering economic prosperity by significantly expanding exposure to very substantial treaty claims (some of which will be bad claims, and some of which will nevertheless succeed when they should not). {**21.1/651-662**}

(e) *Certainty and predictability*

58 The CA dealt with the certainty and predictability aspect in detail at [173]-[181] and [192], to which CR refers. In particular, CR highlights that the CA drew upon the award in *Aguas del Tunari*, rightly concluding that its analysis was "*compelling*". The CA noted that "*[i]n our judgment the Judge was right to regard a test of de facto control as vague and unmanageable":* [175]. The CA also drew upon Professor Douglas' academic work, *The International Law of Investment Claims* (upon which CR also relies[22]), noting that the analysis was "*convincing*" and that it had "*not been referred to anything in the investment treaty jurisprudence which calls it into question*": [177]. The CA found that the *Aguas del Tunari* analysis "*is given added force*" when applied to this BIT, because of the presence of the Protocol: [175]. **{6/291-294; 296}** {**30.2/2476-2529**}

59 DH seeks to meet this reasoning in two ways. *First*, it says (as the second of the two supposed "*fundamental errors*" by the CA) that the CA was wrong to assume that the *de facto* test would be vague and unmanageable: DH Case [35]-[40]. *Second*, it says (there and at DH **{2/57-59; 68-69}**

[21] Here, Mr Stava's evidence was that he was unaware of investor state arbitration at the time when he placed all the shares in trust, which he did on legal advice for other reasons (Day3/11/3-24; 17/20-23; 21/4-6). **{25.1.2/1174; 1177; 1180}**

[22] CR relies, as it did below, on [554] to [566]. **{31.6/3125-3131}**

Case [73]) that, in any event, *de jure* control would not itself result in certainty and predictability, so the pursuit of certainty / predictability does not favour CR's position.

60 As to the first point, it was the common view of both the Judge and the CA that a *de facto* test would be vague and unmanageable. That accords with common sense and the position in *Aguas del Tunari*. Even *B-Mex*, one of the awards cited by DH, accepted that "*de facto control will typically and logically present a greater evidentiary challenge*". DH Case [36] argues that "*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*", stating that the "evidence" shows the opposite, referring to (a) the approach of other treaties, (b) the fact States have adopted a *de facto* control test under other treaties, particularly the ECT; and (c) suggesting that *de facto* control tests can be found elsewhere in international law. **{30.2/ 2476-2529}** **{30.4/ 2536-2586}** **{2/57-58}**

61 With respect to DH, and especially when one looks at the type of analysis that some tribunals do deploy in respect of *de facto* control, the *Aguas del Tunari* tribunal, the Judge and the CA were all plainly correct to say what they said. That is especially so in respect of the test for which DH advocates here (i.e. where no legal right needs to be shown and the relevant roles in which control is exercised are disregarded). Of course, tribunals will apply some form of *de facto* control test and carry out detailed factual inquiries *if that is what they are tasked to do by the terms of the treaty before them*. But the CA and Judge were right in their description of what such a test would require of the decision maker. Tribunals which have sought to apply a *de facto* control test have not been predictable or consistent, either in the identification of the test, or in the identification of relevant factors, or in the weighing of the same factors. Of course, States party to treaties may expressly agree on a *de facto* control standard, notwithstanding its drawbacks. The question here is whether the BIT mandates such a task. A *de facto* control standard plainly *is* inherently vague, unmanageable, unpredictable and unworkable at the *ex ante*, investment planning stage at which the Protocol in this case contemplates proof may need to be given. It is also inherently unworkable at the *ex post* stage prior to a dispute arising, given that "*a relatively straightforward administrative procedure*" is contemplated by the Protocol. The CA was entirely right to take these matters into account, in particular when considering whether this can be what control meant under the BIT. **{30.2/ 2476-2529}** {**21.1/ 651-662**}

62 As for DH's second point (regarding relative merits of the two tests): at DH Case [37]-[38] and again at [73]-[74], DH points to potential complexity or difficulty which might be faced in the application of the *de jure* test. But DH's argument fails to acknowledge the basic **{2/58-59; 68-69}**

point that the *de facto* approach will be vague and unmanageable in all pure *de facto* cases. Each of the points that DH makes applies with even more force to the *de facto* test. On the other hand, if the test is anchored principally in share ownership, there is a baseline level of certainty and predictability, because the potential class of persons who might render a legal entity a qualifying investor is naturally limited and identifiable, and both the State and the putative or actual investor will have some prospect of assessing whether that entity is likely or unlikely to qualify. At a minimum, they can tell that *without de jure* control, the entity will *not* qualify. Importantly, the *de jure* test is also a reasonable proxy for ascertaining how likely it is that (even though a corporate entity under Article 1(1)(c) may be incorporated anywhere in the world), the benefits of the investment will ultimately flow to a person or legal entity with a meaningful connection to one of the two Party States (even if that does not happen on the facts in every case). **{21.1/653}**

(f) *Final points*

63 CR notes that two important aspects of the CA's reasoning, in respect of which it differed from the Judge, are (rightly) not the subject of challenge by DH. See CA Judgment [182]-[184]. DH's appeal therefore must proceed on the basis that these limbs of the Judge's reasoning were wrong. One was the rejection of the Judge's point that *de jure* control prioritised "*form over substance*" (see [182]). A valid trust is a matter of substance, not form. It has been common ground throughout these proceedings that this is not a sham or illusory trust case.[23] (This is so notwithstanding Foxton J's finding that the sale aspect of the Lawbook Transaction was not genuine.) A second point was the Judge's view that, if a *de facto* approach were not adopted, then the change of trustee might result in a loss of investor status, which he regarded as an improbable consequence. The CA rightly disagreed for the reasons it gave: [184].[24] **{6/294}**

(2) Materials said by DH to be relevant under Articles 31(3)(c) and 32 VCLT

64 DH refers to "*other interpretative aids*" that it says are relevant under Articles 31(3)(c) and 32 VCLT: [75]-[83]. DH refers to the ICJ's recent *Advisory Opinion on Right to Strike under ILO Convention* No. 87, 21 May 2026 (DH Case, [76]-[78]), and makes a series of assertions about **{29.32/2420-2421}** **{28.4/2022-2033}**

[23] As to which, see generally *Pugachev* [2017] EWHC 2426 (Ch) per Birss J at [145]-[169], [438]-[442]. **{27.8/1854-1863}**

[24] In addition to *Pitt v Holt*, which the CA accepted as an illustration of the significance of the change in nationality of a trustee, see *Green v Cobham* [2002] S.T.C. 820. **{27.4/1733-1746}**

the so-called "*treaty practice of Switzerland and the Czech Republic*": DH Case, [79]-[83]. Neither of these advances its interpretation of this BIT. {2/69-72}

65 As to the ICJ's Advisory Opinion as the basis for reliance on this treaty material, that was an Opinion issued by a majority, with powerful dissent from four judges, including two former Presidents and a former Vice President of the Court.[25] The majority view itself was qualified, as is apparent in DH's own quotes: see the "*may*" and "*if*" in "*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*": [76]. The ICJ was considering a very different situation to the present. Whilst the majority may have been justified in drawing upon subsequent multilateral treaties with a significant degree of overlap in States party and subject matter to interpret the multilateral treaty in issue (a point which even there was clearly controversial), seeking as DH does here to use other treaties to interpret the BIT, especially where some of the other treaties are multilateral and have different subject matters and others are bilateral and between only one treaty party and third States, is much more problematic. {2/69-70}

66 Here, it is very difficult to see why such treaties are "*relevant*" rules for the purpose of Article 31(3)(c) VCLT. DH has not explained how that could be so. How could such treaties be said to express the common understanding of Switzerland and CR regarding the meaning of Article 1(1)(c) of the BIT? {29.32/2421} {21.1/653}

67 As to Article 32 VCLT: that allows recourse to "*supplementary means*" in certain circumstances. It is also not a proper vehicle for the introduction of other treaties that Switzerland or CR have happened to sign in the manner DH attempts. *First*, supplementary means are usually related to the treaty in issue. Article 32 refers to "*the preparatory work of the treaty and the circumstances of <u>its</u> conclusion*". While that is not an exhaustive list, it reflects the reality that in order to be relevant as a means of interpretation, material must have a connection to the instrument being interpreted. The fact that one, or both, of the States parties to a bilateral treaty have, at a different point in time, signed another treaty is a very limited connection to the treaty being interpreted. It means either that the terms of that other treaty are irrelevant to the interpretation exercise, or at most minimal weight can be placed thereon. {29.32/2421} {28.6/2042-2064} {28.7/2065-2079} {28.8/2080-2094}

[25] See Dissenting Opinions of Tomka, Abraham, Xue, Hmoud.

{51/4785-4906}

68 *Second*, in any event, one can only use supplementary means "*to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.*" See *ISL v Spain* [2026] UKSC 9, [2026] 2 WLR 581 [75]-[77], which summarises the limited circumstances in which recourse can be made to supplementary means. Using a treaty signed well before or after the instant Treaty fundamentally to affect its interpretation is either not within such circumstances, or at most at the periphery. **{27.7/ 1850-1851}**

69 *Third*, even within the confines of the ICJ Advisory Opinion, limited weight can be placed on the propositions stated at DH Case, [76]-[78]. Indeed, as former President Tomka explained in his dissenting opinion, a subsequent agreement or common understanding for the purpose of Article 31(3) must exist among "*the parties*" to the treaty (see paras [30] – [34]). Where only some states are party to the subsequent treaty, or where the subsequent treaty is a multilateral treaty among many states concerning a different subject matter, it is not realistic to draw therefrom a subsequent agreement or common understanding of "*the parties*" to the instant treaty. While Judge Tomka's analysis focused on Article 31(3)(b), the point applies equally to Article 31(3)(c). At [34], he quoted Sir Humphrey Waldock, Special Rapporteur in the Sixth Report on the Law of Treaties in 1966, as saying: "*Under [what became Article 31], it is only subsequent practice which clearly establishes the understanding of all the parties regarding the meaning of the treaty which is recognized as equivalent to an interpretative agreement and the reason is, of course, that two parties or even a group of parties cannot, by their interpretation of the treaty, bind the other parties as to its correct interpretation*" (emphasis added by CR). Indeed, Judge Tomka's conclusion at [34] is likewise clear: "*Accordingly, whatever terminology is employed — "agreement of the parties", "common understanding", "common intention", "common will", or any other permutation — the requirement is the same. For the purposes of treaty interpretation, an understanding that is not shared by all the parties is no understanding at all.*" **{2/69-70}** **{28.6/ 2050-2051}** **{29.32/ 2421}** {**32.3/ 3374**}

70 In this context, use of Article 32 is also limited. As Judge Tomka states: "*What follows is the Opinion's attempted second act: a turn to supplementary means of interpretation under Article 32, into which the majority seeks to channel arguments based on subsequent agreement and practice that it could not sustain under Article 31 (3). As will be seen, this turn adds little and changes nothing.*"[26] The Court here ought to apply real caution in respect of DH's suggestion that the ICJ's Advisory **{29.32/ 2421}**

[26] See Dissenting Opinion Tomka, 30. **{28.6/ 2050}**

Opinion authorises interpreting this BIT by reference to a few hand-picked subsequent treaties to which Switzerland and CR, or one of them, is party. {**21.1/ 651-662**}

71 In any event, no or only limited substantive assistance can be taken from the treaty practice of Switzerland and CR, as canvassed at DH Case, [80]-[83]. The wording which refers to "*control*" upon which DH seeks to rely differs from treaty to treaty, leading to the CA's correct observation that "*Reference to such treaties shows only that there is no uniform understanding in public international law of what is meant by "control" in investment treaties. It is therefore necessary to interpret each treaty in accordance with the principles set out in Article 31 (and, where relevant, Article 32) of the Vienna Convention*": [186] (emphasis added). This dictum applies *a fortiori*, as the BIT contains the Protocol, which is a bespoke guide to interpretation of the *very provisions relating to control* in this BIT. **{2/70-72}** **{6/294-295}**

72 As to the **ECT** (DH Case [80]): (a) this treaty was concluded some years after the BIT. Switzerland signed it on 17 December 1994, ratified it on 28 May 1996, and it entered into force on 16 April 1998.[27] CR signed it on 8 June 1995, ratified it on 29 March 1996, and it entered into force on 16 April 1998.[28] (b) The relevant wording of Article 1(6) was the product of multilateral compromise. There does not appear to be any indication or evidence that Switzerland or CR either attempted to influence the negotiation of that provision or would have been able to do so. (c) The States parties to the ECT did not intend to affect other treaties: see the 'Understanding with respect to the treaty as a whole', paragraph (a): "*The representatives underline that the provisions of the Treaty have been agreed upon bearing in mind the specific nature of the Treaty aiming at a legal framework to promote long-term cooperation in a particular sector and as a result cannot be construed to constitute a precedent in the context of other international negotiations.*" Whilst that provision looks to the future, it suggests the parties were adopting solutions limited to the context of the ECT. (d) The 'understanding' to Article 1(6) is a deliberate drafting choice which focuses on *de facto* control. It demonstrates the type of wording States would use to achieve that aim. It stands in sharp contrast to the BIT. (e) Finally, the ECT wording contemplates an *ex post* assessment alone, unlike the *ex ante* assessment envisaged by the Protocol to the BIT.[29] **{2/70}** **{29.12/ 2226-2227}** {**21.1/ 651-662**}

[27] https://www.energycharter.org/who-we-are/members-observers/countries/switzerland/
[28] https://www.energycharter.org/who-we-are/members-observers/countries/czech-republic/
[29] If one is to consider the ECT, equally relevant is another multilateral treaty by which both states became bound, i.e., the General Agreement on Trade in Services (GATS). CR became a member on 1 January 1995 and Switzerland on 1 July 1995. GATS defines a situation where a juridical

73 As to **ICSID** (DH Case [81]): (a) CR was not a party to ICSID at the time the BIT was concluded – that is why Article 9(3) of the BIT is phrased in contingent terms. There is no reason to suppose that the ICSID alternative dispute resolution route would necessarily become available and therefore that it would have affected the view of the treaty parties in concluding the BIT. (b) As discussed below, it is far from clear that the "*foreign control*" requirement under Article 25(2)(b) can be satisfied in the absence of any *de jure* control at all – the better view is that it cannot be, but the Court need not and should not express a view on what may be a controversial question which is not squarely before it. In any event, (c) given that Article 25(2)(b) of the ICSID Convention takes a maximalist approach, intended to leave room for States using the ICSID system to make provision regarding control as they wish, it would not make sense to use Article 25(2)(b) in the manner DH seeks to.

{2/71} **{21.1/658}** **{29.14/ 2232}**

74 As to **Switzerland's treaty practice at the time** (see DH Case [82]): (a) the 'Swiss Standard Draft' (1 June 1986) defines companies as "*aa) with respect to the Swiss Confederation, corporate or business associations without legal personality but able to possess assets, in which there exists, directly or indirectly, a preponderant Swiss interest*"; (b) the Switzerland/Turkey BIT (1988) defines corporate investors as "*companies, including corporations, business associations or other organisations, which are incorporated, constituted or otherwise duly organised under the law of either Contracting Party and in which nationals of one or the other Contracting Party have, directly or indirectly, a prevailing interest.*"; (c) the Switzerland/Hungary BIT (1988) contains the same investor definition and protocol language as the BIT; (d) the Switzerland/Uruguay BIT (1988) contains an investor definition of "*legal entities established under the law of any country which are, directly or indirectly, controlled by nationals of that Contracting Party*" and has a protocol, which are consistent with *de jure* control; (e) the Switzerland/Poland BIT (1989) contains an investor definition in Article 1(1)(c) referring to "*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; it being understood that control requires a substantial part in the ownership*"; (f) the Switzerland/Jamaica BIT (1990) includes a definition of companies "*with respect to the Swiss Confederation, juridical persons or*

{2/71-72} **{29.21/ 2298}** **{29.29/ 2381}** **{29.24/ 2321-2323}** **{29.30/ 2390-2403}** **{29.28/ 2366}** **{29.26/ 2337}**

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person is owned or controlled by another person in Article XXVIII(n) as "*a juridical person is: (i) "owned" by persons of a Member if more than 50 per cent of the equity interest in it is beneficially owned by persons of that Member; (ii) "controlled" by persons of a Member if such persons have the power to name a majority of its directors or otherwise to legally direct its actions;*". That definition, which corresponds more closely to the present situation by referring to the power to assert corporate control specifically, supports CR's case.

{29.13/ 2230}

business associations which are effectively controlled by Swiss nationals having a substantial part in the ownership…"; (g) the Switzerland/Argentina BIT (1991) referring to "*legal entities which are … effectively controlled by nationals*" accompanied by a protocol indicating types of proof consistent with *de jure* control; and (h) the Switzerland/Ghana BIT (1991) refers to "*legal entities which are … effectively controlled by nationals … having a substantial part in the ownership.*" **{29.22/2307}** **{29.23/2311}**

75 As to **CR's treaty practice at the time** (see DH Case [82]): (a) the CR/Finland BIT (1990) contains an investor definition of "*any legal person having its seat in the territory of either Contracting Party, or in a third country with a predominant interest of an investor of either Contracting Party*"; (b) the CR/Sweden BIT (1990) contains an investor definition of "*Any legal person constituted under the law of one of the Contracting Parties, and having its seat in the territory of either Contracting Party, or in a third country with a predominant interest of an investor of either Contracting Party, in particular constituted by a majority of shares or votes*"; and (c) the CR/Australia BIT (1991) contains a broad company definition "*that is duly incorporated, constituted, or otherwise duly organised … under the law of a third country and is owned or controlled by an entity described in paragraph (1)(d)(i) of this Article or by a natural person who is a national of a Contracting Party under its law…*", with a clarification that "*a natural person or company shall be regarded as controlling a company or an investment if the person or company has a substantial interest in the other company or the investment.*" **{2/71-72}** **{29.8/2199}** **{29.10/2210}** **{29.7/2196-2197}**

76 Given what Switzerland and CR were including in their BITs at the time, CR suggests that, at a minimum, this indicates the BIT was not intended to take matters in a new direction of pure *de facto* control. DH's point concerning the use of both ownership and control goes nowhere, because CR has already explained how control goes beyond ownership, but nevertheless requires a *de jure* anchor: see paragraphs 32 and 37 above. {**21.1/651-662**}

(3) Investment treaty awards

77 At DH Case, [84]-[94], there are submissions made about previous investment treaty awards. There are two aspects of this: (a) the precedential value of such awards; and (b) the substantive analysis and findings of such awards. **{2/72-82}**

78 As to the precedential value (DH Case, [86]), DH is incorrect to say "*An investment tribunal will follow a consistent line of earlier case law unless there is good reason to distinguish it*". At [86(3)] the proposition is put differently, as applying where there is a series of "*consistent and cogent awards*". Even if such a principle did exist, it would not assist DH. There is no consistent or cogent line of earlier decisions supporting its position. As noted above, applying the approach of *Yukos*, DH's appeal fails. But in any case, DH's proposition is incorrect and **{2/73}** **{30.27/2961-3006}**

the materials to which DH refers do not support its proposition at [86]. (In fact, only one case seems to support its interpretation.) In any event, DH does not properly explain the legal basis of the alleged principle, nor how it would apply to a *supervisory court*.

79 At [86(1)], reference is made to Article 38(1)(d) of the ICJ Statute. That cross-refers to Article 59, confirming there is no doctrine of precedent in international law. It expressly underlines the "*subsidiary*" role of awards and academic work for determining what the relevant rules of law actually are. Professor Crawford discussed recourse to decisions of arbitral tribunals under Article 38, noting that "*the quality of such decisions varies considerably*" and "*much depends on the status of the tribunal and of its members*".[30] The ICJ decision in *Land and Maritime Boundary between Cameroon and Nigeria* [1998] ICJ Rep 275 at [28] (on which DH relies at [86(2)]) does *not* say, as DH contends, that *tribunals* will ordinarily follow the reasoning of earlier judicial decisions unless there is cause not to. The ICJ was discussing the approach that *it* would take to an argument that *it* should not follow the approach previously adopted by *it* to exactly the same point in previous cases. The ICJ then carefully considered the various arguments advanced by Nigeria as to why a different approach should be adopted in that case.

80 At [86(3)] and [86(4)], reference is made to the approach adopted by arbitral tribunals. DH submits that "*where a series of consistent and cogent arbitral awards emerge (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*". The materials cited by DH do not support the proposition for which they are cited. Dr Campbell McLachlan, *International Investment Arbitration*, in fact notes that tribunals have adopted a variety of approaches to previous awards. One approach, espoused by Professor Kaufmann-Kohler in the cited lecture and in some awards in arbitrations which she chaired, is that where there is a "*series of consistent cases*", then "*subject to compelling contrary grounds*", a tribunal has a duty to adopt solutions established in such cases. This is "*subject to the specifics of the treaty and the circumstances of the actual case*" and is apparently regarded by her as a moral duty rather than a legal obligation.[31] Moreover, the approach is controversial. As McLachlan notes, in one award in which a majority took that approach, one arbitrator (Professor Stern) dissented.[32] Other

{2/73}

{29.20/2294}

{28.3/2021}

{2/73}

{31.10/3170-3173}

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[30] J Crawford *Brownlie's Principles of Public International Law* (9th edn) p 37. {31.4/3110}

[31] G Kaufmann-Kohler 'Arbitral Precedent: Dream, Necessity or Excuse?' (2007) 23 Arbitration International 357 at 374. {31.9/3165}

[32] *Quiborax v Bolivia,* ICSID Case No. ARB/06/2, Award, 16 September 2015. {30.20/2848-2876}

tribunals have preferred the approach that their task is to interpret and apply the terms of the treaty in the case before them. They will have regard to prior decisions, but the weight afforded to them will depend upon the rigour and persuasiveness of the analysis in them: see e.g. McLachlan [5.44].[33] That is similar to the approach adopted in *Daimler v Argentina*. DH cites that decision at DH Case [86(4)] as supporting a proposition that "*like cases should be decided alike*" but omits to note what the tribunal there actually said, which included the need to have regard to various factors, including "*the Tribunal's independent estimation of the persuasiveness of prior tribunals' reasoning*".[34]

81 As to the substantive findings of such previous investment treaty awards, again DH refers to awards that have little direct relevance. As far as CR can ascertain, there are only two awards which have considered the proper approach to (as here) a discretionary trust with discretionary beneficiaries.[35] Both support CR's position, not DH's position. One of these, *Yukos*, rejected the argument that certain oligarchs who were multi-hatted as settlors (in most cases), protectors and discretionary beneficiaries of several parallel discretionary trusts governed by Guernsey law (which is similar to English law) were in control of the trusts so as to be disqualified under the denial of benefits provision in the ECT. That provision provides that a state *"reserves the right to deny the advantages of this Part to: (1) legal entity if citizens or nationals of a third state own or control such entity…*". As part of its conclusion, the tribunal observed at [535]: **{30.27/ 3003-3004}**

> *"… Settling certain properties into a trust, thus transferring legal ownership to the trustee and adopting provisions with regard to the beneficiaries—including leaving their establishment at the trustee's discretion, subject to the powers of a protector as the case may be—is a well-established legal institution at common law, which is recognized internationally today pursuant to the Hague Convention on the Law Applicable to Trusts and their Recognition of 1 July 1985. The Tribunal sees no reason to unsettle a centuries-old legal institution when the trust instruments at hand do not depart from standard forms used in countless other similar settlements. To do so would put into question the validity of the very concept of trusts at a time when their recognition goes well beyond the common-law countries…"*

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[33] Citing *Tulip v Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issues, 5 March 2013, [47]. **{30.24/ 2910-2911}**

[34] See also C McLachlan 'Investment Treaties and General International Law' (2008) 57 ICLQ 361 at 392.

[35] Reference to a 'discretionary beneficiary' requires caution. They are more accurately described as objects of discretionary powers, because they have no right to any trust property even under English law, which in principle recognises equitable interests: see e.g. Lionel Smith, '*Massively Discretionary Trusts*' [2017] Current Legal Problems 17, 21-25. Liechtenstein law, as found by the Judge, does not recognise equitable interests even in principle, and hence the position is *a fortiori*. **{31.11/ 3205}** **{31.18/ 3302-3306}**

82 That is the closest analogous award. The other case (*Agarwal*) rejected the argument that a discretionary beneficiary had sufficient interest to meet an "*investment*" qualification in the applicable BIT. It is therefore less squarely on point but supports the broad thrust of CR's submission that setting up a discretionary trust structure similar to that in this case is not likely to attract, or is likely to result in the loss of, treaty protection. **{44}** **{30.27/ 2961-3006}**

83 DH then relies on several awards that are not apposite and certainly do not have the same level of relevance as *Yukos* and *Agarwal*: DH Case, [88(1)-(6)]. On each (*in seriatim*): **{44}** **{2/74}**

84 *Thunderbird*: the relevant "controller" was a shareholder with stakes of between 33.3% and 40.1%: [104]. The analysis of the relevant NAFTA provision is limited to a single paragraph: [106], involving the assertion that control can be exercised in various manners, such that a showing of *de facto* control is deemed to be sufficient. It asserts that in the absence of legal control, *de facto* control must be established to a higher than usual standard, namely beyond any reasonable doubt. For the purposes of Ground 2, it should be noted that the tribunal was persuaded that it had been exercised, having regard to the conduct that *had actually taken place*: [107]. **{30.23/ 2906-2907}**

85 *B-Mex*: this case did not decide that factual control without any legal right would suffice. The ultimate conclusion was that share ownership was required. It was present in respect of two of the three groups of claimants, but not in respect of a third, as to which the tribunal held there was no investment at all. The analysis of the relevant NAFTA provision was contained in 13 paragraphs, most of which was comprised of quotations from elsewhere. It proceeded from the non-contextual starting point of a dictionary definition ([211]) and then cited from *Thunderbird* and *Aguas del Tunari* (addressed below) respectively. At [220], it was sceptical of the *Thunderbird* tribunal's heightened standard of proof. It stated "*(i) there is nothing in the ordinary meaning of control that precludes either prong of control—legal capacity or de facto; and (ii) de facto control will typically, and logically, present a greater evidentiary challenge*" and then did precisely nothing with those observations. At [221], it disclaimed any recourse to Article 31(3)(c) material, including GATS Article XXVIII(n), but noted if it did, then it would do so by taking account of the fact that if the parties wanted those definitions they would have used them in the treaty. At [234] it clarified that the *de facto* control had to have been exercised. And at [246], contrary to DH's case, it made the key point that *de facto* control could not be established without share ownership. **{30.4/ 2574-2586}** **{29.13/ 2230}**

86 *MAKAE*: the tribunal undertook next to no independent analysis of the BIT. At [115], it noted the parties agreed that international law did not define control. At [116], it recorded both parties' citations from dictionary definitions. At [117], it recorded the parties' *agreement* that proof of *de facto* control would be sufficient, referring to several prior awards. At [118], the tribunal recorded its agreement with the point. The high point for DH was the tribunal's rejection at [132] of the contention that some ownership or other form of economic interest was required to establish *de facto* control. However, it did so on the assertion that this requirement would disregard the distinction between ownership and control and conflicts with the ordinary meaning of the Treaty's words. No further explanation or analysis was offered (and CR notes that point is inconsistent with how various others have explained this very point, including *Leshkasheli*, discussed below). **{30.14/ 2767-2775}** {**30.13/ 2719-2754**}

87 *Von Pezold*: there were two categories of claimants, the Border Claimants and certain individual claimants. As to the former, the Claimants' submission was that "*effective control*" under the BIT was met by means of both factual and legal control: [221]. The tribunal did not need to distinguish between the two as both were made out: [226] (the state's contention had been based on its submissions as to foreign control that it had deployed in relation to the ICSID qualification requirement, i.e. the obviously ambitious point that indirect control via intermediary companies was insufficient: [216]). As to the latter, the individuals did have legal rights of control both by means of shareholdings and where they were below 50%, a management agreement. Although there is a reference to *de facto* control at [324] being used synonymously with factual or effective control, the tribunal was actually addressing a legal right (a management agreement between the shareholders), and the only support for the point was a reference to *Thunderbird*. In the CA, DH said that this was its "*best*" case on the point of principle at stake. {**30.5/ 2603-2606; 2611**}

88 *Leshkasheli*: the tribunal was required to assess whether there was an investment for the purposes of Article 1(6) of the ECT, the understanding to which expressly mandates a factual enquiry. It was a trusts case which supports CR's submissions on Ground 2 (and displays an approach similar to that taken by the CA): see in particular [373]-[374], [378], [402]-[403], [409]-[410], [416]-[418], and [421]. The tribunal then held at [422]: {**30.13/ 2731-2754**}

"*Whatever the case may be, the Tribunal is of the view that Dr. Leshkasheli must live with the consequences of his decision. Although it cannot be denied that he exercised an important role in CEG's management, the evidence shows that he did so in his capacity as President of CEG. … In other words, even if the Tribunal were to find that Dr. Leshkasheli exercised substantial influence over the management and operation of CEG, such influence was exercised under the authority of the trustee of the Alamar Trust.*"

89 *Fotowatio*: this was merely a procedural order on bifurcation. The tribunal disclaimed any intention to express a view on whether the objections advanced were likely to succeed: [77]. The jurisdictional objection concerned whether "*an investment is one of the listed assets "owned or controlled" by an investor*": [78]. The tribunal observed at [80] that "*The concept of control is potentially a broad one*" (emphasis added). It went on to note "*In order to rule upon the first objection, it will be necessary to ascertain what degree of control is required as a matter of law and whether that degree of control is shown to have existed at the relevant times. The Tribunal considers that this exercise is likely to involve detailed inquiry into evidence which would also be material to the merits of the case if those are reached*" (emphasis added). Accordingly, it declined to bifurcate, with no decision made as to what control means and no detailed treaty interpretation undertaken. {**30.8/ 2646-2647**}

90 DH also seeks to derive support for its case on control from certain awards that it says do not explicitly state that the test is *de facto* control but have still applied that test to the facts: [89]. As to these (*seriatim*): {**2/77-78**}

91 *Italba*: this award dealt with the meaning of control in a single paragraph: [254]. Its only observation was that "*The 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.*" It is not clear when that practice began, but as an observation, it has no weight beyond US BITs, and moreover it does not suggest that the US accepts factual control in the absence of any *de jure* control at all. Nothing approximating a proper VCLT analysis was undertaken. {**30.11/ 2696-2697**}

92 *Vacuum Salt*: this decision concerned ICSID Article 25(2)(b). The tribunal held that the claimant was not subject to foreign control (by a Greek national) as required by that provision because he held *only* 20% of the shares. The meaning of Article 25(2)(b) is informed by the *travaux* and particular context of access to ICSID. What was key was the passage at [43], which observed that foreign control "*does not require, or imply, any particular percentage of share ownership. Each case arising under that clause must be viewed in its own particular context, on the basis of all of the facts and circumstances. There is no "formula." It stands to reason, of course, that 100 percent foreign ownership almost certainly would result in foreign control, by whatever standard, and that a total absence of foreign share- holding would virtually preclude the existence of such control. How much is "enough," however, cannot be determined abstractly.*" In fact, CR relies (and relied below) on this reasoning. Whilst DH points to the qualified "*virtually preclude*" to suggest that a lack of any share ownership is not necessarily fatal, the references to "*any particular percentage*" and "*enough*" indicate that the Tribunal was intending to make the point {**29.14/ 2232**} {**30.26/ 2955**}

that some percentage was actually required. Foxton J's conclusion that it did not find that a shareholding was a prerequisite of control, relied on at DH Case [89(2)], must be understood in light of the above. {2/78}

93 *United Utilities*: here, there was a shareholding of c.35% as part of the background to the discussion of control. The tribunal assessed the meaning of control in 10 paragraphs from [365]. It combined consideration of the ICSID test of "*foreign control*" and the different BIT language, without sensible justification: [365]. From that point on, the tribunal simply analysed the ICSID Convention by reference principally to Professor Schreuer's commentary, *Vacuum Salt* and the *travaux*, and without undertaking a full VCLT analysis. Its discussion is consistent with a minimum requirement that there be some level of equity participation, present on the facts, which centred on "*the most important private shareholder*" [413]. {30.25/ 2919-2930} {30.26/ 2937-2960}

94 Following its discussion of the above cases, DH Case [90] criticises the CA for suggesting that some of the relevant awards could be distinguished because of a reference to "*effective control*". It discusses, for instance, *von Pezold*, and DH suggests that nothing turned on the word effective in that case. That is incorrect. At [324], the tribunal equated the word "*effective*" with "*de facto*". Further, the point about certain Swiss treaty wording using "*effectively*" with a *de jure* standard is also wide of the mark – on one interpretation, that is imposing a *de facto* control requirement to be satisfied *in addition* to a *de jure* requirement. {2/78-79} {30.5/ 2611}

95 DH then in [91] notes that "*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*". This is difficult to understand. In the block voting scenario described and illustrated by the awards referenced in DH Case [91], the shareholders own shares. These say nothing about *de facto* control in the absence of some shareholding, which is the precise situation on this appeal. {2/79} {2/79-81}

96 Lastly, in [92]-[93], DH addresses cases outside the trust context on which CR placed reliance below, and continues to rely on, i.e., *Aguas del Tunari, Vacuum Salt* (already discussed above) and *Gramercy*. {30.2/ 2476-2529} {30.26/ 2937-2960} {30.9/ 2648-2658}

97 DH seeks to distinguish *Aguas del Tunari* at [92] on the basis that, if it is read as supporting the view that legal control is required, it is an outlier. But that stands or falls on whether DH has established that a mainstream view existed – which it has not. The powerful {2/79-80}

reasoning of the eminent tribunal in *Aguas del Tunari*, interpreting materially identical wording relating to an "*investor*" qualification as found in the present BIT, cannot be put to one side so easily. Hence, CR relies on it. The tribunal engaged in a 100-paragraph interpretation exercise (at [214]-[314]), iterating the various factors contemplated by Articles 31 and 32 VCLT, including declining to place any weight on the ICSID Convention as an interpretative guide to the BIT, given its particular context ([275]-[286]), and finding the states' treaty practice of limited probative value ([291], [314]). **{29.32/ 2420-2421}** **{30.2/ 2499; 2502-2527}**

98 At [92(2)] DH correctly notes that the issue was whether proof of *de facto* control was required *in addition to* legal control (the AdT entity was indirectly controlled – its shares were 55% owned by an entity in a third country, the shares in which were 100% owned by companies with a relevant nationality: [221]). But the suggestion that *Aguas del Tunari* left open the question that arises on this case, and that it was only affirming that legal control was sufficient and not necessary (DH Case [92(3)] and [92(4)]) is untenable in light of its observations that "*Given the context of defining the scope of eligible claimants, the word "controlled" is not intended as an alternative to ownership ... In this sense, "controlled" indicates a quality of the ownership interest. … The question therefore is how the term "controlled" in Article 1(b)(iii) is meant to qualify "ownership"*": [242]-[243]. At DH Case [92(5)], it suggests that there were particular confirmations of ordinary meaning. That takes out of context the discussion at [227]-[234], which concluded with the observation that the words "*control*" or "*controlled*" were not determinative ([233]) and that the latter was ambiguous ([234]). **{2/80}** **{30.2/ 2504-2510}**

99 As to *Gramercy*, at DH Case [93], the tribunal rejected an argument of control based on a company acting only as manager, i.e. without ownership or a legal right of control in that entity's own right. See Award [620] ff, especially [638]-[640]. At [93] DH appears to accept that this tribunal found that ownership was required to satisfy Article 10.28 of the US-Peru FTA. **{30.9/ 2648-2658}** **{2/80-81}** **{21.10/ 932-939}**

100 Accordingly, on a complete review of the cases, there is simply no basis for DH's contention that "*There is a consistent line of investment treaty case law which favours the interpretation of "control" as encompassing de facto control*": [87]. In any event, there is no line of cases indicating that factual control in the absence of any ownership interest or other legal right can suffice on its own. The most apposite cases, in *Yukos* and *Agarwal*, plainly favour CR's position. DH's attempt to extract support from a disparate collection of other cases, none of which concern the type of trust structure in issue in the present proceedings, is not relevant (as the CA held). The cases do not support its interpretation and provide no reason to alter **{2/74}** **{30.27/ 2961-3006}** **{44}**

the Court's approach to the text of the BIT in this case, the proper interpretation of which is set out in **Section C(1)** above.

(4) Academic commentary

101 Lastly, at DH Case [95]-[97], reference is made to academic commentary. When reviewed in the round, that commentary supports CR's position. CR relied upon extracts from two academic works before the CA, i.e., Professor Douglas's text (quoted by the CA and referred to above), and a chapter contained in Professor Brown's *Commentaries on Selected Model Investment Treaties* which concerns Swiss BITs, which was written by Mr Schmid, who was the Deputy Head of the 'International Investments and Multinational Enterprises' Unit at the Swiss State Secretariat for Economic Affairs, and has extensive experience in BIT and FTA negotiations on behalf of Switzerland and EFTA. The relevant passage from Mr Schmid's chapter states at p. 665: {**2/82-83**} {**31.6/ 3120-3135**} {**31.3/3104**}

> *"…What constitutes 'control' or even 'indirect control' is specified only in a handful of BITs, largely borrowing from the respective GATS-terminology. Some BITs require the investor to prove his control of an investment in order to be recognized as an investor in the sense of the BIT. Despite the fact that only control, but not ownership, of non-party legal entities is explicitly mentioned in the definition, it is obvious that ownership of non-party legal entities also qualifies for being an investor under the BIT because ownership implies an absolute majority of shares whereas the control of a company requires at least a relative majority of shares." (emphasis added)*

102 That aligns with the observations of the majority in *Aguas del Tunari* at [264] that: {**30.2/ 2516**}

> *"… the phrase "controlled directly or indirectly" means that one entity may be said to control another entity (either directly, that is without an intermediary entity, or indirectly) if that entity possesses the legal capacity to control the other entity. Subject to evidence of particular restrictions on the exercise of voting rights, such legal capacity is to be ascertained with reference to the percentage of shares held. In the case of a minority shareholder, the legal capacity to control an entity may exist by reason of the percentage of shares held, legal rights conveyed in instruments or agreements such as the articles of incorporation or shareholders' agreements, or a combination of these…"*[36]

103 Professor Petsche, in *The Concept of Investment in Investment Treaties,* Chapter 5 (Traditional Definitions and Typical Requirements), notes to similar effect at 5.37 that it is "*unlikely that control can exist absent any ownership rights*" but an "*individual or entity holding 51 per cent of the shares of a company generally exercises control over that company*". {**31.14/ 3222**}

104 As to Professor Douglas, DH Case [97] says 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* {**2/83**}

[36] See also *Vacuum Salt*, discussed above. {**30.26/ 2937-2960**}

protection under any investment treaty, rather than focussing on the explicit requirement of "control" of an investor". It is not clear why that context would invalidate the points he was making, which are common sense. In the context of an express requirement of control (as here), the point he was making is stronger, as no implication is needed. DH also suggests that his views have been superseded because of the trend in later awards, and also because Professor Douglas was a member of the tribunal in *Italba*. That is a bad point for various reasons, not least of which is that the tribunal in that case said that on the facts it would be "*futile*" in that award to express a view on whether the notion of control was flexible or strict: [264]. In any case, it is not possible to draw the inference that DH suggests from the award of a three-person panel, and more generally, it is his earlier academic work, and not the analysis of the tribunal in a single paragraph in *Italba* (if otherwise read to support DH's case), which is the more persuasive. **{30.11/2705}**

{2/82}

105 Finally, DH Case [95] relies upon Professor Schreuer's commentary on the ICSID Convention and passages specifically concerned with the ICSID Article 25(2)(b) gateway and with cases such as *Thunderbird* and *B-Mex*, already discussed. The CA properly noted this may be correct as a summary of what (as a matter of outcome) various tribunals have done, before going on to correctly highlight why such reasoning would be problematic in its application in the present case: [190]-[191], as well as the existence of the Protocol as a significant distinguishing factor in any event. **{38.12/4639-4660}** **{29.14/2232}** **{30.23/2889-2908}** **{30.4/2536-2586}**

{6/296}

D GROUND 2: THE COURT OF APPEAL WAS CORRECT TO CONCLUDE THAT IF (CONTRARY TO THE ABOVE) INVESTOR STATUS CAN BE ESTABLISHED BY REFERENCE TO *DE FACTO* CONTROL ALONE, MR STAVA DID NOT HAVE IT

106 As background, it is necessary first to read the Judge's primary fact findings in Annex 3 to the August Judgment, summarised in part in **Section B** above. The CA's main reasons for its decision on *de facto* control were as follows. **{13/579-596}**

107 *First*, what the control standard requires is control of the economic interest of the entity (here DH), as distinct from control over the *conduct of its business* ([196]-[198]). (That proposition was not challenged by DH in the Grounds of Appeal; no permission to advance an additional Ground has been sought or granted; nor was it included as an issue in the SFI. Yet DH now seeks in effect to advance such a new Ground in DH Case [114].) The CA then went on to disagree with the Judge, who had held incorrectly that Mr Stava held "*the "economic attributes of ownership"*". As it said: *"Any value in Diag SE was held by the* **{6/297-298; 302}** **{17/622-632}** **{2/90}**

trustee for the benefit of the class of potential beneficiaries as a whole, but none of those potential beneficiaries (including Mr Stava) had any interest in the assets of the trust": [207]. *That* aspect of the CA's reasoning is not challenged by DH.

108 *Second*, in any event, control in this case had to be assessed consistently with the trust structure in place (the validity of which was never in issue). Any roles (i.e. settlor, protector, beneficiary, holder of the shares or chairman) conferring alleged control had to be considered in that context ([200]-[204]), and not necessarily as control in Mr Stava's own right. What is more, it was "*essential that this should be so if the purposes of establishing the trust, succession planning and asset protection, were to be achieved*". In any event, certain of those roles, for example as chairman, were concerned with control over the conduct of the entity's business, not control of the investor company itself. **{6/300-301}**

109 *Third*, the CA then considered Mr Stava's protector powers (which were fiduciary) and the basis of the principal control argument advanced in the CA,[37] namely that he was able in theory[38], having regard to a significant number of contingent steps and important legal assessments which would have to be measured by reference to actual future circumstances, to "*reconstitute the trust with himself and a Liechtenstein company under his control as the trustees, provided always that he considered this to be in the best interest of the trust, and to make distributions to himself as one of the beneficiaries*": [205]. **{6/301}**

110 *Fourth*, as to that power, "*At the relevant time, the end of 2011, Mr Stava had not exercised his power to acquire control of Diag SE and had no intention of doing so. On the contrary, it was important to him that he was not regarded as having such control*": [206]. He had no intention of doing so because this would run counter to his purposes in establishing the trust. This is an important point, because Article 1(1)(c) requires control, not a contingent possibility to acquire control. **{6/301-302}**

(1) Two false criticisms

111 Two of DH's criticisms of the CA may be addressed at the outset. These points are introduced at DH Case [104]-[105], and repeated at [116(1) and (2)], namely that: (a) by **{2/85; 90-91}**

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[37] CA Day5/58.

[38] Males LJ put to Mr Riches KC (CA Day5/43) that "*there is no legal sequence of steps that he can put in train that will ensure that he gets the shares, because there will always need to be an independent consideration by the trustee, acting on behalf of the trust, that what he is asking for is in the interest of the trust. Now, it may be that you say that in practice the trustee is likely to conclude that it is, but that's as high as you can put it, isn't it*". Mr Riches replied: "*Absolutely, that is the point*". **{25.2.2/1462; 1477}**

requiring Mr Stava to have exercised his protector power by 31 December 2011, the CA applied a test that was futile and impossible to fulfil; and (b) for the CA, in order for Mr Stava to have *de facto* control it was first necessary for him to obtain or exercise *de jure* control by replacing the trustee and thereby obtaining legal title to the shares, i.e. that it cannot be necessary for a putative controller to obtain *de jure* control in order to establish their *de facto* control, and that to so hold was an erroneous conflation of two separate tests.

112 Both are false criticisms. As to the first, if the factual test of whether DH was "*controlled*" by Mr Stava requires ascertaining whether there was in fact control being exercised – which is what the materials relied upon by DH on Ground 1 and in support of a *de facto* test appear to require – then the *test* is not futile and impossible to fulfil. Rather, as the CA found, the test was simply *not satisfied on the present facts* as at 31 December 2011. That is agreed to be the relevant date (DH Case [100]), on the basis of what the Judge said at August Judgment [168], which has never been challenged on appeal. {**17/623-629**} {**2/84**} {**13/531-532**}

113 The second confuses unexercised rights under the trust with the question of control of DH. The CA did not require Mr Stava to have *de jure* control *of the company* in order to establish *de facto* control of it. Rather, it considered the legal rights and powers that Mr Stava had under the trust and considered DH's own submission as to a potential course of conduct that DH argued conferred on Mr Stava the potential ability to control the shares in DH. The fact that in this particular example which DH chose, the exercise of such rights and powers under the trust may result in the acquisition of *de jure* control of the company, does not disclose any mistake in the CA's reasoning; it is simply the function of the CA considering, properly, the particular argument which was advanced to it by DH.

(2) DH's other criticisms of the Court of Appeal

(a) *Control of what – the economic interest or the conduct of business? (DH Case [114])* {**2/90**}

114 *First*, CR objects to DH advancing this previously unheralded new Ground for the reasons already set out in paragraph 107 above. DH attempts to disguise it by contending that their argument on this point has been advanced as part of Ground 1. The basis for that is unclear. The mere fact that DH refers to the *Gramercy* case as part of its argument in the context of Ground 1 does not mean that the point DH seeks to run at DH Case [114] is part of Ground 1. The CA's reasoning on this point, which DH Case [114] seeks to challenge, was made only in the context of its decision on *de facto* control. {**17/623-629**}

115 *Second*, the CA was right to conclude that what was required was control of the economic interest, not merely control of the conduct of the business. This is a key distinction. Even if *de facto* control alone is sufficient, it must necessarily be control by the Swiss or Czech national *of the investor company* which is actually connected with the investment, otherwise, for the reasons set out in relation to Ground 1 above, the class of potential controllers would be far too wide. Control merely of the *conduct of the business* of the company is not what is required by the wording of Article 1(1)(c), and is very different from controlling the company. {**17/623-629**} {**21.1/653**}

116 Even if the Court is against CR on Ground 1, the same reasons as those advanced in favour of CR's position in relation to that Ground support constraining the concept of *de facto* control of the investor company within more limited bounds than a completely open-ended set of control indicia. The awards identified by DH are not fully consistent in their approach, still less do they endorse the weak form of connection with the investment now espoused by DH, namely 'whether X can procure that his wishes in respect of Y be carried out' (cf DH Case [108]). If that were the test, which it is not, it would require no connection with the investment and no actual *exercise* of control of the investor company, only an ability (if it is desired to exercise it) to give instructions as to how the company operates which should be carried out. {**17/623-629**} {**2/86**}

117 It is important to look at the basis on which control of the company itself (not the conduct of its business) is exercised. What is stated in *Gramercy* [639]-[640] is correct, or at least a good pointer in the correct direction: "*control can only be exercised at the ownership level, not at the level of administration. Managers, directors and administrators do not control the company – their role is to adopt decisions and make declarations of intent on the company's behalf*". Further, any control exercised by Mr Stava *of the company*, e.g. voting the trust's shares, was not in his own right, but on behalf of the trustee (as the Judge held). Any control by him of the conduct of the business of the company did not qualify as control by him of the company itself, which is what is required by Article 1(1)(c). In arguing that the ability to control the business of the company is relevant/sufficient (e.g. DH Case [111(2)(h)-(k)]), DH is mistaken, as was the Judge, who discussed various aspects of control over the conduct of the business of the company, rather than control of the *company itself*. {**30.9/2654**} {**21.1/653**} {**2/87-88**}

118 The focus on control of the economic interest of the investor entity is more appropriate in applying any test of factual control of the entity in question, being far more reasonable and justified than the test advanced by DH. If that is so, this Ground fails because there is

quite properly no challenge to the CA's conclusion at [207] that Mr Stava did not hold "*the "economic attributes of ownership". Any value in Diag SE was held by the trustee for the benefit of the class of potential beneficiaries as a whole, but none of those potential beneficiaries (including Mr Stava) had any interest in the assets of the trust.*" As this was a trust established for succession planning, it may reasonably be inferred that the letter of wishes – to which at least one witness referred[39] but which was not produced *in breach of the Court's orders* (Annex 3, [21]) – would have confirmed there was no intention for Mr Stava to personally benefit (but rather for his daughters and remoter issue to benefit after his death). Even if DH were right that control of business activities is relevant (see DH Case [114]), control of the economic interest of the company would still remain a highly relevant factor telling against it.

{6/302} {13/582} {2/90}

(b) *Any roles conferring control had to be considered in that [trust] context and not as control which counted as Mr Stava's personal control (CA Judgment [200]-[204])*

{6/300-301}

119 DH Case [118]-[121] criticises the CA's conclusion that action by Mr Stava as agent for the trust qualified as control *by the trust* (not by him). DH contends that the CA made an erroneous use of *de jure* control within Ground 2, and that the fact that Mr Stava acted as agent for the trustee was only the beginning of the enquiry and not the end of it. As well as confusing the position under the trust with the position as regards the company, that is, in effect, a disguised attack on the genuineness and validity of the trust structure, seeking to ignore the structure that has been put in place. Further, the suggestion at DH Case [120] that the structure can simply be 'looked through' because Mr Stava's role does not necessarily share the hallmarks of a conventional agency relationship has no principled basis (outside of sham or veil piercing scenarios which it is common ground are not engaged here). The experts on Liechtenstein law agreed in a joint report that Mr Stava was acting for and on behalf of the trustee and not in his own right, the former having retained control of the shares.[40] When an international law test is applied to a situation created under domestic law, one does not ignore the domestic law structure that exists.[41]

{2/92-93}

120 The CA's approach gains support from the following point. One situation specifically envisaged by Article 1(1)(c) is control of an "*investor*" by another legal entity.

{21.1/653}

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[39] E.g. Nicole Stava (Day2/201/23-202/3).

[40] Joint Memorandum, [32], [33], [36] and [37].

{25.1.1/1170-1171}

[41] See e.g. *Swissbourgh Diamond Mines (Pty) Ltd v Kingdom of Lesotho* [2018] SGCA 81 at [103]-[109] noting (in the context of what constitutes an investment) that the existence and scope of rights are a matter of domestic law to which international law necessarily defers.

{22.1/1075}

{35.6/3640-3643}

Corporations invariably act through natural persons. The BIT cannot be understood to be focusing on whether the natural person allegedly acting for the alleged controller company in exercising *de facto* control of the alleged investor company is Swiss – it must look at that person's legal position (i.e. is he exercising control for the putative corporate controller) and/or the legal position as between the two companies. There has to be some reference to and grounding in legal relationships, rather than open ended discretion, even in the *de facto* arena. To so hold is consistent with the approach taken to the trusts analysis in both *Yukos* ([511]) and *Leshkasheli* [417]-[418] (the latter applying a *de facto* analysis as directed by express treaty wording in that case). {**30.27/2997**} {**30.13/2752-2753**}

(c) *Alleged failure to look at the overall position*

121 DH Case [103] criticises the CA for not looking at the overall picture. This is unfair. The CA was addressed on all the relevant matters, and the first such matter put to it in oral submissions[42] was the protector powers. In any event, it did look at the overall picture. It appreciated that many of the matters sought to be relied upon could not assist DH, not least in view of the Judge's fact findings. Thus, the Judge held that holding/voting the bearer shares and making decisions as chairman of DH were not done in Mr Stava's own right, but on behalf of the trustee and DH respectively (and not solely in his own interests)[43]. He also found that Mr Stava had no relevant rights *qua* settlor or beneficiary. Broadly, these were not challenged in the CA, although DH did file a Respondents' Notice, one point of which sought to divorce the control Mr Stava was exercising from its legal relationship, stating that "*insofar as it was necessary for Mr Stava to have some form of 'legal right' in order to possess control, then at all material times he also had the legal right to exercise the voting rights attached to the shares*". That attempt to reheat a late and unpleaded attempt by DH to advance a new case in closing, contrary to the expert evidence, which the Judge had rejected (Annex 3, [34]-[44]) and the CA also did not accept, has not been repeated in this Court. That left only Mr Stava's position as protector, and whether his powers as such under Clauses 22.1 and 22.2 of the trust deed conferred control. That is considered in the next section below. {**2/84-85**} {**13/588-591**} {**23.1/1121**}

(d) *Mr Stava's position as protector*

122 The CA was right in relation to Mr Stava's position as protector. The theoretical ability of Mr Stava to use his powers as such to set in motion a chain of events which, had an entirely

[42] See fn 37 above.
[43] Annex 3, [61(iv)].

{**25.2.2/1477**}

{**13/595**}

theoretical set of circumstances been present, *might* have led in the future to a change of ownership in relation to the shares in DH, does not establish that DH was in fact controlled by Mr Stava as at 31 December 2011. Still less does it do so when Mr Stava did not actually set that chain of events in motion at the relevant time, and yet further, had no intention of doing so (something which DH Case [125(2)] even describes as "*unsurprising*"), and would not have done so. It would be especially unfair to draw any inference in Mr Stava's favour on this aspect, given his breach of the Court's order which should have resulted in disclosure of his letter of wishes as to the operation of the discretionary trust. {**2/94**}

123 It is common ground that pursuant to his protector powers (Clauses 22.1 and 22.2), Mr Stava could appoint himself only as a Co-Trustee, i.e. he could not be the sole trustee, unless he became resident or domiciled in Liechtenstein (per Clause 2.2.b of the Trust Deed) (see also DH Case [103] and fn16). He did not do that, and he was unlikely to have done either of those things; had he done so, he might have risked losing his Swiss status and the protection of the BIT, or potentially made his tax position worse in comparison to Turks and Caicos (where his evidence was that he paid no tax[44]). {**23.1/1112; 1121**} {**2/84-85**} {**31.2/ 3043-3044; 3046**}

124 Multiple future steps would have been required to achieve the position envisaged in DH's submission of putting in new Co-Trustees, including at a minimum: (a) prior written consent of three beneficiaries to removal of LNR Trust Reg under Clause 22.2; (b) the execution of a Deed of Removal under Clause 22.2 to remove LNR Trust Reg; (c) prior written consent of three beneficiaries to addition of Mr Stava as Co-Trustee under Clause 22.1; (d) the execution of a Deed of Addition under Clause 22.1 to add Mr Stava as Co-Trustee; (e) the acquisition or incorporation of a Liechtenstein company by Mr Stava in order for it to act as Co-Trustee; (f) prior written consent of three beneficiaries to addition of the Liechtenstein company as Co-Trustee under Clause 22.1; (g) the execution of a Deed of Addition under Clause 22.1 to add the Liechtenstein company as Co-Trustee under Clause 22.1; and (h) the execution of a Deed of Transfer under Clause 22.4 to transfer ownership of the DH shares from LNR Trust Reg to the new Co-Trustees. {**23.1/ 1121-1122**}

125 These steps could only ever be expected to be contemplated in the most exceptional of circumstances, and, in the real world, Mr Stava did not do so. Instead, he: (a) retained the perceived benefits to himself and his family of the trust as constituted without any such change(s); and (b) avoided the risks of having to take such steps. In particular, a change of

[44] Day3/19/10-12.

{**25.1.2/ 1178**}

trustees is one of the most significant events in the life of a trust. The structure that had been put in place was established on legal advice. Given the type of serious adverse consequences involved in getting it wrong (see e.g. CA [184]), any change to that would have been done after taking legal and tax advice, with the ultimate outcome and manner of resolution being dependent upon circumstances as to which reliable assumptions cannot be made (by analogy with CR's submission accepted by the Judge in Annex 3, [60]). {**6/294**} {**13/ 594-595**}

126 In circumstances in which Mr Stava accepted that no investment treaty arbitration was in his contemplation at the time (not even knowing of the BIT's existence),[45] it is vanishingly unlikely that Mr Stava would have changed the trust structure so soon after setting it up, either at all or particularly in the manner suggested (an example thought up after the fact with the BIT's provisions in mind). It is fanciful that he would have appointed himself as Co-Trustee along with a Liechtenstein company *under his control*, as opposed to simply making a like for like replacement of LNR Trust Reg with another *independently owned* professional Liechtenstein trust company, especially as Mr Stava's evidence was that the purpose of the Koruna Trust was succession planning and a subsidiary purpose was asset protection, both of which would likely be threatened by such a change (CA [183], [203], [206]). Further and in any event, the Court was deliberately deprived of documentary evidence bearing upon Mr Stava's intentions in relation to the distribution of the Koruna Trust by DH and Mr Stava breaching the Court's disclosure orders: Annex 3, [21], in circumstances where more broadly the Judge was "*unable to rely on Mr Stava's evidence save to the extent that it accords with the documentary record or the inherent probabilities*": August Judgment [14]. Dr Rabanser (a principal of LNR Trust Reg, the corporate trustee) did not provide a witness statement and was not tendered for cross-examination. Whether Mr Stava's protector powers could properly be exercised in accordance with the Liechtenstein law fiduciary duties would depend on, *inter alia*, the answers to the type of issues canvassed above, in the relevant circumstances as they actually existed at the relevant time. It is not possible to give an answer to that question which holds good for all times and all circumstances. The repeated references in DH Case to Mr Stava's "*wishes*" not only ignore the fact that the contemporaneous written evidence of his actual wishes was withheld, but also ignore that he would have been obliged to consider matters properly and fairly in accordance with his fiduciary duties (whether as protector, delegate of the trustee, or Co-

{**6/294; 301-302**} {**13/582**} {**13/488**}

[45] Day3/11/3-16. {**25.1.2/ 1174**}

Trustee), as would any replacement trustee, rather than being able just to decide on a course of action that did not require justification.

127 DH Case provides no adequate answer to these points. There is no support, either in the BIT or in the awards on which DH relies, which would justify finding a future contingent ability to control the investor company to be sufficient to prove *de facto* control. DH Case [109] sets out DH's proposed test for *de facto* control in a case such as this one. It begins by cross-referencing back to Grounds [21]. But in fact the test now being proposed by DH differs from what it proposed in its Grounds, which was that the CA "*should have held that the test is a wider one, as follows: de facto control can be established by a combination of: (1) the giving of instructions by A; (2) the following of instructions by B; along with (3) the existence of a coercive sanction over B that would ultimately result in A's instructions being carried into effect by B or by a replacement B (insofar as B did not follow the instructions).*" {**2/86**} {**17/629-630**}

128 As to this proposed 'test' for *de facto* control, there was no evidence at trial that any instructions were given by Mr Stava (and thus no evidence that such instructions were followed, with Mr Stava / DH having taken a deliberate decision not to call Dr Rabanser). In relation to this there were a number of related findings of law and fact. The Liechtenstein law experts were agreed that "*A settlor cannot retain a continuous right of instruction, which is inconsistent with the existence of a trust*": Annex 3, [29(v)]. The Judge also found as a fact at Annex 3, [31] that there was no evidence of Mr Stava having entered a binding agreement with Dr Rabanser whereby the latter would follow his instructions (there being a dispute between the parties about the legal consequences of such an agreement if there had been one). Before the trial, DH and Mr Stava were subject to a disclosure order requiring disclosure of documents sufficient to evidence any instructions given by Mr Stava to Dr Rabanser in respect of the Koruna Trust. Mr Stava certified that there were *no responsive documents* (August Judgment, [25]) regarding a search with a date range of 25 May 2011 to 22 December 2017. In light of this evidential position, it is not surprising that the first two limbs of the proposed test have now undergone a marked change at DH Case, [109]. It has moved away from being a test based on what did (supposedly, but not in fact) happen to one based on what *might* have happened, becoming the even looser "*ability to give instructions*" and the "*willingness to follow instructions*" respectively. {**13/584-586**} {**13/491**} {**2/86**}

129 In relation to the third limb of DH's suggested test, this was also incapable of being satisfied in this case. It is notable that the words "*which would ultimately result*" in "*instructions*" being carried into effect skirt over the (many) inconvenient restrictions and conditions

which would need to be overcome to make this happen. As a matter of fact, this would not have happened and is simply an unrealistic example DH has hypothesised for the purposes of this case. In any event, the possibility is itself too hypothetical or remote to constitute control as a matter of law. And further still, if LNR Trust Reg (or a replacement) had carried Mr Stava's "*instructions*" into effect, that would have been as a result of it complying with its fiduciary duties as trustee, consistently with the applicable legal framework, not because of an "*instruction*" or any *in terrorem* effect of a coercive sanction of potential removal. It would not demonstrate control. This third limb of the test proposed in the Grounds therefore also undergoes a relaxation in DH Case, [109], becoming "*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*". But the above points cannot simply be ignored. **{2/86}**

130 The reference to the approach taken to "*control*" in sanctions law or PSC reporting for company law purposes at DH Case [110] is of no assistance to the Court's treaty interpretation task:[46] it occurs in a wholly different context in those situations. The reason for the extended meaning of "*control*" in the sanctions context is simple - the anti-avoidance purpose underpinning the effectiveness of the sanctions regime requires very broad formulations of ownership and control which look through opaque structures: see *Shvidler v Secretary of State for Foreign, Commonwealth and Development Affairs* [2026] AC 607 per Lord Sales and Lady Rose JJSC at [213] and [233]. A mere ability to control is justified in that context bearing in mind the legislative purpose. That justification is entirely absent here.[47] **{2/86-87}** **{27.14/ 1992-1996}**

(e) *The absence of any actual exercise of control*

131 DH contends at DH Case [116(3)] that the CA drew the wrong conclusions from the fact that Mr Stava had not exercised the protector power to replace the trustee at the relevant **{2/91-92}**

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[46] Likewise, generalised comments concerning protectors in two English cases noted at DH Case [117]. To the extent relevant, in *ITS*, the trust structure formed part of various fraudulent activities: [94], [122] and the lawyers involved gave evidence as to its operation: [88]. *Nightingale*, concerned whether a property was beneficially owned by a company when it was purchased in its own name, but the funds had been provided to it. The company was held in trust, and the existence of the protector powers supported a conclusion that the company was the beneficial owner. **{2/92}** **{27.6/ 1776-1777; 1782}**

[47] Even the extended meaning of *de facto* control in this specialised context is not understood to include "*situations where P might be likely to able to bring about a position where he could take control, but only on the assumption that other people cooperate; and/or situations where P would face penalties or consequences that might be unwelcome to P such that it is unlikely that P would choose to take such control*": see *Hellard v OJSC Rossiysky Kredit Bank* [2024] EWHC 1783 (Ch), [2025] 1 WLR 297 per Nicholas Thompsell KC at [76]-[83]. **{27.11/ 1900-1941}** **{27.5/ 1754-1756}**

time. The straightforward answer to that point is that if *de facto* control is the standard, the BIT requires it to have been exercised. This is not least because the word "*controlled*" is used in Article 1(1)(c) and refers to a past and/or present actual state of affairs. That is consistent with the immediate context, i.e. (a) Article 1(1)(b) likewise looks backwards or at least to a present state of affairs in terms of the "*seat*" and "*real economic activities*"; (b) nationality in Article 1(1)(a) requires a status that has actually been acquired by the relevant time. Consistent with this, the awards upon which DH relies for the *de facto* control standard have regard to how the alleged control has actually been exercised (or not). There is no sensible basis on which the requirement of control in Article 1(1)(c) can be read as exclusively forward looking (to a future situation in which control might be exercised, subject to various contingencies). {**21.1/653**}

(f) *Other points made by DH*

132 One cannot infer control from the non-exercise of the protector power (cf DH Case, [105], [116(3)]). The fact that X acts in a manner they anticipate or know Y will approve of (which Y does in fact approve of) shows at best a coincidence of interests, not control by Y of X. The point in DH Case [116(3)(a)] simply begs the question. If control has not yet been exercised, and there is a coincidence of interests, then if the power of coercion or sanction has also not been exercised, then there remains no control. In the same way, there is no randomness about that outcome (cf DH Case, [116(3)(b)], where DH contends that on the CA's test, the outcome is random as it depends on whether the putative controller has exercised a "*power of coercion*" in time). There is no injustice in people failing to meet the control standard required by the BIT, all the more where (as here) Mr Stava took legal advice and deliberately created the trust structure under which he lost his ownership of the shares and any right of control of DH. {**2/85; 91-92**}

133 DH Case [116(4)] suggests that the effect of the CA's judgment is that if CR had asked for proof of his control on 1 January 2012, then Mr Stava could have done so, but as CR did not ask, Mr Stava is now unable to do so. There is nothing to this point. He could not have provided proof of something that did not exist. For the reasons given by the CA, Mr Stava had no intention of exercising personal control at that time (and in any case this hypothetical is just that, as he did not know anything about the BIT and its jurisdiction requirements). The essential thrust of the submission is that if Mr Stava had known about the BIT and the potential loss of treaty protection involved in setting up the trust, he would not have done it. That may be so, but it cannot undo what in fact happened. {**2/92**}

134 Finally, DH Case [123]-[126] seeks to suggest that the CA's conclusion in [206] that it was important to Mr Stava that he was not regarded as having such control at the end of 2011 is a 'red herring'. It is not. There was ample support for that conclusion and it is relevant in answering various points made by DH. {2/93-95} {6/301-302}

135 DH Case, [125(3)], contends that "*On* [CR]*'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*". This is not understood. At the end of 2011, Mr Stava knew nothing of investment treaty arbitration - this arbitration under the BIT was commenced in 2017. Instead, he was pursuing efforts to enforce the Commercial Arbitration Award. Mr Stava's view was clearly that this was something valuable, so as to be worth making succession plans and to protect the assets. That has nothing to do with CR's case concerning *de facto* control under the BIT. {2/94}

136 DH Case, [125(4)] suggests that the succession planning and asset protection purposes did not mean the DH shares could never be transferred out of the trust (nor is there any finding to that effect). CR agrees there is no finding to that effect. DH then notes that "*in 2024, following a request by Mr Stava, the trustee made a distribution of those shares to Mr Stava personally*". This is a reference to a document which in itself was irrelevant because it post-dated the agreed date of assessment, i.e. it related to the position after 1 January 2012. It was produced late and not the subject of any Liechtenstein law evidence. There was no evidence or cross-examination about it at trial. In any event, what the 22 May 2024 document actually did is contentious; on its face it in fact appears to provide for *future* distribution and transfer of the DH shares to Mr Stava. But for present purposes, at most, it illustrates very starkly something that was *not* done 13 years previously in 2011. Even if it has the effect DH suggests, one can well see why in 2024, shortly before part two of the High Court trial at which DH faced losing the jurisdiction challenge due to the control issue, Mr Stava made a self-serving request and the trustee formed a proper view that it was appropriate to override the succession planning and asset protection purposes in order to try to save the BIT Award in its favour. The Judge noted as much in closing,[48] and correctly placed no weight on this document. {2/95} {2/87-89}

137 These points cumulatively dispose of the list of points made at DH Case [111] as supposedly supporting Mr Stava having control, which DH categorises by reference to matters concerning the Koruna Trust, DH, and the shares in DH. However, CR makes

[48] Day8/139/24-140/8. {25.1.4/ 1195-1196}

three further short points on DH Case [111]. *First*, in relation to the Koruna Trust (i.e. DH Case [111(1)]), whilst Mr Stava was settlor and a discretionary beneficiary (DH Case [111(1)(b)]), he had no relevant rights or powers in those capacities (cf Grounds [27]). The clause referred to at DH Case [111(1)(d)] regarding trustee involvement in management of DH's business is a typical anti-Bartlett clause often found in trusts of this kind. Its function is to exclude liability if the trustee does not involve themselves in the management or conduct of the business, and it does not affect the trustee's right to do so or to delegate: *Yukos* [525]. It is no surprise that a professional trustee delegates to those with experience the running of the business, as LNR Trust Reg did in this case, and it does not mean that the person with that experience is in "*control*". DH Case [111(1)(h)] appears to seek to elide the presentational aspect of the Lawbook Transaction with the purposes and operation of the Koruna Trust. The CA correctly deprecated such an attempted sleight of hand at [203]. {**23.1/ 1109-1124**} {**17/ 631-632**} {**30.27/ 3001**} {**6/301**}

138 *Second*, in relation to DH (i.e. DH Case [111(2)]), the Judge's conclusion that the success or failure of DH inured to Mr Stava and his family as members of the class of discretionary beneficiaries (DH Case [111(2)(a)]) was wrong – it would only do so if and insofar as an appointment was made to one or more of them (in respect of which the Judge had found that no beneficiary had any right, Annex 3, [26(ii) and (iii)]). The CA set out the correct (and unchallenged) position at [207]. On any view, the success or failure of DH did not inure to Mr Stava alone or even primarily. The remaining points taken by DH all relate to Mr Stava acting in a ministerial capacity, i.e. not in his own right but as agent for the trust or for DH, as the Judge held. Just because there may be no conflict of interest between an agent and a principal (as is often the case) does not mean that the agent should be treated as the principal (which is inferentially what the Judge wrongly held when relying on the absence of conflict as a relevant factor). As to DH Case [111(2)(k)], Mr Stava's position after the settlement of the shares into trust was completely different to what it had been before. Even if his scope for decision-making was the same (as the Judge considered) it was being exercised now on a wholly different basis, i.e. no longer as the 100% shareholder, and no longer in his own right. {**2/87-89**} {**13/584**} {**6/302**}

139 The Judge's finding that Mr Stava funded the business is irrelevant (cf DH Case [111(2)(g)]). Any provision of funding (sole or otherwise, by gift or loan), would not prove control. Funding might equally be provided by a bank or a third-party, having no control of DH itself. However, to the extent that it is wrong, the Judge's finding has proven to be unsafe and can be given no weight: see [15]-[16] above. In any event, there was no specific {**2/87-89**}

evidence of funding by Mr Stava in the period from June to December 2011 (and if and insofar as it was provided thereafter, it was irrelevant in view of the agreed cut-off date).

140 *Third*, in respect of the shares, DH Case [111(3)(b)] mixes together two findings by the Judge and could be read as suggesting that there was a finding by the Judge that there was no realistic possibility of a conflict of interest between Mr Stava's own interests and those of the trust when exercising voting rights attached to the shares (*qua* agent of the trustee). In fact, paragraphs [170(v) and (vi)] of August Judgment, to which DH refers, record findings only that there is no realistic possibility of conflict regarding the *conduct of DH's business*. {**2/89**} {**13/532-533**}

E CONCLUSION

141 DH's appeal should be dismissed, for the following **REASONS**:

142 *First*, the CA was correct in its interpretation of Article 1(1)(c) of the BIT as requiring *de jure* control and rejecting DH's submissions that *de facto* control in the absence of *de jure* control was sufficient, having regard to the ordinary meaning of the terms in their context, the BIT's object and purpose and the good faith interpretation of it, as part of a single combined operation pursuant to Article 31 VCLT. It is not necessary for the Court to consider supplementary materials under Article 32 VCLT, but if it does so, these confirm the CA's conclusion. {**21.1/653**} {**29.32/2420-2421**}

143 *Second*, if the Court is against CR and accepts DH's submissions that *de facto* control in the absence of *de jure* control is sufficient, the CA applied the correct test for *de facto* control, properly considered and weighed the relevant factors, and correctly assessed that DH was not controlled by Mr Stava after DH's shares were placed into the Koruna Trust.

GRAHAM DUNNING KC
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Duxton Hill Chambers

PETER WEBSTER
RICHARD HOYLE
KATHERINE RATCLIFFE
Essex Court Chambers

14 October 2026