IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 81

Civil Appeal No 149 of 2017

Between

(1) SWISSBOURGH DIAMOND MINES (PTY) LIMITED
(2) JOSIAS VAN ZYL
(3) TRUSTEES OF THE JOSIAS VAN ZYL FAMILY TRUST
(4) TRUSTEES OF THE BURMILLA TRUST
(5) MATSOKU DIAMONDS (PTY) LIMITED
(6) MOTETE DIAMONDS (PTY) LIMITED
(7) ORANGE DIAMONDS (PTY) LIMITED
(8) PATISENG DIAMONDS (PTY) LIMITED
(9) RAMPAI DIAMONDS (PTY) LIMITED

… *Appellants*

And

KINGDOM OF LESOTHO

… *Respondent*

In the matter of Originating Summons No 492 of 2016

Between

KINGDOM OF LESOTHO

… Plaintiff

And

(1) SWISSBOURGH DIAMOND MINES (PTY) LIMITED
(2) JOSIAS VAN ZYL
(3) TRUSTEES OF THE JOSIAS VAN ZYL FAMILY TRUST
(4) TRUSTEES OF THE BURMILLA TRUST
(5) MATSOKU DIAMONDS (PTY) LIMITED
(6) MOTETE DIAMONDS (PTY) LIMITED
(7) ORANGE DIAMONDS (PTY) LIMITED
(8) PATISENG DIAMONDS (PTY) LIMITED
(9) RAMPAI DIAMONDS (PTY) LIMITED

… Defendants

JUDGMENT

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

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

[International Law] — [International investment law] — [Investor-State arbitration]

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

[2018] SGCA 81

Court of Appeal — Civil Appeal No 149 of 2017
Sundaresh Menon CJ, Andrew Phang Boon Leong JA, Judith Prakash JA, Tay Yong Kwang JA and Steven Chong JA
17, 21 May 2018

27 November 2018 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 International investment law is a hybrid legal construct uniquely placed at the crossroads of domestic and international law and of private and public law. It has, over the years, become a reliable avenue to which aggrieved investors turn when host States fail to honour obligations owed to them. The dispute resolution mechanisms and substantive rules of investment protection provided for in the growing body of investment treaties enable such investors to bring proceedings against host States for alleged breaches of investment treaty obligations. While these treaties are unusual in the sense that States party to them undertake obligations that may be enforced by private individuals, this is generally subject to the qualification that an investor would *not* be permitted to bring a claim against the State unless certain jurisdictional requirements

provided for either under the treaty or as a matter of customary international law are first satisfied. As a result, an investment arbitration claim brought by an investor may, not infrequently, encounter jurisdictional objections raised by the host State. The present proceedings are no different. Their complexity, as will be seen in the course of this judgment, is compounded by the fact that the investors, in a bid to surmount the jurisdictional objections raised by the host State, have sought to characterise their investment in a number of ways, not all of which bear a territorial nexus with the host State.

2 In this appeal, the first to ninth appellants (collectively, "the Appellants") seek to reverse the decision of the High Court judge ("the Judge") to set aside a partial final award on jurisdiction and merits issued on 18 April 2016 ("the Award"). The Judge's decision was made upon the application of the Kingdom of Lesotho ("the Kingdom") in Originating Summons No 492 of 2016 ("the Setting Aside Application"). The Award was made by an *ad hoc* international arbitration tribunal constituted under the auspices of the Permanent Court of Arbitration ("the PCA") and seated in Singapore ("the PCA Tribunal"). The Appellants had commenced the arbitration proceedings ("the PCA Arbitration"), pursuant to Art 28 of Annex 1 to the Protocol on Finance and Investment of the Southern African Development Community (18 August 2006) (entered into force 16 April 2010) ("the Investment Protocol"), against the Kingdom, which is a member of an intergovernmental socio-economic organisation known as the Southern African Development Community ("the SADC").

3 The Appellants' complaint in the PCA Arbitration, briefly put, centred on their assertion that the Kingdom had contributed to or facilitated the shutting down (or "shuttering") of another tribunal ("the SADC Tribunal"), which is a dispute resolution body that was established pursuant to Art 9(1)(g) of the

Treaty of the Southern African Development Community (17 August 1992) 32 ILM 116 (entered into force 30 September 1993) ("the SADC Treaty"). The operation of the SADC Tribunal – including its composition, powers, functions, jurisdiction and procedures – was subsequently clarified by the Protocol on Tribunal in the Southern African Development Community (7 August 2000) (entered into force 14 August 2001) ("the Tribunal Protocol"). According to the Appellants, the SADC Treaty read with the Tribunal Protocol enabled aggrieved investors to refer disputes concerning the alleged failures of member States of the SADC ("the SADC Member States") to comply with their obligations in relation to investments made in the SADC Member States, to the SADC Tribunal for resolution. The Appellants maintained that following the shuttering of the SADC Tribunal, the Kingdom was obliged, but failed, to provide for an alternative forum to determine such claims – in particular, a claim that had already been brought by the Appellants against the Kingdom and which was pending before the SADC Tribunal ("the SADC Claim") at the time the SADC Tribunal was shuttered.

4 The SADC Claim involved allegations that the Kingdom had breached its obligations under the SADC Treaty by wrongfully expropriating the Appellants' leases to mine certain territories located in the Kingdom. For reasons that will become evident later, it is important to note that the Appellants maintain that the relevant *dispute* that was before the *PCA Tribunal* was not in respect of the allegedly wrongful expropriation. Rather, it was the separate allegedly wrongful act of interfering with and displacing the means provided and existing at that time for vindicating grievances before the SADC Tribunal by shuttering that avenue. The relief sought by the Appellants in the PCA Arbitration was the establishment of a forum before which it could pursue the part-heard SADC Claim.

5 The PCA Tribunal found that the Kingdom had indeed breached various obligations under the SADC Treaty, the Tribunal Protocol and the Investment Protocol. These pertained specifically to what the PCA Tribunal considered was the obligation of the Kingdom to afford the Appellants an effective means of pursuing the SADC Claim. It accordingly granted relief by directing the parties to constitute a new tribunal to hear the SADC Claim. The PCA Tribunal also found that the Kingdom was liable to pay the Appellants' costs in the arbitration. The Kingdom then commenced the Setting Aside Application. The Judge allowed the application, and set aside the Award in its entirety on the ground that the PCA Tribunal lacked jurisdiction over the parties' dispute: see *Kingdom of Lesotho v Swissbourgh Diamond Mines (Pty) Limited and others* [2017] SGHC 195 ("the Judgment"). The Appellants now appeal against the Judgment.

6 Having reserved judgment after hearing the submissions of counsel and the *amici curiae* whom we appointed to assist us in these proceedings, we now set out our decision and the accompanying reasons.

Background

7 We begin by setting out the facts relevant to this appeal.

The parties

8 The first appellant, Swissbourgh Diamond Mines (Pty) Limited ("Swissbourgh"), is a company that was incorporated on 12 November 1986 under the laws of the Kingdom by the second appellant, Mr Josias Van Zyl ("Mr Van Zyl"), a South African national. The third and fourth appellants are, respectively, the representatives of the Josias Van Zyl Family Trust ("the JVZF Trust") and the Burmilla Trust, which are trusts constituted under the laws of the Republic of South Africa. In March 1989, the ownership of Swissbourgh

was structured such that the JVZF Trust owned 95% of its shares and Mr Van Zyl held the remaining 5%. In June 1997, the JVZF Trust transferred 90% of the shares in Swissbourgh to the Burmilla Trust. Mr Van Zyl now owns 5% of the Swissbourgh shares, the JVZF Trust owns 5%, and the Burmilla Trust owns the remaining 90%.

9 Following its incorporation, sometime in or about 1987, Swissbourgh submitted applications for prospecting and mining leases ("the Mining Leases") in five regions in the Kingdom, namely, the Matsoku, Motete, Orange, Patiseng/Khubelu and Rampai regions. In June 1988, the Kingdom formally approved Swissbourgh's applications for the Mining Leases.

10 The fifth to ninth appellants – Matsoku Diamonds (Pty) Limited, Motete Diamonds (Pty) Limited, Orange Diamonds (Pty) Limited, Patiseng Diamonds (Pty) Limited and Rampai Diamonds (Pty) Limited ("Rampai Diamonds") (collectively, "the Tributees") – were incorporated in 1988 under the laws of the Kingdom, and served as operating companies responsible for the diamond mining operations in the areas of the Kingdom that they were respectively named after. Between 15 December 1989 and 10 January 1990, the Tributees entered into and registered licensing agreements with Swissbourgh for the sub-lease of the Mining Leases ("the Tributing Agreements"). Under the Tributing Agreements, the Tributees undertook to hold and exercise the mining rights under each of the Mining Leases for each of the eponymous mining areas.

11 In September 1994, ownership of the Tributees was transferred to the Burmilla Trust (which acquired 99% of the shares in the Tributees) and the JVZF Family Trust (which acquired the remaining 1%). At various times from 1994 to 1997, Swissbourgh and the Tributees assigned to the Burmilla Trust their rights relating to any claims against the Kingdom arising out of the latter's

purported interference with the Mining Leases. The PCA Tribunal found that it lacked jurisdiction *ratione personae* over Swissbourgh and the Tributees in the arbitration proceedings on this basis (see [42] below), and the Judge did not disagree with this finding (Judgment at [320]); however, he additionally found (at [338]) that the PCA Tribunal lacked jurisdiction *ratione personae* over Swissbourgh and the Tributees on the grounds that they were domestic investors (see [52(f)] below). Although this point was not taken on appeal, for convenience, we will refer not only to Mr Van Zyl and the representatives of the JVZF Trust and the Burmilla Trust, but also to Swissbourgh and the Tributees as "the Appellants" collectively.

The disputes

12 The disputes that led to the PCA Arbitration and the subsequent setting-aside proceedings arise out of a protracted saga stretching over two decades. The disagreement between the parties revolves around two distinct matters: first, the Kingdom's alleged expropriation of the Appellants' Mining Leases ("the Expropriation Dispute"), and second, the shuttering of the SADC Tribunal without the provision of an alternative forum to determine the pending SADC Claim ("the Shuttering Dispute").

The expropriation of the Mining Leases

13 In 1986, the Kingdom embarked on the Lesotho Highlands Water Project ("the LHWP"), a large-scale commercial joint venture with South Africa. The LHWP required the Kingdom to divert water from the Orange-Senqu River in the Kingdom to South Africa. In exchange, the Kingdom would receive royalties for the water and would be able to generate a significant output of hydroelectricity from hydropower stations for its own energy needs. The Lesotho Highlands Development Authority ("the LHDA"), which was created

in 1986 to implement, operate and maintain the LHWP, commenced construction works in the Rampai area in 1989.

14 In April 1991, the Kingdom's military council ("the Military Council"), which was the governing body of the Kingdom at that time, underwent a change in leadership.

15 On 18 July 1991, Swissbourgh and Rampai Diamonds obtained an interim injunction from the High Court of Lesotho requiring the LHDA to cease construction works in the Rampai area. On 29 July 1991, both parties agreed to set aside the injunction, although no settlement agreement was concluded.

16 In August 1991, the Kingdom's Commissioner of Mines ("the Commissioner") wrote to Swissbourgh, alleging that it had breached its obligations under all five Mining Leases and threatening to cancel the Mining Leases if the breaches were not remedied within 60 days. Between 10 October and 4 November 1991, notwithstanding that the Mining Leases provided for the resolution of such disputes by arbitration, the Commissioner purported to cancel all five Mining Leases and ordered Swissbourgh and the Tributees to vacate the mining areas and cease operations within 90 days.

17 On 28 October 1991, Swissbourgh commenced arbitration proceedings in connection with the purported cancellation of the Mining Leases. On 19 November 1991, Swissbourgh and the Tributees commenced judicial review proceedings against the Commissioner in the High Court of Lesotho, seeking to annul the purported cancellations of the Mining Leases and obtain interim relief pending the outcome of the arbitration ("the 1991 Annulment Proceedings"). The court granted interim relief and ordered that the Tributees be permitted to continue mining. Both parties subsequently agreed to stay the arbitral

proceedings pending the substantive outcome of the 1991 Annulment Proceedings. It was subsequently revealed that on 18 November 1991, the Kingdom had granted the LHDA a lease over parts of the territories that were already subject to the Mining Leases for the purposes of water storage and generation of electric power.

18 On 20 March 1992, the Military Council passed an order purporting to revoke the Mining Leases as well as the Tributing Agreements, discharge all pending claims brought by Swissbourgh and the Tributees in the domestic courts and arbitral tribunals, order Swissbourgh and the Tributees to vacate the mining areas, and exclude any right to compensation as well as any right to judicial or arbitral redress. On 7 April 1992, Swissbourgh and the Tributees commenced proceedings in the High Court of Lesotho, seeking the annulment of the Military Council's revocation order and an injunction to restrain the LHDA from interfering with the rights of Swissbourgh and the Tributees under the Mining Leases ("the 1992 Annulment Proceedings"). While this application was pending, Swissbourgh and the Tributees terminated all of the Mining Leases, save for the Rampai lease, on 11 March 1993 on the basis that the Kingdom had breached and repudiated them. On 27 September 1994, the High Court of Lesotho found in favour of Swissbourgh and the Tributees in the 1992 Annulment Proceedings, and annulled the Military Council's revocation order. The Court of Appeal of Lesotho affirmed this decision in January 1995.

19 On 2 March 1995, the LHDA filed an application in the High Court of Lesotho seeking a declaration that the Rampai lease – the last of the Mining Leases that had not been terminated by Swissbourgh and the Tributees – was void *ab initio* due to the Kingdom's failure to consult the local chiefs responsible for the Rampai area before approving the Mining Leases ("the Rampai Lease Proceedings").

20 Subsequently, on 27 March 1995, the Commissioner consented in the 1991 Annulment Proceedings to an order of the High Court of Lesotho setting aside his purported cancellations of the Mining Leases in 1991, conceding that he had acted prematurely. The upshot of this was that both the 1991 Annulment Proceedings and the 1992 Annulment Proceedings commenced by Swissbourgh and the Tributees had concluded in their favour, but given their termination of the other Mining Leases in March 1993, only the Rampai lease remained in place (subject to the outcome of the Rampai Lease Proceedings).

21 On 16 and 17 August 1995, the Kingdom enacted legislation that enabled it to expropriate any area that fell within the LHWP, subject to compensating the holders of valid mining leases in the affected areas ("the LHDA Acts"). Pursuant to the LHDA Acts, the Kingdom expropriated areas in Rampai subject to the Rampai lease in October 1995.

22 In May 1996, Swissbourgh and the Tributees brought a claim against the Kingdom in the High Court of Lesotho for damages suffered as a result of the Commissioner's and the Military Council's purported revocations of the Mining Leases (except the Rampai lease, which was the subject of the Rampai Lease Proceedings) and other acts of the Kingdom which had allegedly hindered Swissbourgh from exercising its mining rights, thus resulting in losses of profit ("the 1996 Proceedings"). In July 1996, the Appellants filed a claim for compensation under the LHDA Acts, but the LHDA declined to consider the claim until the Rampai Lease Proceedings had been decided. In September 1998, Swissbourgh and Rampai Diamonds brought a claim against the LHDA in the High Court of Lesotho, claiming damages for the LHDA's expropriation of the Rampai lease under the LHDA Acts ("the 1998 Proceedings").

23 On 28 April 1999, the High Court of Lesotho granted the LHDA's application in the Rampai Lease Proceedings, finding that the Rampai lease was void *ab initio*. The Court of Appeal of Lesotho affirmed the decision in October 2000. The Appellants discontinued both the 1996 Proceedings and the 1998 Proceedings following this development.

24 Between 2000 and 2007, the Appellants requested the Government of South Africa to exercise diplomatic protection regarding their investments in the Kingdom. The South African Government declined to do so. The Appellants challenged the Government's decision in the South African courts, but that challenge failed.

The shuttering of the SADC Tribunal

25 On 12 June 2009, the Appellants commenced proceedings against the Kingdom before the SADC Tribunal pursuant to Art 15 of the Tribunal Protocol, seeking damages arising from the alleged expropriation of the Mining Leases (this being the SADC Claim). The Appellants claimed damages arising from the Kingdom's alleged violations of Arts 4(c) and 6 of the SADC Treaty.

26 In August 2010, the Summit of the Heads of State or Government of the SADC ("the SADC Summit"), which comprises the heads of State of all the SADC Member States and is the SADC's supreme policy-making body, unanimously resolved that: (a) the terms of offices of five SADC Tribunal judges, which were due to expire in October 2010, would not be renewed pending a review of the SADC Tribunal's role and responsibilities; and (b) the SADC Tribunal would not hear any new cases. These developments, which left the SADC Tribunal unable to operate or function, were prompted by the SADC Tribunal having assumed jurisdiction over certain investor-State claims against

the Republic of Zimbabwe and then finding against Zimbabwe in a series of decisions made at various times from 2007 to 2009 including *Mike Campbell (Pvt) Ltd and others v The Republic of Zimbabwe* [2008] SADCT 2 ("*Campbell v Zimbabwe*") and *William Michael Campbell and another v The Republic of Zimbabwe* [2009] SADCT 1. The SADC Summit's resolution made it impossible for the Appellants to prosecute the SADC Claim.

27 Despite these developments, the Appellants applied to the SADC Tribunal on 25 January 2011 to request the continuation of its operations at least in respect of the pending SADC Claim. The SADC Tribunal rejected the application. In May 2011, the SADC Summit endorsed the decision of the SADC Council of Ministers (comprising the Ministers for foreign affairs, economic planning or finance from each SADC Member State) to continue the suspension of the SADC Tribunal until August 2011 and not re-appoint any of the judges on the SADC Tribunal. On 22 August 2011, the Appellants sought the Kingdom's agreement to submit the pending SADC Claim to arbitration by the PCA. The Kingdom rejected this request.

28 In August 2012, the SADC Summit resolved to dissolve the existing SADC Tribunal and negotiate a new protocol that would limit the tribunal's jurisdiction to inter-State disputes. This resulted in the suspension of the determination of all the claims pending before the SADC Tribunal, including the SADC Claim. The Appellants were thus left without a forum for the SADC Claim.

29 On 7 and 8 August 2014, the SADC Justice Committee (comprising the Ministers of Justice or Attorneys-General of the SADC Member States) resolved to recommend to the SADC Council of Ministers and the SADC

Summit that the dissolution of the SADC Tribunal left a "legal vacuum", and that the appropriate way forward was that:

> ... the Parties to the pending cases before the SADC Tribunal may elect to pursue them before other regional or international legal forums as they will be left with no prospect of them being resolved at the SADC regional level ...

30 On 18 August 2014, the SADC Summit unanimously adopted a new Protocol on the SADC Tribunal that restricted the tribunal's jurisdiction to inter-State disputes and abolished jurisdiction over cases brought by non-State entities. But this version of the protocol has not yet entered into force. As a result, the Tribunal Protocol remains valid, save that it is inoperable.

31 In November 2014, the SADC Justice Committee recommended to the SADC Council of Ministers and the SADC Summit that "each aggrieved party may decide on an alternative forum for the resolution of a SADC Tribunal pending case of which a Member State has been named a respondent".

32 During a meeting of the SADC Council of Ministers held on 14 and 15 August 2015, the Kingdom proposed that the Council should recommend to the SADC Summit that:

> ... each aggrieved party *shall* have a right of recourse to an alternative forum within a SADC [M]ember [S]tate for the resolution of a SADC Tribunal pending case of which a [M]ember [S]tate has been cited as a Respondent. The case shall be presided over by a person/s who would qualify to act as a judge/s on the SADC Tribunal. [emphasis added]

The Kingdom further added during its presentation at the same meeting that:

> [i]n the unlikely event that it is the view of the [SADC] Council of Ministers that there is no right of recourse, [the Kingdom] requests that her position (*that, it is only the right thing to do to accord aggrieved parties an alternative forum for the ventilation*

> *of their grievances*) be recorded in the minutes and all the reports of this august body. [emphasis in original]

33 On 17 and 18 August 2015, the SADC Summit approved a proposal that "each Member State of the SADC may decide on an alternative forum for the resolution of a SADC Tribunal pending case of which that Member State has been named a respondent". However, the Kingdom has taken no steps to establish any such alternative forum.

The PCA Arbitration proceedings

34 In the meantime, on 20 June 2012, the Appellants had commenced the PCA Arbitration by filing a Notice of Arbitration pursuant to Art 28 of Annex 1 to the Investment Protocol ("Annex 1") which entered into force on 16 April 2010. Article 28 reads as follows:

> **ARTICLE 28**
>
> **SETTLEMENT OF INVESTMENT DISPUTES**
>
> 1. Disputes between an investor and a State Party concerning an obligation of the latter in relation to an admitted investment of the former, which have not been amicably settled, and after exhausting local remedies shall, after a period of six (6) months from written notification of a claim, be submitted to international arbitration if either party to the dispute so wishes.
>
> 2. Where the dispute is referred to international arbitration, the investor and the State Party concerned in the dispute may agree to refer the dispute either to:
>
> (a) The SADC Tribunal;
>
> (b) The International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the ICSID Convention and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings); or
>
> (c) An international arbitrator or ad hoc arbitral tribunal to be appointed by a special agreement

> or established under the Arbitration Rules of the United Nations Commission on International Trade Law.
>
> 3. If after a period of three (3) months from written notification of the claim there is no agreement to one of the above alternative procedures, the parties to the dispute shall be bound to submit the dispute to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The parties to the dispute may agree in writing to modify these Rules.
>
> 4. The provisions of this Article shall not apply to a dispute, which arose before entry into force of this Annex.

35 It was common ground between the parties that by virtue of Art 28(4) of Annex 1, the Expropriation Dispute (as distinct from the subsequent shuttering of the SADC Tribunal and the failure to provide an alternative forum for the pending SADC Claim) could not possibly be submitted to arbitration under Art 28 as that dispute had arisen long before the Investment Protocol entered into force. In other words, it was accepted that the Expropriation Dispute did not fall within the PCA Tribunal's jurisdiction *ratione temporis*. However, the question remained as to whether the *Shuttering Dispute*, which on the face of it occurred between August 2010 to August 2012 (see [26]–[28] above) and hence arose *after* the Investment Protocol had entered into force, was caught by Art 28.

36 The parties elected to refer the dispute to an *ad hoc* arbitral tribunal for arbitration pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL") (as revised in 2010) ("the UNCITRAL Arbitration Rules 2010"), which is the option specified under Art 28(2)(c) of Annex 1. The PCA Tribunal comprised three arbitrators: Mr R Doak Bishop (who was nominated by the Appellants), Mr Justice Petrus Millar Nienaber ("Justice Nienaber") (who was nominated by the Kingdom), and Prof Sir David A R Williams QC (who was the Presiding Arbitrator chosen by the

designated appointing authority). The PCA Tribunal chose Singapore as the place of arbitration and the hearing venue. The arbitral proceedings were bifurcated, with the first phase dealing with all issues of jurisdiction and liability, and the second phase dealing with all issues of remedies. The PCA Tribunal heard the parties for the first phase of the proceedings in Singapore from 24 to 27 August 2015, and did not reconvene for a second phase.

37 The Appellants' claim was that by participating in the shuttering of the SADC Tribunal without providing an alternative means for the SADC Claim to be determined, the Kingdom had breached its obligations under Arts 14 and/or 15 of the Tribunal Protocol, Arts 6(1) and 27 of Annex 1, and Art 6(1) read with Art 4(c) of the SADC Treaty. They sought such relief and compensation as could have been granted by the SADC Tribunal for the expropriation of the Mining Leases, as well as all costs incurred in the proceedings. The Kingdom challenged the jurisdiction of the PCA Tribunal on grounds which we will elaborate on below.

38 During the oral hearing before the PCA Tribunal, the Kingdom maintained on 24 August 2015 that it "stands by [the] statement" that it had made on 14 and 15 August 2015, and that "it is only the right thing to do to accord to aggrieved parties an alternative forum for the ventilation of their grievances" (see [32] above).

39 After the close of proceedings before the PCA Tribunal, on 6 October 2015, the Kingdom made a free-standing offer to the Appellants that the SADC Claim be submitted to arbitration before an alternative forum within a SADC Member State. This offer was subject to acceptance by the Appellants within one month from the date of the Award, failing which the offer "will fall

away and will be considered withdrawn". On 13 October 2015, the Appellants rejected the Kingdom's offer.

40 Subsequently, in the Kingdom's post-hearing brief dated 16 October 2015, the Kingdom made the following submission in respect of the appropriate remedy to be ordered in the event that the jurisdiction of the PCA Tribunal were to be established and the Kingdom found liable in respect of the Appellants' claims:

> 106 Against this backdrop, the [Kingdom's] position *(assuming against itself, for the purposes of argument, on the issues of jurisdiction and liability)* is that the appropriate way in which to wipe out "as far as possible" the consequences of the allegedly wrongful acts is for the Tribunal to take cognizance of the [Kingdom's] formal offer to submit the dispute which was before the SADC Tribunal to an UNCITRAL arbitral tribunal which will replicate, so far as possible, the composition, the physical location and the procedural rules of the SADC Tribunal itself: see Rejoinder, para. 361 and the [Kingdom's] letter of 6 October 2015. ... the [Kingdom] has given its consent to arbitration, and the Tribunal can make an order with respect to the [Appellants'] entitlement to proceed to arbitration as was made in the *ATA v Jordan* case. ...
>
> 107 In this manner, the [Appellants] would be placed as closely as possible in the position which would otherwise have obtained if the SADC Tribunal had continued to function. ...
>
> [emphasis added]

41 On 18 April 2016, the PCA Tribunal rendered the Award. It found in favour of the Appellants (with Justice Nienaber dissenting).

42 In relation to the jurisdictional objections raised by the Kingdom, the PCA Tribunal held that it had jurisdiction to hear and determine the claims of only Mr Van Zyl and the representatives of the JVZF Trust and the Burmilla Trust. It first held that while Art 28 of Annex 1 was broad enough to cover domestic investors, Swissbourgh and the Tributees had assigned their claims to

the Burmilla Trust, which was the proper party. The claims of Swissbourgh and the Tributees were therefore dismissed on this basis. But the PCA Tribunal dismissed all the other jurisdictional objections. To this end, it made the following findings:

(a) The investment in question comprised: (i) the Mining Leases, (ii) the shares in Swissbourgh and the Tributees held by Mr Van Zyl and the representatives of both the JVZF Trust and the Burmilla Trust ("the Shares"), (iii) the resources expended in pursuing the exploitation of the Mining Leases ("the Expended Resources"), *and* (iv) the right to claim compensation before the SADC Tribunal.

(b) The investment had been "admitted", given the Kingdom's confirmation, authorisation and acceptance of the Mining Leases.

(c) The true dispute before the PCA Tribunal was the *Shuttering Dispute*, which had arisen *after* the entry into force of Annex 1.

(d) The Shuttering Dispute concerned the obligations of the Kingdom in relation to the *Appellants' right to refer disputes to the SADC Tribunal*, which was part of the bundle of rights comprising the Mining Leases.

(e) There were no local remedies for the Appellants to exhaust in respect of the Shuttering Dispute.

43 On the merits, which do not directly concern us, save and unless the relevant obligations need to be considered to determine whether jurisdiction was properly taken, the PCA Tribunal made the following findings:

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

(b) The Kingdom had breached Art 6(1) of Annex 1 by failing to accord fair and equitable treatment ("FET") to the Appellants and their investment.

(c) The Kingdom had breached Art 27 of Annex 1 by failing to protect the Appellants' right of access to the SADC Tribunal, which was a judicial tribunal competent under the laws of the Kingdom, to redress the Appellants' grievances in relation to matters concerning their investment.

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

44 As for the relief ordered, the PCA Tribunal found that the most appropriate remedy would be for a new tribunal to be established to hear and determine the SADC claim. The new tribunal was to be seated in the Republic of Mauritius (unless the parties agreed on another seat) and comprise three independent and impartial arbitrators who were nationals of SADC Member States ("the Mauritius Tribunal"). The Mauritius Tribunal would have the same jurisdiction which the SADC Tribunal had in 2009 when the Appellants first filed the SADC Claim. The arbitration would be administered by the PCA (unless the parties agreed otherwise) under the UNCITRAL Arbitration Rules 2010, save that the tribunal should take into account the Tribunal Protocol and the applicable rules where practicable, including in relation to jurisdiction. The parties were required to confirm in writing to the PCA Tribunal, within 30 days

of the issuance of the Award, that they agreed to submit, and thereby consented, to arbitration of the Expropriation Dispute before the new tribunal.

45 In deciding to order the parties to constitute the Mauritius Tribunal, the PCA Tribunal expressly regarded as an indication of the Kingdom's "consent", the Kingdom's offer, in its Rejoinder dated 15 June 2015, to "submit to arbitration of the dispute as set out in the [Appellants'] Application instituting proceedings before the SADC Tribunal (and subject always to all jurisdictional objections that were available to the [Kingdom] in respect of that claim)". However, it is important to note that this had in fact been expressly *conditioned upon* the PCA Tribunal deciding against the Kingdom on issues of jurisdiction and liability.

46 In Justice Nienaber's dissenting opinion ("the Dissenting Opinion"), he disagreed with the majority and found that the PCA Tribunal lacked jurisdiction on two grounds. First, the PCA Tribunal lacked jurisdiction *ratione temporis* because the dispute should have been properly characterised as the *Expropriation Dispute*, which pre-dated the entry into force of the Investment Protocol, rather than the Shuttering Dispute. Second, the Appellants had *not* exhausted all local remedies as required by Art 28(1) of Annex 1 prior to commencing the arbitration. In particular, the Appellants had not pursued the remedy of what was referred to as an Aquilian action to seek compensation for economic loss caused by the Kingdom's participation in the shuttering of the SADC Tribunal.

47 On 13 May 2016, the Kingdom sought an interpretation of the Award pursuant to Art 37 of the UNCITRAL Arbitration Rules 2010, seeking confirmation from the PCA Tribunal that the obligation to establish the new

tribunal applied to only Mr Van Zyl and the representatives of the JVZF Trust and the Burmilla Trust.

48 On 17 May 2016, the Kingdom filed the Setting Aside Application (see [51] below).

49 On 27 June 2016, the PCA Tribunal issued an Interpretation of the Partial Final Award on Jurisdiction and Merits. The PCA Tribunal clarified that only Mr Van Zyl and the representatives of the JVZF Trust and the Burmilla Trust, as well as the Kingdom, were ordered to establish a new tribunal given that these were the parties over whom the tribunal had jurisdiction *ratione personae*. Nevertheless, the new tribunal, being vested with the same jurisdiction as that vested in the SADC Tribunal in 2009 prior to its shuttering, would have the jurisdiction to accept claims from all of the Appellants, such that Swissbourgh and the Tributees could also voluntarily apply to participate in the new arbitration should they consider it necessary or desirable to do so.

50 On 20 October 2016, the PCA Tribunal issued a final award on costs, finding that the Kingdom was to pay the Appellants the costs of the arbitral proceedings. This costs award has been the subject of a separate set of enforcement proceedings in Singapore: see *Josias Van Zyl and others v Kingdom of Lesotho* [2017] 4 SLR 849.

The decision below

51 In the Setting Aside Application, the Kingdom seeks to set aside either:

(a) the entirety of the Award pursuant to (i) s 10(3) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA"), or (ii) s 3(1) of the IAA read with Art 34(2)(*a*)(iii) of the UNCITRAL

Model Law on International Commercial Arbitration as adopted on 21 June 1985 and as amended on 7 July 2006 ("the Model Law"); or

(b) the part of the Award finding the Kingdom liable to pay the Appellants' costs of the PCA Arbitration pursuant to s 24(*b*) of the IAA and/or s 3(1) of the IAA read with Art 34(2)(*a*)(iii) of the Model Law.

The Kingdom also seeks the costs of both the Setting Aside Application and the PCA Arbitration proceedings.

52 In the Judgment below, the Judge granted the Setting Aside Application and set aside the entirety of the Award, pursuant to s 3(1) of the IAA read with Art 34(2)(*a*)(iii) of the Model Law, on the ground that the Award dealt with a dispute not contemplated by and not falling within the terms of the submission to arbitration (at [341]). The Judge also ordered the costs of the Setting Aside Application to follow the event (at [342]). The material findings in the Judgment may be summarised as follows (at [340]):

(a) The dispute submitted to arbitration was the Shuttering Dispute (and *not* the Expropriation Dispute), which was within the PCA Tribunal's jurisdiction *ratione temporis* under Art 28(4) of Annex 1.

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

(c) The Appellants' right to submit disputes to the SADC Tribunal was *not* "admitted" for the purposes of Art 28(1) of Annex 1.

(d) The Shuttering Dispute did not concern any obligation of the Kingdom in relation to the purported investment (assuming this was or included the Appellants' right to submit disputes to the SADC Tribunal).

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

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

53 The Judge declined to come to a conclusion on the costs of the arbitration, and reserved judgment on that issue pending further submissions from the parties on the two issues of: (a) whether the court has jurisdiction to remit the costs of the arbitration to the PCA Tribunal for assessment or to make an order of the costs of the arbitration itself; and (b) the quantum of such costs on the assumption that the court has jurisdiction (at [347]). Subsequently, pursuant to the Appellants' request, the Judge agreed to defer judgment in respect of this specific issue until the determination of the present appeal.

The parties' cases on appeal

54 The Appellants' position is that the court has no jurisdiction to hear the Setting Aside Application, the PCA Tribunal did indeed have jurisdiction to render the Award, and the Appellants should be entitled to have the Expropriation Dispute heard by a new tribunal to be established by the parties. To this end, the Appellants advance the following contentions:

(a) First, the court does not have jurisdiction to set aside the Award under Art 34(2)(*a*)(iii) of the Model Law as this is only applicable where it is alleged that the arbitral tribunal improperly decided matters that were not submitted to it or failed to decide matters that were submitted to it, and *not* where the applicant contests the very existence of the

tribunal's jurisdiction to deal with the dispute as the Kingdom does in this case.

(b) Second, given the numerous representations that the Kingdom had made to the effect that the Appellants would be permitted to pursue their part-heard SADC Claim before an alternative forum, it is either estopped from denying the PCA Tribunal's jurisdiction or bound by a formal unilateral declaration to that effect.

(c) Third, the Appellants did have a qualifying "investment" within the meaning of Annex 1 to the Investment Protocol. This investment comprised the Mining Leases, the Shares and the Expended Resources. Alternatively, it also included the right to refer a dispute to the SADC Tribunal and/or the SADC Claim (whether as a distinct stand-alone investment, or as an integral part of the Mining Leases).

(d) Fourth, the Appellants did have an "admitted" investment for the purposes of Art 28(1) of Annex 1 because: (i) if the Mining Leases were the investment, they had clearly been admitted by the Kingdom; and (ii) if the SADC Claim were the investment, it did not have to be separately "re-admitted" (assuming it was part of the bundle of rights comprising the Mining Leases or a continuation or transformation of the Mining Leases), and would in any event have been admitted by the Kingdom's ratification of the Investment Protocol (assuming it was a stand-alone investment).

(e) Fifth, the Shuttering Dispute is a dispute concerning an obligation of the Kingdom in relation to the Appellants' admitted investment for the purposes of Art 28(1) of Annex 1. The relevant obligations include: (i) the obligation under Art 6(1) of Annex 1 to

accord FET to the Appellants; (ii) the obligation under Arts 14 and 15 of the Tribunal Protocol to ensure access to the SADC Tribunal; (iii) the obligation under Arts 4(c) and 6(1) of the SADC Treaty to respect the rule of law and to refrain from jeopardising the objectives of the SADC Treaty; and (iv) the obligation under Art 27 of Annex 1 to ensure a right of access to courts and tribunals. These obligations relate to either the Mining Leases or the SADC Claim, and the Shuttering Dispute concerned those particular obligations.

(f) Finally, the Appellants had exhausted all local remedies prior to commencing arbitration proceedings, and the Kingdom has not shown that an Aquilian action is a reasonably available remedy.

55 Conversely, the Kingdom submits that the court does indeed have the jurisdiction to hear the Setting Aside Application, and that the Award had correctly been set aside by the Judge given the Appellants' failure to satisfy multiple pre-conditions under Art 28(1) of Annex 1 in order for the PCA Tribunal to assume jurisdiction over the claim brought by the Appellants. To that end, the Kingdom makes the following arguments:

(a) First, the court has jurisdiction to hear and determine the Setting Aside Application because the present case falls within either Art 34(2)(*a*)(iii) of the Model Law, which allows the courts to set aside an award that "deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration", or alternatively, Art 34(2)(*a*)(i), which allows the courts to set aside an award where "the [arbitration] agreement is not valid under the law to which the parties have subjected it".

(b) Second, the Kingdom is *not* bound to accept the jurisdiction of the PCA Tribunal to hear and determine the claim brought in respect of the Shuttering Dispute on the basis of either estoppel or a formal unilateral declaration. Neither doctrine applies on the facts.

(c) Third, the Appellants do not have a qualifying "investment" within the meaning of Annex 1 to the Investment Protocol for the following reasons:

(i) The *Mining Leases* cannot be considered the qualifying investment because the only dispute concerning the Mining Leases is the Expropriation Dispute, which is outside the PCA Tribunal's jurisdiction *ratione temporis*.

(ii) The *SADC Claim* cannot be considered the qualifying investment because it was not located in the territory of the Kingdom and did not comprise rights arising under municipal law, and it concerned only the Expropriation Dispute, which is outside the PCA Tribunal's jurisdiction *ratione temporis*.

(iii) The *right to refer a dispute to the SADC Tribunal* too cannot be considered the qualifying investment because this right was also not located in the territory of the Kingdom and further did not arise as a matter of municipal law, did not meet the definition of "investment" under Art 1(2) of Annex 1, and was not part of a bundle of rights comprising the Mining Leases.

(d) Fourth, the right to refer a dispute to the SADC Tribunal cannot be an "admitted" investment for the purposes of Art 28(1) of Annex 1 because there is no possibility for SADC Member States to adopt a

domestic law that would establish a procedure for the submission of *international* claims to the SADC Tribunal as a matter of right.

(e) Fifth, the Shuttering Dispute does not concern an obligation of the Kingdom in relation to the Appellants' admitted investment for the purposes of Art 28(1) of Annex 1. The Shuttering Dispute can have no effect on the status of the Mining Leases or the SADC Claim, given that the only dispute that concerns any obligation in relation to the Mining Leases or the SADC Claim is the Expropriation Dispute, which was and is beyond the PCA Tribunal's jurisdiction *ratione temporis*. Even if the investment comprised the right to refer a dispute to the SADC Tribunal, the obligations relied on by the Appellants concern rights in respect of which the Kingdom could not accord its investors protection given that these were beyond the Kingdom's territorial enforcement jurisdiction.

(f) Finally, in any event, the Appellants have not discharged their burden of showing that an Aquilian action is not a reasonably available local remedy or that there is no reasonable possibility of the Appellants obtaining effective redress.

56 Apart from the parties' submissions, we also had the benefit of a joint written opinion and oral submissions from Mr J Christopher Thomas *QC* ("Mr Thomas *QC*") and Prof N Jansen Calamita ("Prof Calamita"), who are the co-*amici curiae* we appointed to assist us in respect of the various intricate questions of law that arise in this appeal. We take the opportunity here to express our immense gratitude for the invaluable contributions of Mr Thomas *QC* and Prof Calamita, who were ably assisted by their research fellow, Ms Emily Choo Wan Ning. We derived tremendous assistance from their detailed, learned and

thorough submissions, which we will refer to where pertinent in the course of our reasoning and analysis.

Issues to be considered

57 From the foregoing summary of the submissions raised by the parties on appeal, the issues that arise for our determination are:

(a) first, whether the court has jurisdiction to set aside the Award under either Art 34(2)(*a*)(iii) or Art 34(2)(*a*)(i) of the Model Law;

(b) second, whether the Kingdom is bound to accept the PCA Tribunal's jurisdiction;

(c) third, whether the PCA Tribunal had jurisdiction to hear and determine the Appellants' claim, having regard to the following sub-issues relating to the requirements specified in the wording of Art 28(1) of Annex 1:

(i) whether the Appellants have a qualifying "investment" within the meaning of Art 28(1) and what precisely that investment is;

(ii) whether the Appellants' investment was "admitted" for the purposes of Art 28(1); and

(iii) whether the dispute submitted by the Appellants for determination in the PCA Arbitration "concern[s] an obligation of the [Kingdom] in relation to [the] admitted investment" for the purposes of Art 28(1); and

(d) fourth, whether the Appellants had exhausted their local remedies before commencing the PCA Arbitration proceedings.

58 In order for the Appellants to prevail in this appeal, they would have to persuade this court that: (a) the first issue regarding the court's setting-aside jurisdiction should be answered in the negative; (b) the second issue on estoppel and formal unilateral declaration should be answered in the affirmative; *or* (c) the third and fourth issues regarding the PCA Tribunal's jurisdiction to hear and determine the claim and the Appellants' exhaustion of local remedies respectively should both be answered in the affirmative.

Our decision

59 In our judgment, we do have jurisdiction to hear the Setting Aside Application and to set aside the Award under Art 34(2)(*a*)(iii) of the Model Law even though the Kingdom is contesting the PCA Tribunal's jurisdiction to hear and determine the entirety of the claim referred to it. Next, we are satisfied that the Kingdom is not bound by the doctrines of estoppel or formal unilateral declaration to accept the PCA Tribunal's jurisdiction in these proceedings. As regards the jurisdictional challenges raised by the Kingdom in the Setting Aside Application, we agree with the Judge that the Award should be set aside. In particular, while we find that the Appellants do have an *investment* that has been admitted for the purposes of Art 28(1) of Annex 1 to the Investment Protocol (namely, the Mining Leases), we find that there are no relevant *disputes* that concern any obligation that was owed by the Kingdom in relation to the admitted investment. Finally, we also take the view that the Appellants may not have exhausted their local remedies. In the result, we dismiss the appeal.

60 Before proceeding to address each of the identified issues, because this appeal requires us to engage in the exercise of treaty interpretation, it would be useful for us to preface our substantive analysis with a brief summary of the applicable principles in this regard. In *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [46], we recognised that the rules of treaty interpretation that should govern in these cases are those encapsulated within Art 31 – and, we add, also Art 32 – of the Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331 (entered into force 27 January 1980) ("VCLT"). Essentially, they oblige the court to interpret a treaty in accordance with the ordinary meaning of the terms of the treaty, having regard to the context of the treaty and in the light of its object and purpose (Art 31(1)). When considering the context of the treaty, the court may have regard to the text of the treaty (including its preamble and annexes) together with any instrument or agreement that was made in connection with the conclusion of the treaty (Art 31(2)). The court is also permitted to consider any subsequent agreement between the parties regarding the interpretation of the treaty, or any subsequent practice in the application of the treaty that establishes such an agreement, or any relevant rules of international law (Art 31(3)). Finally, Art 32 allows the court to have regard to supplementary means of interpretation, including the *travaux préparatoires* of the relevant treaty, to either confirm the meaning of a treaty term obtained from the exercise under Art 31, or clarify the meaning of a term that might remain ambiguous or obscure, or where its plain meaning would be manifestly absurd or unreasonable.

61 Beyond these principles of treaty interpretation which have been recognised to reflect customary international law, it also bears mentioning, especially in the international investment law context, that investment treaties

"should be interpreted neither liberally nor restrictively" (see August Reinisch, "The Interpretation of International Investment Agreements" in *International Investment Law* (Marc Bungenberg *et al*, eds) (C H BECK, Hart & Nomos, 2015) ("*Bungenberg*") at p 397, para 53, citing *Siemens AG v The Argentine Republic*, ICSID Case No ARB/02/8, Decision on Jurisdiction, 3 August 2004 at [81]). In this regard, it has been usefully observed in *Amco Asia Corporation and others v Republic of Indonesia*, ICSID Case No ARB/81/1, Decision on Jurisdiction, 25 September 1983 (at [14]) that:

> ... a convention to arbitrate is not to be construed restrictively, nor, as a matter of fact, broadly or liberally. It is to be construed in a way which leads [the tribunal] to find out and to respect the common will of the parties; such a method of interpretation is but the application of the fundamental principle *pacta sunt servanda*, a principle common, indeed, to all systems of internal law and to international law. ...

62 To like effect, in *Mondev International Ltd v United States of America*, ICSID Case No ARB(AF)/99/2, Award, 11 October 2002 ("*Mondev v USA*"), the tribunal stated (at [43]) that:

> ... there is no principle either of extensive or restrictive interpretation of jurisdictional provisions in treaties. In the end the question is what the relevant provisions mean, interpreted in accordance with the applicable rules of interpretation of treaties. ...

63 Ultimately, given that an investment treaty reflects the balance that has been struck between investor protection and the State's interests (generally following a considered period of negotiations between two or more States), neither an unequivocally pro-investor nor pro-State approach should be adopted in interpreting the provisions of an investment treaty.

64 With these principles in mind, we turn to our analysis of the issues we have identified above.

Whether the court has jurisdiction to hear the Setting Aside Application

65 We begin with the preliminary issue concerning the court's jurisdiction to set aside the Award. We first note the exhaustive list of grounds upon which an arbitral award may be set aside by the court as enumerated in Art 34(2) of the Model Law, which (with the exception of ch VIII) has the force of law in Singapore pursuant to s 3(1) of the IAA. The Kingdom relies primarily on the ground provided in Art 34(2)(*a*)(iii), which states that an award may be set aside if it "deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration" (we refer to this as "the third ground"). If, however, we should find that the Kingdom may not avail itself of Art 34(2)(*a*)(iii), the Kingdom seeks leave to amend the Setting Aside Application to rely, in the alternative, on Art 34(2)(*a*)(i), which provides that an award may be set aside if "the [arbitration] agreement is not valid under the law to which the parties have subjected it" (which we refer to as "the first ground").

*Art 34(2)(*a*)(iii) of the Model Law*

66 The Appellants contend that Art 34(2)(*a*)(iii) of the Model Law is only applicable where it is alleged that the arbitral tribunal has improperly decided matters that were not submitted to it or has failed to decide matters that were submitted to it, and *not* to a situation such as the present, where the Kingdom is contesting the very existence of the PCA Tribunal's jurisdiction to deal with the dispute. In support of this contention, they cite our decision in *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 ("*CRW Joint Operation*"), where it is stated (at [31]) that:

> … Art 34(2)(*a*)(iii) is not concerned with the situation where an arbitral tribunal did not have jurisdiction to deal with the dispute which it purported to determine. Rather, it applies where the arbitral tribunal improperly decided matters that had not been submitted to it or failed to decide matters that had

> been submitted to it. In other words, Art 34(2)(*a*)(iii) addresses the situation where the arbitral tribunal exceeded (or failed to exercise) the authority that the parties granted to it …

67 With respect, we do not find *CRW Joint Operation* to be instructive in this regard. As the Judge pointed out at [77] of the Judgment, these observations in *CRW Joint Operation* were made *obiter* as that case did not in fact involve a dispute that was found to be beyond the terms of the submission to arbitration as provided in the arbitration agreement. The finding in that case was that the tribunal had jurisdiction to hear the dispute, but exceeded it by summarily issuing a final award upholding the adjudicator's decision without hearing the substantive merits of the parties' dispute in circumstances where the arbitration agreement in question contemplated a rehearing *de novo*: *CRW Joint Operation* at [66], [82] and [101]. We also note that the court in *CRW Joint Operation* did not have the benefit of submissions from the parties and *amici curiae* on this specific issue, as we now do.

68 The Appellants also rely on the observation of Judith Prakash J (as she then was) in *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd and another* [2006] 3 SLR(R) 174 ("*Aloe Vera*") that s 31(2)(*d*) of the IAA "relates to the scope of the arbitration agreement rather than to whether a particular person was a party to that agreement" (at [69]). We referred to these observations in *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 ("*Astro*") at [153]. Although s 31(2)(*d*) of the IAA, which mirrors Art 36(1)(*a*)(iii) of the Model Law and Art V(1)(*c*) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) 330 UNTS 38 (entered into force 7 June 1959, accession by Singapore 21 August 1986) (more commonly known as the New York Convention), concerns the refusal of recognition or enforcement of an award rather than its

setting aside, we accept that judicial observations on this may nonetheless be considered persuasive authority because that provision essentially mirrors Art 34(2)(*a*)(iii) of the Model Law, which concerns the setting aside of an award.

69 However, in our judgment, neither *Aloe Vera* nor *Astro* supports the Appellants' position. The critical point to note is that those cases were not concerned with the situation where, despite the existence of an arbitration agreement between the parties, it was contended that the tribunal had no jurisdiction at all in respect of the dispute. *Aloe Vera* involved the question of whether an employee of a company that was party to an arbitration agreement with the claimant was a *proper party* to the arbitration agreement; Prakash J held that this was a question that was more properly dealt with under s 31(2)(*b*) of the IAA. *Astro* similarly involved the question of whether an arbitration agreement *existed* between some of the affected parties to begin with, which we determined to be a question that fell under Art 36(1)(*a*)(i) of the Model Law.

70 In *Aloe Vera*, Prakash J endorsed (at [66] and [69]) the statement from *Halsbury's Laws of Singapore: Arbitration* vol 2 (LexisNexis, 2003 Reissue) at para 20.145, which seemed to suggest that the third ground "assume[s] that the tribunal had jurisdiction over the parties" but decided a particular issue that was not before it. In *Astro*, we also cited (at [155]) statements from various treatises which supposedly supported the position that "the third ground deals more with the *scope* of the arbitration agreement as opposed to its existence" [emphasis in original]. However, these remarks were made in the context of distinguishing the scope of the first ground from that of the third ground for the purpose of determining which ground would apply in a situation where the applicant seeking to set aside the award contended that it was *not party to the arbitration agreement in question at all*. This is distinct from a situation like the present

where the essence of the Kingdom's argument is that even if there *was* an agreement between the parties, there were obstacles to jurisdiction which had not been overcome.

71 As against this, the Kingdom's position is supported by academic commentary that directly addresses the question at hand. In particular, we find the following passage in Gary Born, *International Commercial Arbitration*, vol III (Wolters Kluwer, 2nd Ed, 2014) ("*Born*") at p 3295 to be especially instructive:

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

72 We agree that there is no reason why the phrase "submission to arbitration" should exclude situations such as the present from the ambit of Art 34(2)(*a*)(iii). This view is also advanced in Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th Ed, 2015) ("*Redfern and Hunter*") at para 10.38, in which Art 34(2)(*a*)(iii) is described as covering situations where "the award deals with matters not

contemplated by, or falling within, the *arbitration clause or submission agreement*, or goes beyond the scope of what was submitted" [emphasis added]. Indeed, we think that Art 34(2) could not have been intended to exclude a situation where the tribunal did not have jurisdiction over the dispute under the arbitration agreement, which *Born* describes as "one of the paradigmatic examples of an excess of authority".

73 The *amici curiae* endorse the view that Art 34(2)(*a*)(iii) must be interpreted flexibly. However, they express some uncertainty as to how the provision should be applied in the context of an investment treaty arbitration. This is because the process by which an investor and a State arrive at an agreement to arbitrate is rather different from that by which commercial parties ordinarily manifest their common intention to arbitrate disputes. Investment treaties contain the consent of the respective *contracting States* to submit disputes arising from claims presented by qualified investors from the other contracting State(s) to arbitration; but as the *amici curiae* point out, "[o]nly one half of the consent" would have been provided at that stage. The other half – namely, the consent of the investors – would not have been provided at the time the treaty was entered into. It is therefore not identical to an arbitration agreement in the commercial arbitration context.

74 However, we consider that in specifying the conditions under which a claim may be submitted to arbitration, contracting States define the terms of an admissible submission to arbitration by reference to the provisions in the investment treaty. Seen in this way, we can conceive of no reason why Art 34(2)(*a*)(iii) should not apply to such a situation. This is consistent with the approach taken by the Ontario Court of Appeal in *United Mexican States v Cargill, Inc*, 2011 ONCA 622 (at [52]), where the court held that in determining whether an award should be set aside under Art 34(2)(*a*)(iii), the approach was

to ask whether the issue decided by the tribunal was within the submission to arbitration made under the provisions of the relevant investment treaty.

75 It would also be helpful to analyse the arbitration clause in this context as being analogous to a unilateral contract. When a State enters into an investment treaty that provides for the submission of disputes to arbitration, it effectively makes a unilateral offer to arbitrate. By doing so, the State binds itself to arbitrate a claim that is brought under and in accordance with the terms of that unilateral offer, which is then accepted once an investor initiates arbitration proceedings in accordance with those terms. The relevant terms for this purpose are those set out in the investment treaty.

76 This analysis is well established in the existing academic literature. For example, in David Joseph QC, *Jurisdiction and Arbitration Agreements and their Enforcement* (Sweet & Maxwell, 3rd Ed, 2015), it is observed (at para 17.26) that:

> … [e]ach of [the dispute resolution clauses in investment treaties] contains an irrevocable open offer on the part of the State to qualifying investors to arbitrate claims or disputes concerning issues covered by the treaty and in particular alleged breaches of the investment protection afforded to investors under the treaty. Once the qualifying investor gives notice of arbitration and commences arbitration, an arbitration agreement comes into force between the investor and the State. Thus in its structure, it is a somewhat different type of arbitration agreement than that generally encountered in private law disputes. The irrevocable open offer is made to a class of persons; namely qualifying investors. Each qualifying investor has a direct right to pursue on its own behalf claims against a host State in arbitration, that right crystallising at the point of commencement of arbitration. … The open offer to arbitrate once accepted itself is sufficient to constitute an agreement in writing to arbitrate so as to satisfy the requirements of art.II(1) of the New York Convention … No further agreement or submission to arbitration is required from the State over and above its agreement to the treaty itself. …

77 To similar effect, in Andrea Marco Steingruber, *Consent in International Arbitration* (Oxford University Press, 2012) ("*Steingruber*"), the modalities by which parties express consent to arbitration when a State enters into an investment treaty and an investor subsequently brings a claim under that investment treaty are helpfully explained as follows (at paras 12.23–12.24):

> 12.23 The host State's expression of consent to arbitration is always general and abstract. However, at the time when the investor makes his investment, or, at least, at the time when the investor accepts the host State's consent – often by introducing a request for arbitration (instituting proceedings) – *a transformation takes place.* In fact, while it is true that in treaty arbitration proceedings only one of the drafters of the investment treaty is present, ie the respondent State, and that for the claiming foreign investor the dispute resolution provision is *res inter alios acta*, it has nevertheless to be considered that the investment, and the possible dispute arising out of it, is an individual and concrete (specific) one. Therefore, in treaty arbitration the dispute is ultimately not between the drafters of the investment treaty, but between a foreign investor and the host State. Indeed, *the (host) State gives double consent*:
>
> - a consent which is general and abstract (standing offer to foreign investors). This consent to arbitration is expressed by the host State by reaching mutual consent with another State – in the [Bilateral Investment Treaties ("BITs")] – or with various other States – in multilateral investment treaties – to use arbitration as a dispute resolution mechanism in investment disputes with investors of its counterpart(s) (the other State(s)); and
>
> - a consent to the investor of its counterpart(s) (the other State in the case of BITs or the other States in the case of a multilateral investment treaty) to resolve an individual and concrete investment dispute through arbitration. This consent arises from a standing offer (general and abstract consent, ie expression of consent to arbitration) contained in a BIT or a multilateral investment treaty which is then transformed with the acceptance by the foreign investor (individual and concrete consent) into a consent which relates to an individual and concrete dispute (reaching of mutual consent to arbitration).

> 12.24 The host State is therefore bound by two agreements: an international investment treaty, where it reaches mutual consent with another State / other States to use arbitration as a dispute resolution mechanism, and a transnational arbitration agreement with the foreign investor, where it reaches mutual consent to resolve a concrete dispute with a foreign investor by means of arbitration.
>
> [emphasis in original]

78 A similar analysis of consent between a host State and an investor in investment treaty arbitration has also been adopted in the jurisprudence of investment treaty arbitral tribunals. In *Eureko BV v Slovak Republic*, PCA Case No 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, the tribunal held (at [223]) that when an investor accepts a host State's standing offer to arbitrate provided for in the investment treaty, there is then consent *between the investor and the State* to submit to the jurisdiction of the arbitral tribunal. The tribunal in *Metal-Tech Ltd v The Republic of Uzbekistan*, ICSID Case No ARB/10/3, Award, 4 October 2013 likewise observed (at [409]) that "the scope of the State's offer is defined in the investment treaty, in particular in the dispute resolution clause of that treaty", and the investor accepts this standing offer when he initiates arbitration proceedings under the treaty. Similarly, in *Giovanni Alemanni and others v The Argentine Republic*, Decision on Jurisdiction and Admissibility, ICSID Case No ARB/07/8, 17 November 2014 ("*Alemanni v Argentina*"), the tribunal remarked (at [284] and [305]) that:

> 284 … consent can be manifested in numerous ways, and ascertained by various means. … That includes also cases in which the 'agreement' does not come about simultaneously, but is constructed in attenuated form out of disaggregated acts of consent by the different parties. This is a common process which is no stranger to investment arbitration; the entire institution of dispute settlement under bilateral and multilateral investment treaties is based on a standing offer made generally by host States of investment subsequently taken up after a dispute has arisen by individual investors, the

> whole then being understood to constitute the necessary mutual consent to arbitration or other settlement processes.
>
> ...
>
> 305 What the [clause providing for investment treaty arbitration] does is to generate and record the standing offer to arbitrate ... It is trite law that the jurisdictional link is then completed by the acceptance of the offer by an investor, manifested implicitly by the investor's commencing arbitration proceedings in reliance on its terms. The process is a sequential one, but its legal effect is now universally recognized, on the basis that the claimant's acceptance of the respondent's offer brings into being the necessary legal relationship between them in the same way as if they had concluded between themselves a specific agreement to that effect. ***But it surely requires no further demonstration that this legal effect can only be produced if the investor accepts the offer on the terms specified by the host State; it cannot either re-write the offer or 'accept' an offer other than that which the host State has made***. ...
>
> [emphasis in original underlined; emphasis added in bold italics]

79 Thus, a dispute that is referred to arbitration by an investor who purports to rely on the arbitration clause contained in the investment treaty, but which is found to fall outside the scope of that clause (and accordingly, of the State's offer to arbitrate) should be considered to fall outside the scope of the arbitration agreement and "the terms of the submission to arbitration" under Art 34(2)(*a*)(iii) because in such a case, the State would not, in fact, have agreed to arbitrate such a dispute.

80 In our judgment, the Kingdom's jurisdictional objections, if these are made out, fall within the ambit of Art 34(2)(*a*)(iii), and the court would therefore have the jurisdiction to set aside the Award on this ground. After all, as the *amici curiae* rightly point out, Art 34 is intended to prescribe an exhaustive mechanism applicable in relation to the setting aside of all types of awards. It ought therefore to be read flexibly. In our view, Art 34(2)(*a*)(iii) could not have

been intended to exclude situations such as the present where a tribunal might not have had jurisdiction under the terms of the investment treaty.

*Art 34(2)(*a*)(i) of the Model Law*

81 Even if the third ground in Art 34(2)(*a*)(iii) of the Model Law were inapplicable, we would in any event have allowed the Kingdom to amend its originating summons in the Setting Aside Application to include the first ground in Art 34(2)(*a*)(i) as a basis for the court to rule upon the jurisdictional challenges brought by the Kingdom.

82 Article 34(2)(*a*)(i), in essence, allows the court to set aside an arbitral award where the arbitration agreement is invalid. Returning to the unilateral contract analysis which we have set out earlier (at [75] above), it may also be said that an investor who purports to commence an arbitration that is found to fall outside the scope of the investment treaty has in fact failed to match the terms of the State's unilateral offer to arbitrate. In such a case, the arbitration agreement would not have been perfected and there would have been no valid contract at all. Therefore, in our judgment, the first ground would apply equally to cases like the present to permit the court to hear and determine the Setting Aside Application.

83 It would have been open to us to permit the Kingdom to amend its originating summons in the Setting Aside Application pursuant to O 20 r 5(1) read with O 20 r 7 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the ROC") in order to also rely on Art 34(2)(*a*)(i). The guiding principle is that the amendment of an originating summons ought to be allowed if this would enable the real question and/or issue in controversy between the parties to be determined: see *Sunbreeze Group Investments Ltd and others v Sim Chye Hock*

Ron [2018] SGCA 64 ("*Sunbreeze*") at [29], citing *Review Publishing Co Ltd and another v Lee Hsien Loong and another appeal* [2010] 1 SLR 52 ("*Review Publishing*") at [113]. This is subject to the caveat that it must be just to grant such leave, which is a matter to be considered having regard to all the circumstances of the case including, in particular, whether the amendments would cause any prejudice to the other party that cannot be compensated in costs: see *Sunbreeze* at [24], citing *Review Publishing* at [113]. Here, the parties have had every opportunity to, and did in fact, address the specific question of whether the court has jurisdiction to hear the Setting Aside Application pursuant to Art 34(2)(*a*)(i). Also, this question was purely one of law. There would therefore have been no prejudice that would not have been compensable in costs had we deemed it necessary to allow the Kingdom to amend the Setting Aside Application. For the foregoing reasons, however, an amendment is not necessary because the Setting Aside Application comes within the third ground as set out in Art 34(2)(*a*)(iii).

Whether the Kingdom is bound to accept the PCA Tribunal's jurisdiction

84 Next, we briefly address the Appellants' contention that the Kingdom is *bound* to accept the PCA Tribunal's jurisdiction. The Appellants submit that the following representations serve to compel the Kingdom to accept the PCA Tribunal's jurisdiction:

(a) first, representations made by the Kingdom in the SADC Justice Committee and the SADC Council of Ministers to the effect that the Appellants would be permitted to pursue their disputes before other dispute resolution fora ("the first category") (see [29]–[33] above);

(b) second, representations made by the Kingdom in the course of the oral hearing before the PCA Tribunal and in its post-hearing brief,

reiterating its position that the Appellants should be permitted to pursue their dispute before another dispute resolution forum ("the second category") (see [38] and [40] above); and

(c) third, the Kingdom's free-standing offer made to the Appellants on 6 October 2015 for the SADC Claim to be submitted to arbitration in an alternative forum within a SADC Member State ("the third category") (see [39] above).

85 Although the Appellants suggest that the Kingdom's actions amount to "bad faith approbation and reprobation" and that the Kingdom "should not be permitted to 'blow hot and cold'", as we see it, the Appellants' submissions regarding why the Kingdom is bound to accept the PCA Tribunal's jurisdiction ultimately rest on two separate doctrines. First, they claim that the Kingdom should be bound to act in accordance with the formal unilateral declarations it has made. Second, they claim that the Kingdom should be bound by the doctrine of estoppel to accept the PCA Tribunal's jurisdiction. In our judgment, there is no merit to these submissions, and we reject them.

86 First, as regards the argument based on the Kingdom having made formal unilateral declarations, the doctrine which the Appellants rely on has been described in James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 8th Ed, 2012) ("*Brownlie*") at pp 416–417 as follows:

> A state may evidence a clear intention to accept obligations vis-à-vis certain other states by a public declaration which is not an offer or otherwise dependent on reciprocal undertakings from its addressees. Apparently the terms of such a declaration will determine the conditions under which it can be revoked. … Such a declaration may implicitly or otherwise require acceptance by other states as a condition of its validity or at least of its effectiveness. In short, it seems that while a bare

> (unaccepted) declaration may be valid, it can produce its intended effects only if accepted (expressly or implicitly).

87 In *CEMEX Caracas Investments BV and CEMEX Caracas II Investments BV v Bolivarian Republic of Venezuela*, ICSID Case No ARB/08/15, Decision on Jurisdiction, 30 December 2010, the tribunal made the following pertinent observations regarding the interpretation of unilateral declarations (at [81]–[82]):

> 81 Customary rules governing States' unilateral declarations in international law have never been codified. However, as recognized by the International Law Commission of the United Nations, a basic distinction must be drawn in that field between:
>
> (a) declarations formulated in the framework and on the basis of a treaty, and
>
> (b) *other declarations made by States in the exercise of their freedom to act on the international plane.*
>
> 82 Both declarations may have the effect of creating international obligations. However, *when considering declarations not made within the framework and on the basis of a treaty, the utmost caution is required when deciding whether or not those declarations create such obligations.* The International Court of Justice faced situations of that kind in the *Nuclear Tests* cases in 1974. In those cases, it decided that *'when States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for.'* In 2006, in the *Case Concerning Armed Activities on the Territory of The Congo*, it confirmed that *'a statement of this kind can create legal obligations only if it is made in clear and specific terms.'* The International Law Commission adopted the same position in its Guiding Principles of 2006 Applicable to Unilateral Declaration of States.
>
> [emphasis added]

88 In our judgment, the representations made by the Kingdom in the SADC Justice Committee, the SADC Council of Ministers, in the course of the oral hearing before the PCA Tribunal and/or in the free-standing offer to arbitrate made on 6 October 2015 do not evince any intention on the part of the Kingdom

to be bound to accept the jurisdiction of *the PCA Tribunal*. On the contrary, they merely reflect the Kingdom's willingness to offer an alternative dispute resolution forum, as a matter of policy, for the resolution of the part-heard SADC Claim. However, these statements can be of no relevance to the jurisdiction of *the PCA Tribunal,* which turns on whether the requirements in Art 28 of Annex 1 of the Investment Protocol had been complied with. On this point, the Kingdom had strenuously contended before the PCA Tribunal that these requirements had not been met.

89 Moreover, even assuming, for the sake of argument, that the Appellants' position is that the representations made by the Kingdom show its intention to be bound to accept the jurisdiction of *the Mauritius Tribunal*, we find that the representations made by the Kingdom do not amount to formal unilateral declarations to this effect. First, it is noteworthy that the representations falling within the first category were made in the context of discussions to which the Appellants were not party and in the course of which the Kingdom was expressing certain policy preferences to other State actors. Second, as regards the representations falling within the second category, these representations were made in the context of the Kingdom's submissions before the PCA Tribunal, where they were clearly accompanied by caveats that the Kingdom was *not* conceding on either jurisdiction or liability in the proceedings before the PCA Tribunal. Indeed, while the PCA Tribunal, in ordering the parties to constitute the Mauritius Tribunal, thought that it was crafting a remedy that took into account the Kingdom's prior expressed "consent" to refer the part-heard SADC Claim to a new tribunal, the Kingdom's expression of consent had always been qualified by its objections as to both jurisdiction (of the PCA Tribunal) and liability (see [45] above). Third, regarding the third category of representations, the Kingdom's free-standing offer to arbitrate was made to the

Appellants on terms which required the latter to accept the offer within one month; in any event, the Appellants ultimately rejected the offer. Hence, bearing in mind the "restrictive interpretation" that ought to be adopted in relation to statements made by States "in the exercise of their freedom to act on the international plane" (see [87] above), we are satisfied that these representations were made in circumstances that simply would *not* support an intention to make a formal unilateral declaration in favour of the Appellants.

90 Second, as for the argument based on estoppel, *Brownlie* sets out the doctrine at p 420 in the following terms:

> … By analogy with principles of municipal law, and by reference to decisions of international tribunals, Bowett has stated the essentials of estoppel to be: (a) an unambiguous statement of fact; (b) which is voluntary, unconditional, and authorized; and (c) which is relied on in good faith to the detriment of the other party or to the advantage of the party making the statement. A considerable weight of authority supports the view that estoppel is a general principle of international law, resting on principles of good faith and consistency. The essence of estoppel is the element of conduct which causes the other part, in reliance on such conduct, detrimentally to change its position or to suffer some prejudice. …

91 In our judgment, the Appellants' reliance on this doctrine fails at the very first hurdle for the same reason stated at [88] above: none of the representations referred to at [84] above can be said to constitute an unambiguous statement of fact to the effect that the Kingdom was willing unconditionally to accept the jurisdiction of *the PCA Tribunal*. Also, we fail to see how there had been any form of reliance by the Appellants on any of these statements to their detriment. This is especially so given that the Appellants had purported to invoke the jurisdiction of the PCA Tribunal *before* any of these statements were made. Moreover, even assuming that the Appellants were relying on these representations to submit that the Kingdom is estopped from

denying the jurisdiction of *the Mauritius Tribunal*, we find that these representations fail either of the first two elements described in the extract from *Brownlie* set out at [90] above: The first category of representations are not unambiguous statements of fact, but rather broad indications of the Kingdom's policy preferences to the other SADC Member States. The second and third category of representations are not unconditional statements because, as we have explained, they were accompanied by express caveats as to their legal effect.

Whether the PCA Tribunal had jurisdiction to hear and determine the claim

92 We now direct our attention to the heart of the appeal, which concerns the issues bearing upon the jurisdiction of the PCA Tribunal to hear and determine the claim referred to it by the Appellants. Central to this question is Art 28(1) of Annex 1, which sets out the requirements which must be satisfied for the PCA Tribunal to assume jurisdiction over the claim, and thus serves as the yardstick against which the Appellants' purported acceptance of the Kingdom's consent to arbitration is to be measured. For ease of reference, we set out the text of Art 28(1) again as follows:

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

93 As evident from the wording of Art 28(1), there are at least three key jurisdictional requirements that must be satisfied in order for the PCA Tribunal to assume jurisdiction. First, there must be an "investment". As we will explain below, an asset must both satisfy the definition of an "investment" provided in Art 1(2) *and have a territorial nexus* with the host State in order to qualify as

an "investment" for the purposes of Art 28(1). Second, the investment must have been "admitted". Third, there must be a dispute which "concern[s] an obligation of the [Kingdom] in relation to [that] admitted investment".

94 These terms in Art 28(1) must be interpreted in the light of the object and purpose of the Investment Protocol (see [60] above). Although the Kingdom contends otherwise, we consider that a cardinal objective of the Investment Protocol is to increase the flow of investment into the SADC region by promoting and protecting investments in the SADC Member States. Articles 2 and 3 of the Investment Protocol reflect this, and they state as follows:

> **ARTICLE 2**
>
> **OBJECTIVES**
>
> 1. This Protocol seeks to *foster harmonisation of the financial and investment policies of the State Parties* in order to make them consistent with objectives of SADC and ensure that any changes to financial and investment policies in one State party do not necessitate undesirable adjustments in other State Parties.
>
> 2. The objective referred to in paragraph 1 shall be achieved through facilitation of regional integration, co-operation and co-ordination within finance and investment sectors with the aim of diversifying and expanding the productive sectors of the economy, and enhancing trade in the Region to achieve sustainable economic development and growth and eradication of poverty by:
>
> (a) creating a favourable investment climate within SADC with the aim of *promoting and attracting investment* in the Region;
>
> ...
>
> **ARTICLE 3**
>
> **CO-OPERATION ON INVESTMENT**
>
> State Parties shall co-ordinate their investment regimes and cooperate to *create a favourable investment climate within the Region* as set out in Annex 1.

[emphasis added]

95 The same objective is also reflected in Annex 1 to the Investment Protocol. This is borne out by the Preamble to Annex 1, which states as follows:

> **ANNEX 1**
>
> **CO-OPERATION ON INVESTMENT**
>
> ***PREAMBLE***
>
> The High Contracting Parties:
>
> **COMMITTED** to achieving the broad objectives of the SADC as set out in the Treaty and specifically to achieving economic growth and sustainable development through regional integration and working through [Investment Promotion Agencies] in the Region;
>
> **RECOGNISING** the *increasing importance of the role played by investment* to advance productive capacity and increase economic growth and sustainable development and the importance of the link between investment and trade;
>
> **CONCERNED** with the *low levels of investment into the SADC*, even though a number of measures have been taken to improve the investment environment;
>
> **AIMING** to create new employment opportunities and improve living standards in our territories;
>
> **ACKNOWLEDGING** that there is a need for greater regional cooperation among [Investment Promotion Agencies] in the Region *in order to enhance the attractiveness of the region as an investment destination*;
>
> **CONSCIOUS** that *without effective policies on investment protection and promotion, the Region will continue to be marginalised in terms of investment inflows* and sustainable economic development; and
>
> **WISHING** to be guided by the ideals, objectives and spirit of the [Investment] Protocol in *the facilitation and stimulation of investment flows* and technology transfer and innovation into the Region
>
> **HEREBY AGREE as follows:**
>
> ...
>
> [emphasis in original in bold; emphasis added in italics]

96 Apart from the jurisdictional requirements identified at [93] above, we should add that there is also the requirement for the Appellants to have exhausted their local remedies. However, given that this final requirement is not so much a question of the interpretation of Art 28(1), but more a question relating to the application of general principles of international law, we address this in a separate section below (at [205]–[224]). But before we do so, we will first consider each of the aforementioned requirements of Art 28(1).

Identification of the investment

97 We begin by identifying what exactly the relevant investment is. In our judgment, the Appellants' investment for the purposes of their claim brought in the PCA Arbitration comprises the Mining Leases, the Shares and also the Expended Resources. This is to be distinguished from the SADC Claim itself or, more generally, the right to refer a dispute to the SADC Tribunal. In the following sections, we elaborate on our reasons for coming to this conclusion.

(1) The basic requirements to constitute an investment

98 For an investment to qualify for protection under Art 28(1) of Annex 1, it must first fall within the definition of an "investment" found in Art 1(2) of Annex 1, which reads as follows:

> **"investment"** means the purchase, acquisition or establishment of productive and portfolio investment assets, and in particular, though not exclusively, includes:
>
> > (a) movable and immovable property and any other property rights such as mortgages, liens or pledges;
> >
> > (b) shares, stocks and debentures of companies or interest in the property of such companies;
> >
> > (c) claims to money or to any performance under contract having a financial value, and loans;

> (d) copyrights, know-how (goodwill) and industrial property rights such as patents for inventions, trade marks, industrial designs and trade names;
>
> (e) rights conferred by law or under contract, including licences to search for, cultivate, extract or exploit natural resources;
>
> Provided that nothing in this definition shall prevent a State Party from excluding short-term portfolio investments of a speculative nature or any sector sensitive to its development or which would have a negative effect on its economy. A State Party that has invoked this provision shall notify the Secretariat for information purposes within a period of three (3) months.
>
> [emphasis in original in bold]

99 In addition to falling within the aforesaid definition, in our judgment, both as a generally accepted principle in international investment law, and as a matter of the interpretation of Annex 1, the alleged investment must also *bear a territorial link with the host State*. This has been described as a "cardinal feature of the investment treaty regime" (see Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009) ("*Douglas*") at para 349), with most investment treaties containing provisions that explicitly limit their application to "investments territorially made within a host State" (see Campbell McLachlan, Laurence Shore & Matthew Weiniger *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2nd Ed, 2017) ("*McLachlan*") at paras 6.88–6.89). What this requires is that the alleged investment must be made or located within the territory of the host State and, if and to the extent it is conceived of as comprising a bundle of rights, these rights must exist and be enforceable under the domestic laws of the host State.

100 In our judgment, although the definition of "investment" provided in Art 1(2) of Annex 1 does not set out a requirement for a territorial nexus in express terms, such a requirement is well supported by the broader textual context surrounding the definition of "investment" in Art 1(2). In particular,

Art 1(2) of Annex 1 defines the "Host Government" as the "government of the State Party in whose territory an investment is made or located"; Art 2(1) of Annex 1 calls for each host State to promote investments "in its territory"; Art 5 of Annex 1 states that investments "shall not be nationalised or expropriated in the territory of any State Party …"; and Art 10 of Annex 1 requires investors to abide by the host State's laws, regulations, administrative guidelines and policies. As the Judge rightly observed in the Judgment at [197], these provisions demonstrate that the object and purpose of Annex 1 is – besides the broader investment promotion and protection objective that we have identified at [94] above – to specifically protect *only* investments made within the territory of the host State and/or arising, existing and enforceable under the domestic laws of the host State.

101 The Judge set out two related points, with which we agree, which elucidate the basis for the territorial nexus requirement while clarifying the analysis concerning the legal rights and obligations that are created when an investment is made in a host State. As will be shown in greater detail below, these are grounded in general principles of international investment law relating to the territorial jurisdiction of States and the source of property rights in an investment.

102 First, *vis-à-vis* a host State, investors can only expect to enjoy guarantees of certain standards of treatment or protection in relation to investments that are made *within* that State because States generally have no extraterritorial enforcement jurisdiction and cannot purport to protect rights or property located *outside* their borders (Judgment at [198]). This is a point made by Michael Waibel in a chapter titled "Investment Arbitration: Jurisdiction and Admissibility" in *Bungenberg* ("*Waibel*") in the context of discussing the jurisdictional requirements under Art 25(1) of the Convention on the Settlement

of Investment Disputes between States and Nationals of Other States (18 March 1965) 575 UNTS 159 (entered into force 14 October 1966) ("the ICSID Convention"). The author writes (at pp 1248–1249, paras 144–145):

> 144 It is a characteristic feature of 'investment' as contemplated in Article 25 of the ICSID Convention, and other instruments of investment protection, that the investment be made in the territory of the ICSID State. Only in such cases does the investment fall directly under the control of the host State's legislative, executive and judicial power and requires the protection afforded by the Convention. In keeping with principles of jurisdiction in international law, States cannot reasonably be expected to protect investments outside their territorial jurisdiction, unless they have expressly undertaken such duties of extending investment protection extraterritorially.
>
> 145 The premise underlying Article 25's conception of an investment is that the investor is physically present in the host country. Investment law is designed to counterbalance political risk and the host State's regulatory authority over investments in its territory or areas under its control. With respect to intangible rights, the jurisdictional criterion is met if the rules of private international law locate the right in the territory of the host State.

103 Second, the existence and scope of rights or property purportedly comprising an investment are issues that are governed by domestic law, and not international law (Judgment at [199]). In this regard, the following observations in *Douglas* at paras 101, 102, 115 and 121 are instructive:

> 101. Investment disputes are about investments, investments are about property, and property is about specific rights over tangibles and intangibles cognisable by the municipal law of the host state. General international law contains no substantive rules of property law. Nor do investment treaties purport to lay down rules for acquiring rights *in rem* over tangibles and intangibles.
>
> 102. Whenever there is a dispute about the scope of the property rights comprising the investment, or to whom such rights belong, there must be a reference to a municipal law of property. Insofar as investment treaties require a territorial nexus between the investment and one of the contracting state

> parties, that property law is the municipal law of the state in which the claimant alleges that it has an investment.
>
> ...
>
> 115. ... Any dispute concerning the existence or extent of the rights *in rem* alleged to constitute an investment that arises in an investment treaty arbitration must be decided in accordance with the municipal law of the host state for this is not a dispute about evidence (facts) but a dispute about legal entitlements. When the issue becomes the international validity of certain acts of the host state that have prejudiced the investor's legal entitlements under municipal law, then international law applies exclusively. ...
>
> ...
>
> 121. ... [I]t is the municipal law of the host state that determines whether a particular right *in rem* exists, the scope of that right, and in whom it vests. It is the investment treaty, however, that supplies the classification of an investment and thus prescribes whether the right *in rem* recognised by the municipal law is subject to the regime of substantive protection in the investment treaty. ...

104 In a similar vein, in *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009) ("*Newcombe & Paradell*"), Andrew Newcombe and Lluis Paradell note the following (at para 2.13):

> The role of domestic law in defining and regulating the investor's acquired rights is entirely logical. [International Investment Agreements ("IIAs")] and general international law do not purport to regulate the complex problems of proprietary and contractual rights, or the legal nature of state measures. Further, the investment rights and state conduct at issue in IIA disputes arise in the context of legal relationships governed by domestic law. Hence the IIA and international law leave these questions to be decided, in principle, by the law of the host state. ...

105 This latter point is well reflected in the corpus of investment treaty case law. For example, in *Emmis International Holding, BV and others v Hungary*, ICSID Case No ARB/12/2, Award, 16 April 2014, the tribunal noted (at [162]) that:

> [i]n order to determine whether an investor/claimant holds property or assets capable of constituting an investment it is necessary in the first place to refer to host State law. Public international law does not create property rights. Rather, it accords certain protections to property rights created according to municipal law. …

106 Similarly, in *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No ARB/07/26, Award, 8 December 2016, the tribunal observed (at [556]) that:

> … [g]eneral international law does not accurately define the concepts of contract, action, patent, etc. This is provided for by domestic law. These rights, once defined, are protected by certain rules of international customary and treaty law.

107 And in *Venezuela Holdings, BV and others v The Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/27, Decision on Annulment, 9 March 2017, the tribunal agreed (at [170]) with the State's submissions, which it summarised in the following terms (at [168]):

> … [A]n investment is, of its very nature, an item of property … [P]roperty is not a quantity that is, or can be, created by international law, and … the only role of international law is to recognize property created and defined by national law, and then to draw from that whatever consequences may flow on the international plane …

108 We consider that these principles are also consistent with the views of the *amici curiae*, who observed as follows in relation to the need for a territorial nexus between the investment and the host State:

> 135 It is a well-established principle of international law that States have jurisdiction, *i.e.* the power to regulate, primarily on the basis of their territory. … It is widely accepted that **identifying the existence and scope of particular property/ownership rights for the purposes of qualifying them as an '*investment*' generally depends on the law of the host State.**
>
> 136 **The proposition, that in order to qualify as protected '*investments*' assets must bear a territorial link with the**

> **putative host State (or fall otherwise within the realm of its prescriptive jurisdiction), is in these senses a generally accepted proposition in international investment law**. It is a requirement of the scope of application of an investment treaty to the particular putative investment operation and a requirement for the assertion of arbitral jurisdiction over the investment.
>
> [emphasis in original in italics; emphasis added in bold]

109 In our judgment, the foregoing analysis in relation to the Judge's second point mentioned at [103] above may be summarised in these propositions:

(a) When the investor makes an investment in the host State, it acquires property and/or rights that exist or are conferred as a matter of the domestic law of the host State.

(b) The precise extent and scope of those rights are to be determined as a matter of the domestic law of the host State.

(c) As a matter of international law, the host State undertakes certain obligations, and may be liable if those domestic law rights (including any property rights) within its jurisdiction are violated.

(d) When it is alleged that the host State has violated its obligations under the investment treaty, it may be necessary in appropriate cases to identify the particular right of the investor that is said to have been violated or interfered with and consider whether that right has the requisite territorial nexus with the host State so as to implicate those obligations of the host State that arise as a matter of international law.

110 Against that backdrop, we turn to consider the parties' submissions as to what precisely may be considered to constitute the relevant investment. The Appellants contend that their investment consists of the Mining Leases, the

Shares, the Expended Resources *and* the SADC Claim. As regards the SADC Claim in particular, the Appellants submit that the investment "is not limited to the *claim* itself but includes the very *right* to bring the claim" [emphasis in original]. The Kingdom disagrees, submitting that none of the foregoing can constitute an "investment" for the purposes of Art 28(1) of Annex 1.

111 We pause to make two preliminary observations in relation to these submissions:

(a) First, given that the submissions generally deal with the Mining Leases, the Shares and the Expended Resources collectively, and do not raise arguments *vis-à-vis* the Shares and the Expended Resources that would not also apply to the Mining Leases, we consider it sufficient for the purposes of our analysis to focus *only* on the Mining Leases and will hereafter simply refer to the Mining Leases, though our analysis will also encompass the position with respect to the Shares and the Expended Resources.

(b) Second, whereas before the Judge, the Appellants only made arguments in respect of the *general right to refer a dispute to the SADC Tribunal*, before us, they contend that the *SADC Claim* itself could also be considered as the qualifying investment, or as part thereof. This was not a feature of their case before the Judge or, indeed, the PCA Tribunal, and is in fact a new case run on appeal. Nonetheless we do deal with this below.

(2) The Mining Leases

112 In our judgment, the Mining Leases do qualify as an investment for the purposes of Art 28(1) of Annex 1.

113 The various types of "productive and portfolio investment assets" that would satisfy the definition of an "investment" under Art 1(2) are listed under Art 1(2) of Annex 1 (as set out above at [98]). In particular, the Mining Leases fall squarely within para (e) of the definition of "investment" in Art 1(2) of Annex 1, which refers to "licences to search for, cultivate, extract or exploit natural resources". Although the Kingdom now submits, for reasons we address below, that the Mining Leases should not be considered qualifying investments, it is telling that in the proceedings below, the Kingdom had expressly accepted the PCA Tribunal's finding that the Mining Leases "were, in principle, capable of falling within the definition of 'investment' under Article 1(2) of Annex 1".

114 Next, there can also be no doubt that the Mining Leases easily fulfil the territoriality requirement (as set out at [99]–[109] above). They are assets that clearly consist of rights validly created and conferred under the domestic laws of the Kingdom in respect of property situated within the territory of the Kingdom.

115 However, the Judge did not agree that the Mining Leases should be deemed the relevant "investment" in the present case; and nor, on appeal, does the Kingdom. We turn to address the specific objections.

116 The Judge approached this question solely from the perspective of considering whether the *right to bring the SADC Claim* was an investment under Art 28 of Annex 1. He did this because the claim in the PCA Arbitration had been brought in respect of the Shuttering Dispute, and he considered that the Shuttering Dispute *necessarily* pertained to the right to bring the SADC Claim and required the Appellants to advance their case on the basis of latter being the qualifying investment. The Judge put the point as follows (at [182]):

> One consequence of the defendants characterising their dispute as the [*S*]*huttering* [*D*]*ispute* rather than the [*E*]*xpropriation* [*D*]*ispute* (which would have fallen foul of Art 28(4) of Annex 1) was that **the corresponding "investment" was not the Mining Leases, but the right to refer the dispute to the SADC Tribunal. This is an inevitable result. ...** It is thus clear that the alleged investment is not the defendants' claim to compensation *per se*, but rather a *right* to claim for compensation before the SADC Tribunal for the expropriation of the Mining Leases. ... [emphasis in original in italics; emphasis added in bold]

117 On appeal, the Kingdom seeks to uphold this finding, submitting that as long as the dispute over which the PCA Tribunal is able to assume jurisdiction *ratione temporis* under Art 28(4) of Annex 1 is held to be the Shuttering Dispute, the Mining Leases cannot be considered the investment for the purposes of the PCA Tribunal's jurisdiction *ratione materiae* under Art 28(1). The Appellants, on the other hand, submit that the Judge erred in seemingly having assumed that it was impossible for more than one dispute to arise out of the same investment and in determining that the *investment* in question *had* to be the right to bring the SADC Claim, just because the *dispute* in question was the Shuttering Dispute.

118 In our judgment, the Judge, with respect, did fall into error in finding that it was "inevitable" that the relevant investment had to be the right to refer the dispute to the SADC Tribunal just because the claim in the PCA Arbitration was brought in respect of the Shuttering Dispute. In fairness to the Judge, this might have been influenced to a significant extent by the tenor of the submissions made by the parties below. In particular, before the Judge, the Appellants appeared to direct their submissions essentially to persuading the Judge that the *right to submit a dispute to the SADC Tribunal* qualifies as an investment, which in turn might have been attributable to the Kingdom's concession below (see [113] above) that the Mining Leases could, in principle,

fall within the definition of "investment" under Art 1(2) of Annex 1. However, leaving aside the Appellants' submissions below, it appears the Judge ultimately assumed that if the Mining Leases were the relevant investment, then the relevant dispute would necessarily have to be the Expropriation Dispute, which would be outside the jurisdiction *ratione temporis* of the PCA Tribunal (Judgment at [182]). This might have caused the Judge to direct virtually the entirety of his discussion on the applicable "investment" towards considering whether the right to refer a dispute to the SADC Tribunal could be the alleged investment. In this regard, we make two main observations.

119 First, we are satisfied that the Appellants never took the position that the Mining Leases could not be regarded as the relevant investment under Art 28(1) of Annex 1. In fact, in the PCA Arbitration, the Appellants maintained that their protected investments include the rights to performance under the Mining Leases, and "the right to claim compensation (including lost profits) for the unlawful taking of the Mining Leases in a neutral independent forum". The PCA Tribunal found for the Appellants, holding that the investment indeed comprised these elements. The Judge acknowledged this finding (see Judgment at [184]). Given that before the Judge, the Appellants were simply defending the PCA Tribunal's findings, there would have been no reason for the Appellants to abandon the case they had successfully run before the PCA Tribunal that the Mining Leases were investments under Art 28(1), and we are satisfied that they did not in fact do so.

120 Next, we think it is important in this context not to conflate the concept of an *investment* with two related but distinct concepts. First, there is the concept of a *right*, which constitutes or is part of all that makes up the investment. Second, there is the concept of the *dispute*. An investment treaty claim commenced pursuant to a dispute resolution clause like Art 28(1) of Annex 1 is

brought not in respect of an investment *per se*, but in respect of a *dispute* that arises out of the alleged violation of a *right* that constitutes, or is part of, or attaches to, an investment. An investment is generally not limited to a single right, such as the primary right to exploit the investment; instead, it generally encompasses a *bundle of rights*, which includes not only the primary right to exploit the investment, but also, among other things, the secondary right to seek remedies and to vindicate the primary right, if and to the extent that the primary right has the requisite territorial nexus with the host State and has been violated. Hence, where a particular right that constitutes a part of an investment has been violated, and this gives rise to a dispute, a claim may be brought in respect of that dispute. But the right that has been violated need not necessarily be the primary right to exploit the investment, and a dispute in respect of which an investment treaty claim is brought *could* conceivably concern the breach of a secondary right to vindicate the primary right, provided that secondary right is found to be part of the investment that the host State has undertaken to protect and has the requisite territorial nexus with the host State.

121 This understanding of an investment as a bundle of rights is not a novel conceptual construct in international investment law. The Appellants cite a number of authorities in support of such an understanding and analysis. In *Douglas*, express reference is made to the concept of a "bundle of rights" when the author proposes the following rule to encapsulate the various elements that an investment must satisfy in the context of an investment treaty arbitration (at p 170):

> The legal materialisation of an investment is the acquisition of a *bundle of rights* in property that has the characteristics of one or more of the categories of an investment defined by the applicable investment treaty where such property is situated in the territory of the host state or is recognised by the rules of the host state's private international law to be situated in the host

> state or is created by the municipal law of the host state. [emphasis added]

122 In *ATA Construction, Industrial and Trading Company v The Hashemite Kingdom of Jordan*, ICSID Case No ARB/08/2, Award, 18 May 2010 ("*ATA v Jordan*"), the tribunal held (at [96]) that:

> … *an investment is not a single right but is, like property, correctly conceived of as a bundle of rights, some of which are inseparable from others and some of which are completely free-standing.* This is why it is not unusual for 'measures' with respect to the same investment to give rise to claims of different violations of a BIT and different defenses on the part of the respondent State, and likewise for tribunals to find that there were violations on some measures and not on others … [emphasis added]

123 The concept of an investment as a "bundle of rights" was also referred to in *Hochtief AG v The Argentine Republic*, ICSID Case No ARB/07/31, Decision on Jurisdiction, 24 October 2011 ("*Hochtief v Argentina*"), where the tribunal analysed whether dispute settlement constituted an "activity in connection with investments" for the purposes of determining whether Argentina's obligation to provide Most Favoured Nation treatment to German investors extended to allowing such investors to avail themselves of more favourable dispute settlement provisions in a bilateral investment treaty ("BIT") between Argentina and Chile. The tribunal held as follows (at [66]–[68]):

> 66 The Tribunal considers that the phrase 'the management, utilization, use and enjoyment of an investment' does include recourse to dispute settlement, as an aspect of the management of the investment. Indeed, *the ('procedural') right to enforce another ('substantive') right is one component of the bundles of rights and duties that make up the legal concept of what property is.*
>
> 67 This is clear if one considers the case of a claim to money or to performance having an economic value, both of which are stipulated by Article 1(c) of the Argentina-Germany BIT to be within the definition of an 'investment, or of intellectual property rights, addressed in Article 1(d). The argument that

> although a State could not cancel such claims or intellectual property rights without violating the BIT, it could cancel the right to pursue the claims or enforce the intellectual property rights through litigation or arbitration without violating the BIT is nonsensical. It is nonsensical because *the right to enforcement is an essential component of the property rights themselves, and not a wholly distinct right.*
>
> 68 This is a perfectly reasonable interpretation of the BIT. The BIT is an agreement both for the promotion and for the reciprocal protection of investments. It is an agreement between two States, which no doubt is intended to operate to the benefit of both States but which plainly confers benefits directly upon investors. The Tribunal considers that *the provisions of Article 10, which on any interpretation confer upon investors the possibility of recourse to arbitration in addition to the right to have recourse to national courts, are a form of protection that is enjoyed within the scope of 'the management, utilization, use and enjoyment of an investment'.* Unlike the inter-State dispute settlement provisions in Article 9, which safeguard the interests of the States parties in the event of a dispute regarding the interpretation or application of the BIT, *Article 10 is a benefit conferred on investors and designed to protect their interests and the interests of a State Party in its capacity as a host State party to a dispute with an investor: it is a protective right that sits alongside the guarantees against arbitrary and discriminatory measures, expropriation, and so on.*
>
> [emphasis added]

124 In our judgment, these authorities support the notion that an "investment" comprises a "bundle of rights", which in turn *may* in principle include the secondary (procedural) right to bring a claim in order to vindicate the primary (substantive) right to enjoy and exploit the commercial benefit of the investment.

125 Before us, the *amici curiae* too advanced the view that an investment comprises a bundle of rights, and that this would typically include the secondary right to take any available measures to remedy any interference with the primary right to exploit the investment. In this regard, they make the following helpful observations:

> 128. **Investments, like the Mining Leases, can be conceived as entailing a '*bundle of rights*' that includes secondary rights of enforcement in addition to the primary possessory rights that comprise the investor's property in the asset**. …
>
> …
>
> 130. Issues of jurisdiction *ratione materiae* similar to those raised here have arisen in other cases where claimants have sought to bring claims under investment treaties in circumstances in which their original investment has been terminated, revoked or has otherwise come to an end. In such cases, tribunals have found that **a later claim should be understood as part of the '*bundle of rights*' held by the underlying investment and, for jurisdictional purposes, should be considered as a continuation of the underlying investment**.
>
> …
>
> 133. It warrants noting that unless the treaty restricts the tribunal's jurisdiction to only a limited number of obligations, as is the case with some treaties, **the protection afforded to the subsisting rights in an investment under an investment treaty will be the full range of obligations, breach of which can be submitted to arbitration**. …
>
> 134. The approach can be explained in practical terms. If the termination of property/ownership rights with respect to an investment were to terminate the investor's right to claim under a treaty, a host State could simply terminate investment rights and, with them, any future treaty claims. Instead, **for jurisdictional purposes, to the extent that a claim is brought in respect of an investment by the investor's acceptance of the State's offer to arbitrate contained in an investment treaty, the right to bring such claim vests and becomes part of the '*bundle of rights*' that survives even after the original investment has come to an end**.
>
> [emphasis in original in italics; emphasis added in bold]

126 The Judge, however, rejected this analysis on the ground that the right to refer a dispute to the SADC Tribunal is *not sufficiently connected* with the Appellants' core investment (which were the Mining Leases) as to be considered part of the corresponding bundle of rights. This is how he put it (at [217]):

> … The alleged secondary right … arose under the SADC Treaty (which entered into force in 1993) and the Tribunal Protocol (which entered into force in 2001), much later than the Mining Leases themselves (which were granted in 1988). The 'bundle of rights' analysis relied upon by the majority is therefore inappropriate: *the conferral of this 'secondary right' was not reciprocal with the defendants' contractual obligations under the Mining Leases, but arose much later.* At the point in time when the defendants acquired the Mining Leases, they did not have the advantage of any treaty protections. The right of recourse to the SADC Tribunal was not given to the defendants (or other investors) in response to, in exchange for or in recognition of their investment activities in the Kingdom. [emphasis in original]

127 We accept the general observation that reciprocity is one of the identifying features of an investment treaty. It is undoubtedly true, as the Judge explained, that investment treaties necessarily operate on the basis of a *quid pro quo* with potential third party investors, and that the protection granted under an investment treaty is operative only when an investor has satisfied its part of the *quid pro quo* by making an investment in the host State (see Judgment at [218], citing *Douglas* at paras 273 and 275).

128 However, we respectfully disagree with the Judge's reasoning that the right to refer a dispute to a dispute resolution forum must necessarily accrue to the Appellants *at precisely the same time* as the acquisition of the Mining Leases. In this regard, we prefer the analysis of the *amici curiae*, who submit that there is no general rule in international investment law that makes *temporal* reciprocity a condition for protection. According to the *amici curiae*, a right associated with an investment need not be in existence at the time the investment was originally made in order for that right to be protected under the investment treaty, given that the "protection afforded by investment treaties is not static, rather, it is dynamic". Indeed, the protection afforded by a treaty may even apply to investments that were made *before* the treaty was concluded: see, for instance, *Douglas* at paras 632, 636 and 637; and *McLachlan* at para 6.58.

129 This is further supported by various provisions that are found in Annex 1. Article 1(2) of Annex 1 defines an "investor" as "a person that has been admitted to make or *has made* an investment" [emphasis added], which suggests that an investor who has made an investment *prior to* the entry into force of Annex 1 could nonetheless be an investor eligible for protection under Art 28(1) of Annex 1. Similarly, Art 28(4) of Annex 1 only imposes a temporal limit on the applicability of Art 28(1) in respect of *disputes* that arose prior to the entry into force of Annex 1, and says nothing about *investments* that were entered into prior to the entry into force of Annex 1. This suggests that investments need not be entered into at the same time as or only after Annex 1 has been entered into for Art 28(1) to be applicable.

130 Finally, Art 6(2) of Annex 1 guarantees that the FET standard of protection afforded to an investment under Art 6(1) of Annex 1 shall be no less favourable than the protections afforded to an investment made by an investor under an investment treaty entered into by the host State with another third State. Given that it is possible for the Kingdom to enter into a *subsequent* investment treaty with another third State and accord the investors of that third State more favourable substantive investment guarantees that might fall within the FET standard of protection under that treaty, the fact that Art 6(2) of Annex 1 would allow those investors who are already covered by Annex 1 to acquire greater standards of FET protection under the later treaty (at a time *after* Annex 1 had already been entered into) further supports the view that temporal reciprocity was not intended to be a condition of protection for investments under Annex 1.

131 While the Kingdom denies that the right to refer a dispute to the SADC Tribunal is a part of the bundle of rights that comprises the Mining Leases as an investment for the purpose of Art 28 of Annex 1, it does not challenge the

contention that the "bundle of rights" analysis may accommodate various causes of action arising in an investment treaty claim; it also does not contend that the "bundle of rights" conception of a property right is objectionable in principle. We therefore adopt, in our analysis, the approach that the investment acquired by the Appellants, that is, the Mining Leases, can in principle comprise *a multitude of rights*.

132 For the foregoing reasons, we respectfully find that the Judge erred in assuming that the only dispute that may arise out of the Mining Leases is the Expropriation Dispute, which would be outside the PCA Tribunal's jurisdiction *ratione temporis*, and in rejecting the Mining Leases as the qualifying investment for this reason. In our judgment, the Mining Leases may be the qualifying investment subject to these coming within the definition of an investment in Art 1(2) of Annex 1. Having said that, whether the bundle of rights constituting the Mining Leases includes the right to refer a dispute to the SADC Tribunal, or for that matter, the SADC Claim itself, is another question altogether. It is to this question that we now turn.

(3) The right to refer the dispute to the SADC Tribunal and the SADC Claim

133 The Appellants contend that the right to refer a dispute to the SADC Tribunal (hereinafter, "the right to refer") as well as the SADC Claim can each qualify as protected investments under Art 28(1) of Annex 1 on either or both of the following two bases:

(a) First, they form part of the bundle of rights that constitutes the Mining Leases, and hence are an "integrated part of the Appellants' investment in the Mining Leases".

(b) Second, they constitute "stand-alone investments" in their own right that fulfil the definition of an "investment" in Art 1(2) of Annex 1, either as a "continuation or transformation" of the original investment in the Mining Leases, or on their own terms.

134 For conceptual clarity, and in the light of the distinction between an investment and a right which we articulated at [120] above, we find it more appropriate to proceed by examining: (a) whether the *right* to refer (rather than a pending *claim* like the SADC Claim) falls within the bundle of *rights* constituting the Mining Leases; and (b) whether the original investment of the Mining Leases "continued or transformed" into the SADC Claim (rather than the general right to refer). In the result, nothing turns on the way we streamline the Appellants' arguments because we find, in any case, that neither the right to refer nor the SADC Claim can be an investment in itself or a right falling within the bundle of rights constituting the Mining Leases.

(A) WHETHER THE RIGHT TO REFER FALLS WITHIN THE BUNDLE OF RIGHTS CONSTITUTING THE MINING LEASES

135 We turn to the first question of whether the right to refer falls within the bundle of rights constituting the Mining Leases. For the reasons that follow, we reject the Appellant's argument in this regard because we find that the putative right to refer the dispute to the SADC Tribunal did not have the requisite territorial nexus with the Kingdom, and in any event, did not even exist at the time the SADC Claim was brought.

(I) THE TERRITORIAL NEXUS REQUIREMENT

136 It is useful for us to revisit the significance of the territorial nexus requirement, which we have set out at [101]–[103] above and which we restate

briefly here. An investment must be made or located within the territory of the host State in order to be eligible for protection under the relevant investment treaty. When an investment is made, an investor acquires property and other rights which exist under the domestic law of the host State. The scope of those rights are to be determined as a matter of the host State's domestic law. Where a host State undertakes obligations in international law to protect foreign investments, the extent of such protection depends on the rules of international law and the terms of the treaty. As we have explained at [99]–[109] above, a foreign investor cannot reasonably expect protection of an investment located outside the host State's borders given that the host State can only control acts that occur within its jurisdiction.

137 These principles apply also to particular *rights* that are said to fall within the bundle of rights comprising an investment. Such rights must likewise exist within the host State's territory and arise as a matter of the host State's *domestic law*, in order to be protected as part of the investment. It is generally not sufficient for a right to exist only extraterritorially or on the international law plane, unless that right is within the State's sole control or the State has expressly undertaken to guarantee that specific right. What again underlies these points is the simple reality that a State would not ordinarily undertake to protect any rights held by an investor from acts that are not within the State's control and jurisdiction. In our judgment, this is the crux of where the Appellants' case runs into difficulty.

138 In the present case, we have accepted that the Mining Leases comprise a bundle of rights which may, in principle, include the secondary right to bring a claim to vindicate a breach of the primary right to exploit the investment. But the Appellants assert that the only relevant right here is the right to refer its dispute to the SADC Tribunal. Even supposing that this right did in fact validly

exist (a premise which we do not accept for reasons we will later explain), they could not have been part of the Mining Leases' bundle of rights recognised under the Kingdom's domestic law, nor would they have fallen within the Kingdom's enforcement jurisdiction.

139 On the Appellants' own case, the right to refer arises out of the provisions in the SADC Treaty and the Tribunal Protocol. These multilateral treaty instruments were entered into by the SADC Member States to create the SADC Tribunal, a unique international entity capable of hearing and adjudicating upon claims for relief against SADC Member States. It is clear from the source of the Appellants' right to refer that it is a right which exists only on the international law plane and its assurance was not a matter within the control of the Kingdom as it was entirely dependent on the existence and maintenance of a mechanism established under international law by the consent of the SADC Member States.

140 In this regard, the Appellants contend that the Kingdom was in fact in a position to guarantee their right to refer by preventing the shuttering of the SADC Tribunal, because Art 19 of the SADC Treaty provides that "[e]xcept as otherwise provided in this Treaty, decisions of the institutions of the SADC shall be taken by consensus". On this basis, they argue that the Kingdom could, on its own, have vetoed or prevented the decisions that resulted in the shuttering of the SADC Tribunal, and hence it would have been within the Kingdom's enforcement jurisdiction to guarantee their right to refer. However, there are in fact provisions in the SADC Treaty that *provide otherwise*.

141 As the Kingdom submits, Arts 35 and 36 of the SADC Treaty evince the true position as to what the Kingdom could have done in respect of the shuttering of the SADC Tribunal. Those provisions read as follows:

ARTICLE 35

DISSOLUTION

1. The Summit may decide by a resolution supported by three-quarters of all members to dissolve SADC or any of its institutions, and determine the terms and conditions of dealing with its liabilities and disposal of its assets.

2. A proposal for the dissolution of SADC may be made to the Council by any Member State, for preliminary consideration, provided, however, that such a proposal shall not be submitted for the decision of the Summit until all Member States have been duly notified of it and a period of twelve months has elapsed after the submission to the Council.

CHAPTER FOURTEEN

AMENDMENT OF THE TREATY

ARTICLE 36

1. An amendment of this Treaty shall be adopted by a decision of three-quarters of all the Members of the Summit.

2. A proposal for the amendment of this Treaty may be made to the Executive Secretary by any Member State for preliminary consideration by the Council, provided, however, that the proposed amendment shall not be submitted to the Council for preliminary consideration until all Member States have been duly notified of it, and a period of three months has elapsed after such notification.

142 It is evident from Art 35 that the SADC itself as well as any institution constituted under the SADC Treaty (including the SADC Tribunal) could have been dissolved at any time, as long as three-quarters of all the heads of State at the SADC Summit or three-quarters of all the Member States were to adopt a resolution implementing such a decision. Article 36 also makes clear that the same three-quarters majority could have amended the SADC Treaty to achieve a similar outcome. It would therefore have been impossible for the Kingdom, acting alone, to have vetoed or prevented any such resolution which the rest of

the SADC Member States had all agreed to pass. Accordingly, as a matter of the interpretation of the SADC Treaty, it seems to us that the right to refer is simply not a right that was capable of being guaranteed by the Kingdom acting unilaterally. In our judgment, the right to refer thus falls outside the Kingdom's enforcement jurisdiction, and does not have the requisite territorial nexus with the Kingdom so as to implicate its investment protection obligations under the relevant treaties.

143 There is nothing novel in the foregoing analysis. An investor can only reasonably expect protection in respect of matters falling within a State's enforcement jurisdiction, and a State cannot as a matter of international law be compelled to guarantee a right that lies outside of its enforcement jurisdiction (see [102] above). Once the SADC Tribunal ceased to be operative by a decision of the SADC Member States which the Kingdom was not in a position to prevent, there was no mechanism at international law by which any claim to enforce the Mining Leases could be adjudicated, and for the reasons set out at [84]–[91] above, there was no unilateral declaration or undertaking by the Kingdom to bind itself to some other avenue of enforcement.

144 We elaborate on the lack of a territorial nexus by drawing a distinction between the present case on the one hand, and either a simple arbitration clause in a BIT or a right to refer such claims pursuant to the ICSID Convention on the other. Although an investor's right to commence proceedings against a host State under an arbitration clause in a BIT is a right that arises pursuant to an international law instrument to which the State is party, it is nonetheless a right that lies within the enforcement jurisdiction of the host State and can be guaranteed by that State acting unilaterally. In such a situation, there seems to be no reason for holding that the right to arbitrate under the BIT would fail the territorial nexus requirement. This may not be the case, however, where the

means of recourse depends on the consent of others. A comparison between the constitutive instruments of the SADC Tribunal and a multilateral treaty establishing a dispute resolution mechanism like the ICSID Convention reveals the difficulty in the Appellants' case: suppose that the International Centre for Settlement of Investment Disputes ("the ICSID") were disbanded following the termination or amendment of its constitutive instrument, that is, the ICSID Convention, would a host State be taken to be bound to uphold and secure an investor's right to have his claim heard by an ICSID tribunal?

145 To answer this question, regard must be had to the provisions of the ICSID Convention. Unlike Art 36(2) of the SADC Treaty, which only requires a three-quarters majority to pass an amendment to the treaty (see [142] above), Art 66(1) of the ICSID Convention provides that amendments may only enter into force once they are ratified by *all* contracting States. The ICSID Convention does not contain a provision on termination, which means that under the default rule in Art 54 of the VCLT, the consent of all contracting States would be required to terminate the ICSID Convention. Hence, it would lie within a host State's control to prevent any attempt to either terminate the ICSID Convention or to introduce amendments to the ICSID Convention that would disband the ICSID dispute resolution mechanism. Further, the ICSID Convention contains a saving clause at Art 66(2), which states that any amendments to the ICSID Convention "shall [not] affect the rights and obligations under this Convention of any Contracting State … or of any national of such State arising out of consent to the jurisdiction of the Centre given before the date of entry into force of the amendment". The upshot of this saving clause is that once an investor has accepted the host State's standing offer to arbitrate an investment dispute pursuant to the ICSID dispute resolution mechanism, the investor would have an enforceable right for that investment dispute to be arbitrated in accordance

with the ICSID Convention. That is a right that seems to us not to be contingent upon the continuing existence of the ICSID dispute resolution mechanism. The constitutive instruments of the SADC Tribunal are distinguishable in that they create a regime where the host State is not able to singlehandedly prevent the shuttering of the SADC Tribunal if the requisite majority has already been obtained, such that any right to submit a dispute to arbitration is ultimately dependent on the continuing consent of the SADC Member States to the maintain the existence of the SADC Tribunal mechanism under international law. Furthermore, because of the absence of a saving clause, the right of an investor to pursue a claim before a SADC tribunal or some functional equivalent would not survive the termination of the constitutive treaty instruments. The right to refer therefore fails the territorial nexus requirement because it is a right that exists only in international law, and which lay outside the Kingdom's enforcement jurisdiction and its control, and which it could not therefore secure or guarantee.

(II) THE EXISTENCE OF THE RIGHT TO REFER

146 In any event, we doubt whether the Appellants even had a right to refer to begin with. The Kingdom asserts that the SADC Treaty and the Tribunal Protocol are *not* investment protection instruments, and confer upon the Appellants no enforceable right of access to the SADC Tribunal and no corresponding obligation on the part of the SADC Member States to protect or defend the existence of the SADC Tribunal. This submission, taken to its logical conclusion, would suggest that the right of investors to refer a dispute to the SADC Tribunal did not even exist at the time the SADC Claim was brought. In our judgment, the SADC Treaty and the Tribunal Protocol are indeed *not* investment protection instruments, and there was indeed no substantive right to

refer. Hence, such a right, which did not in fact exist, could not constitute part of the relevant bundle of rights for the purposes of Art 28(1) of Annex 1.

147 To explain this, we set out the background to the SADC and the relevant treaty instruments. The SADC was established as a regional organisation with the objectives of advancing economic development and integration, strengthening the social and cultural ties, and eradicating poverty and communicable diseases in the Southern African region. The objectives of the SADC are set out in full at Art 5(1) of the SADC Treaty, which provides as follows:

ARTICLE 5

OBJECTIVES

1. The objectives of the SADC shall be to:

   (a) promote sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration;

   (b) promote common political values, systems and other shared values which are transmitted through institutions which are democratic, legitimate and effective;

   (c) consolidate, defend and maintain democracy, peace, security and stability;

   (d) promote self-sustaining development on the basis of collective self-reliance, and the interdependence of [SADC] Member States;

   (e) achieve complementarity between national and regional strategies and programmes;

   (f) promote and maximise productive employment and utilisation of resources of the Region;

> (g) achieve sustainable utilisation of natural resources and effective protection of the environment;
>
> (h) strengthen and consolidate the long standing historical, social and cultural affinities and links among the people of the Region;
>
> (i) combat HIV/AIDS or other deadly and communicable diseases;
>
> (j) ensure that poverty eradication is addressed in all SADC activities and programmes; and
>
> (k) mainstream gender in the process of community building.

148 The constitutive instrument of the SADC is the SADC Treaty, which was signed on 17 August 1992 and entered into force on 30 September 1993. In pursuit of these objectives, Art 9 of the SADC Treaty establishes a number of institutions including the SADC Summit, the SADC Council of Ministers and the SADC Tribunal.

149 Article 16(1) of the SADC Treaty provides for the establishment of the SADC Tribunal "to ensure adherence to and the proper interpretation of the provision of [the SADC] Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it". Article 32 in turn contains a dispute settlement clause that provides as follows:

> **CHAPTER TWELVE**
>
> **SETTLEMENT OF DISPUTES**
>
> ARTICLE 32
>
> Any dispute arising from the interpretation or application of [the SADC] Treaty, the interpretation, application or validity of Protocols or other subsidiary instruments made under [the SADC] Treaty, which cannot be settled amicably, shall be referred to the [SADC] Tribunal.

150 On 7 August 2000, the SADC Member States entered into the Tribunal Protocol, which came into force on 14 August 2001. As envisaged under Art 16(2) of the SADC Treaty, the Tribunal Protocol governs matters relating to the SADC Tribunal such as its composition, powers, functions and procedures. Articles 14 and 15 of the Tribunal Protocol set out the basis and scope of the SADC Tribunal's jurisdiction respectively as follows:

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

151 The Kingdom submits that none of these provisions in the SADC Treaty or the Tribunal Protocol confer upon investors any independent and enforceable right to refer *an investment dispute* to the SADC Tribunal. To this end, the Kingdom first claims that the SADC Treaty is primarily concerned with the establishment of the SADC and its key organs and institutions, and that while Art 32 of the SADC Treaty is a dispute resolution clause, it is only intended to provide for a mechanism for the resolution of *inter-State* disputes amongst the SADC Member States.

152 We agree. In our judgment, the SADC Treaty is not intended to accord any specific or enforceable rights to investors. We are satisfied, from the ordinary meaning of Art 32 of the SADC Treaty and its surrounding provisions, that Art 32 is only intended to provide for a dispute resolution mechanism between SADC Member States in respect of inter-State disputes. In particular, the sole provision in the SADC Treaty that makes any reference whatsoever to "investment" is Art 21(3)(c). The relevant parts of Art 21 state as follows:

CHAPTER SEVEN

CO-OPERATION

ARTICLE 21

AREAS OF CO-OPERATION

1. Member States shall cooperate in all areas necessary to foster regional development and integration on the basis of balance, equity and mutual benefit.

2. Member States shall, through appropriate institutions of SADC, coordinate, rationalise and harmonise their overall macro-economic policies and strategies, programmes and projects in the areas of co-operation.

3. In accordance with the provisions of [the SADC] Treaty, Member States agree to co-operate in the areas of:

...

> (c) trade, industry, finance, *investment* and mining;
>
> …
>
> [emphasis added]

Evidently, Art 21 only refers to "investment" as one of the many areas of cooperation in respect of which the SADC Member States have undertaken, pursuant to the SADC Treaty, to "coordinate, rationalise and harmonise their overall macro-economic policies and strategies, programmes and projects". That is clearly insufficient as a contextual basis upon which to construe Art 32 as conferring upon investors in the SADC Member States the right to bring an investment protection claim under the SADC Treaty.

153 Next, the Kingdom argues that Arts 14 and 15 of the Tribunal Protocol do not constitute an independent basis of jurisdiction for the SADC Tribunal to assume jurisdiction over a dispute given that they are functionally equivalent to Arts 36(1) and 34(1) of the Statute of the International Court of Justice (26 June 1945) TS 993 (entered into force 24 October 1945) ("the ICJ Statute") respectively, neither of which establishes an independent basis of consent for the submission of any independent dispute to the International Court of Justice ("the ICJ").

154 We also agree with the Kingdom on this point. In our judgment, Arts 14 and 15 of the Tribunal Protocol are not jurisdiction-conferring provisions that establish any basis of consent by the SADC Member States to the submission of particular investment disputes by private investors to the SADC Tribunal; indeed, a contrary conclusion would constitute a radical expansion of the jurisdiction of the SADC Tribunal which is unsupported by the text and surrounding context of the Tribunal Protocol.

155 First, in relation to Art 14, we accept the functional parallels drawn by the Kingdom with Art 36(1) of the ICJ Statute, which provides as follows:

> The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specifically provided for in the Charter of the United Nations or in treaties and conventions in force.

Article 36(1) of the ICJ Statute is, in our view, a provision that is merely declaratory of the competence of the ICJ in general terms, such that it remains necessary for a State which is party to a dispute to *separately* accept the jurisdiction of the ICJ, whether by means of a declaration to this effect (as provided for in Art 36(2)), or by referring a dispute to the court (as provided for in the first part of Art 36(1)) through special agreement concluded with the other party (or parties) to the dispute, or by identifying and bringing itself within a specific dispute settlement clause contained in a particular treaty that encapsulates the consent of the State and so confers jurisdiction on the ICJ (as provided for in the second part of Art 36(1)). Similarly, in order for Art 14 of the Tribunal Protocol to confer upon any investor a right to refer a dispute to the SADC Tribunal, it is necessary for the investor to identify and bring itself within either the dispute settlement clause provided for under any applicable protocol or subsidiary instrument adopted within the framework of the SADC (as required under Art 14(b)), or a separate agreement that a SADC Member State has entered into and which expressly confers jurisdiction upon the SADC Tribunal to hear disputes submitted by investors (as required under and contemplated in Art 14(c)).

156 Second, as regards Art 15, we also accept the functional parallels drawn by the Kingdom with Art 34(1) of the ICJ Statute, which defines in general terms the competence *ratione personae* of the ICJ, and simply provides that "[o]nly states may be parties in cases before the Court". Indeed, just as Art 34(1)

of the ICJ Statute does not establish an independent basis for a State wishing to submit a dispute to the ICJ to do so, Art 15 of the Tribunal Protocol too does not constitute an independent basis of jurisdiction. Specifically, while Art 15(3) obviates the need for any further specific submission to the jurisdiction of the SADC Tribunal where a dispute is referred to it, this does not affect the requirement that there must in the first place be a relevant protocol, subsidiary instrument or inter-State agreement as envisioned under Arts 14(b) and 14(c) of the Tribunal Protocol that serves to confer jurisdiction upon the SADC Tribunal to hear and determine the dispute submitted by an investor against a SADC Member State.

157 Further, the entry into force of the Investment Protocol in 2010 does not lead us to a different conclusion. In this regard, it might be contended that the Investment Protocol confers upon the SADC Tribunal the jurisdiction to hear cases involving investment disputes between an investor and a State Party. The Investment Protocol does provide for the submission of investment disputes between an investor and a State Party to international arbitration pursuant to Art 28(1) of Annex 1 to the Investment Protocol, which provides for "[d]isputes between an *investor* and a State Party concerning an obligation of the latter in relation to an admitted investment of the former" [emphasis added] to be submitted to international arbitration. Article 28(2)(a) also provides for such disputes to be submitted to *the SADC Tribunal*. Hence, it might be argued that upon the Investment Protocol's entry into force, Arts 28(1) and 28(2)(a) of Annex 1 to the Investment Protocol, read together with Art 14(c) of the Tribunal Protocol, operated to vest in the SADC Tribunal the requisite jurisdiction to hear the SADC Claim.

158 However, in our judgment, the entry into force of the Investment Protocol did *not* confer upon the SADC Tribunal the jurisdiction to hear and

determine the SADC Claim. Specifically, it did not confer upon the Appellants the right to refer the Expropriation Dispute to the SADC Tribunal. This is because the Expropriation Dispute had arisen long before the Investment Protocol entered into force. Since Art 28(4) of Annex 1 expressly excludes the application of Art 28 to any "dispute, which arose before entry into force of this Annex", the SADC Claim would have fallen outside the SADC Tribunal's jurisdiction *ratione temporis*. For these reasons, we do not think that the Appellants had any right to refer the dispute in question, namely the Expropriation Dispute, to the SADC Tribunal at the time they brought the SADC Claim, and hence the asserted right to refer, which was non-existent, could not have formed part of the bundle of rights constituting the Mining Leases.

159 That said, we do acknowledge that the SADC Tribunal had in fact assumed jurisdiction in certain claims brought by investors against the Republic of Zimbabwe. For example, in its 2008 decision in *Campbell v Zimbabwe* (see [26] above), the SADC Tribunal took jurisdiction pursuant to Art 15 of the Tribunal Protocol even though there did not appear to have been any other agreement entered into between Zimbabwe and the home States of the claimant investors that would confer jurisdiction upon the SADC Tribunal to hear those disputes (as required under Art 14(c)). The SADC Tribunals in that case appeared to have assumed that Arts 14 and 15 of the Tribunal Protocol on their own gave investors the right to submit a claim for their determination, without engaging in any substantial analysis to validate this assumption. This does not sit well with our finding that Arts 14 and 15 of the Tribunal Protocol do not, without more, give investors the right to refer a dispute to the SADC Tribunal. With respect, we doubt the correctness of those aspects of *Campbell v Zimbabwe*. Significantly, we note that this appears to be what led the SADC

Summit to suspend the operation of the SADC Tribunal and to introduce changes to the Tribunal Protocol confining the SADC Tribunal's jurisdiction to inter-State disputes: see [26] above.

160 We do note that the SADC Tribunal too had assumed jurisdiction over the SADC Claim pursuant to Art 15 of the Tribunal Protocol (see [25] above). There was no suggestion that the SADC Claim had been brought pursuant to a separate agreement entered into between the Kingdom and South Africa which purports to expressly confer jurisdiction upon the SADC Tribunal to hear disputes submitted by investors including the likes of the Appellants (as required under Art 14(c) of the Tribunal Protocol). This would therefore suggest, on the basis of our analysis, that the SADC Tribunal did *not* in fact properly assume jurisdiction over the SADC Claim. When questioned on this point during the hearing, counsel for the Appellants submitted that the Kingdom did *not* in fact take any jurisdictional objections on these specific grounds before the SADC Tribunal when the SADC Claim was afoot, while counsel for the Kingdom was unable to confirm or deny whether these specific jurisdictional objections had been taken before the SADC Tribunal. We say no more about whether the SADC Tribunal indeed lacked the jurisdiction to hear and determine the SADC Claim, given that the focus of our inquiry is simply whether the right to refer formed part of the bundle of rights constituting the Mining Leases. As to this, we have found that such a right, even assuming its existence, would not have formed part of the relevant bundle of rights for want of the necessary territorial nexus. Aside from this, we also do not think it even existed at the relevant time and, for this reason, also could not have formed part of the relevant bundle of rights constituting the Mining Leases.

161 For completeness, we also reject the Appellants' alternative characterisation of the right to refer as an investment in itself (see [133] above)

for the same reasons, namely that the asserted right to refer fails to satisfy the territorial nexus requirement and, in any event, did not exist when the SADC Claim was brought.

(B) WHETHER THE SADC CLAIM CONSTITUTES A STAND-ALONE INVESTMENT

162 Finally, the Appellants argue that the part-heard SADC Claim constitutes a stand-alone investment, either as a "continuation or transformation" of the Mining Leases or on its own terms. As we have explained earlier (at [98]–[109] above), there are two requirements that an asset must satisfy in order to qualify as a protected investment under Art 28(1) of Annex 1. The first is that the asset must fall within the definition of "investment" under Art 1(2), which requires the asset to involve the "purchase, acquisition or establishment of productive and portfolio investment assets". This could, for the purposes of this appeal, include either "claims to money or to any performance under contract having a financial value, and loans" or "rights conferred by law or under contract, including licences to search for, cultivate, extract or exploit natural resources" (paras (c) and (e) of the definition of "investment" in Art 1(2), respectively). The second is that the asset must bear a sufficient territorial link with the host State. We consider each of these requirements in turn.

(I) THE ART 1(2) DEFINITION OF "INVESTMENT"

163 In our judgment, a part-heard arbitration claim such as the SADC Claim could, in principle, be considered a stand-alone investment in its own right. First, we find that the SADC Claim satisfies the Art 1(2) definition of "investment" as it is an asset that has some economic value, and therefore comfortably falls within the ambit of the requirement that it be a "purchase, acquisition or establishment of productive and portfolio investment assets". Further, the SADC Claim would specifically be a legal claim for a monetary

remedy, which thus falls within para (c) of the definition of "investment" in Art 1(2), which contemplates investment assets that are "claims to money or to any performance under contract having a financial value".

164 Second, the SADC Claim might in principle also be considered a *continuation or transformation of the original investment*, which are the Mining Leases: see the investment treaty decisions in *Mondev v USA*, *Chevron Corporation (USA) and Texaco Petroleum Corporation (USA) v The Republic of Ecuador*, PCA Case No 34877, Interim Award, 1 December 2008 ("*Chevron v Ecuador*") and *White Industries Australia Limited v The Republic of India*, Final Award, 30 November 2011 ("*White Industries v India*").

165 In *Mondev v USA*, Lafayette Place Associates ("LPA"), which was a partnership owned by a Canadian company known as Mondev International Ltd ("Mondev"), had entered into a commercial real estate development contract in 1978 with the City of Boston and the Boston Redevelopment Authority (collectively, "the Boston city authorities"). The Boston city authorities failed to meet their obligations under the contract, and the investment project failed. In 1992, LPA brought a claim seeking damages against the Boston city authorities before the courts in Massachusetts in respect of the failed investment project. The Massachusetts courts ruled against LPA. Mondev then brought a claim in arbitration against the US under the North American Free Trade Agreement (17 December 1992) 32 ILM 289 (entered into force 1 January 1994) ("the NAFTA"), seeking damages for loss and damage caused to LPA as a result of the acts of the Boston city authorities and the decision of the Massachusetts courts. The US objected to Mondev's arbitration claim, contending that the NAFTA tribunal lacked jurisdiction *ratione temporis* on the ground that there was no subsisting "investment" because the investment project

had been terminated prior to the NAFTA's entry into force, and all that Mondev had were the claims for damages before the Massachusetts courts.

166 The tribunal rejected these contentions, holding that "once an investment exists, it remains protected by the NAFTA even after the enterprise in question may have failed" (at [80]). It explained that "a person remains an investor for the purposes of [the NAFTA] even if the whole investment has been definitively expropriated, so that all that remains is a claim for compensation" (at [80]). The tribunal considered that "[t]he shareholders even in an unsuccessful enterprise retain interests in the enterprise arising from their commitment of capital and other resources, and the intent of the NAFTA is evidently to provide protection of investments throughout their life-span" (at [81]). The tribunal thus found that "there were subsisting interests relating to Mondev's investment in the project as at 1 January 1994" (at [82]), and hence Mondev had standing to bring its arbitration claim under the NAFTA (at [83]).

167 In *Chevron v Ecuador*, the Ecuadorian Government granted oil exploration and production rights in Ecuador's Amazon region to Texaco Petroleum Company ("TexPet") through a series of concession agreements in the 1960s and 1970s. Between December 1991 and December 1993, TexPet filed seven claims in breach of contract against the Ecuadorian Government in the Ecuadorian courts, claiming damages for Ecuador's breach of its obligations under the concession agreements. However, the Ecuadorian courts did not rule on any of the cases for well over a decade. In May 2006, TexPet and its parent company, Chevron Corporation (collectively, "the Claimants"), commenced an arbitration in the PCA against Ecuador, alleging a denial of justice and a breach of Ecuador's obligations under the Treaty Between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment (27 August 1993) (entered into force 11 May 1997)

("the US–Ecuador BIT"). Whereas the concession agreements had been terminated prior to the entry into force of the US–Ecuador BIT, the Ecuadorian lawsuits were still ongoing in the courts when the BIT came into force. Ecuador argued that TexPet's lawsuits in the Ecuadorian courts could not, on their own, be considered an "investment" under the BIT.

168 The tribunal rejected this argument, finding that "the Claimants had what would be considered to be an investment in Ecuador in their oil exploration and extraction activities ranging from the 1960s to the early 1990s", and that the Ecuadorian lawsuits "concern the liquidation and settlement of claims relating to the investment and, therefore, form part of the investment" (at [180]). The tribunal further elaborated (at [183] and [184]) as follows:

> 183 … [O]nce an investment is established, the BIT intends to close any possible gaps in the protection of that investment as it proceeds in time and potentially changes form. Once an investment is established, it continues to exist and be protected until its ultimate 'disposal' has been completed – that is, until it has been wound up.
>
> 184 The Claimants' investments were largely liquidated when they transferred their ownership in the concession to PetroEcuador and upon the conclusion of various Settlement Agreements with Ecuador. Yet, those investments were and are not yet fully wound up because of ongoing claims for money arising directly out of their oil extraction and production activities under their contracts with Ecuador and its state-owned oil company. … *The Claimants continue to hold subsisting interests in their original investment, but in a different form. Thus, the Claimants' investments have not ceased to exist: their lawsuits continued their original investment through the entry into force of the BIT and to the date of commencement of this arbitration.*
>
> [emphasis added]

In so finding, the tribunal cited with affirmation (at [185] and [186]) the analysis of the tribunal in *Mondev v USA*.

169 Finally, in *White Industries v India*, Coal India, an Indian state-owned company, entered into a contract in 1989 with White Industries Australia Limited ("White"), an Australian company, for White to supply equipment to Coal India in the development of a coal mine in India. Disputes subsequently arose as to whether White was entitled to certain bonus payments, and whether Coal India was entitled to certain penalty payments under the contract. In 1999, White brought an arbitration claim pursuant to the arbitration clause in the contract providing for arbitration under the International Chamber of Commerce ("ICC") Arbitration Rules. The ICC tribunal rendered an award in favour of White. In 2002, Coal India applied to the Indian courts to set aside the ICC award. White in turn applied to the Indian courts to enforce the ICC award. After close to eight years, as at 2010, White's application for enforcement was still pending before the Indian courts, and remained unheard and undecided. White then brought an investment treaty claim against the Republic of India, alleging breaches of various provisions under the Agreement Between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments (26 February 1999) 2116 UNTS 145 (entered into force 4 May 2000) ("the Australia–India BIT") due to the failure of the Indian courts to hear and determine White's application for enforcement. An issue that arose was whether White's rights under the ICC award could constitute an "investment" for the purposes of the Australia–India BIT.

170 The tribunal held that White's rights under the ICC award "constitute part of White's original investment (i.e., being a [crystallisation] of its rights under the Contract) and, as such, are subject to such protection as is afforded to investments by the BIT" (at [7.6.10]). In arriving at this finding, the tribunal endorsed (at [7.6.4]) the reasoning adopted in the decision of *Saipem SpA v The People's Republic of Bangaldesh*, ICSID Case No ARB/05/07, Decision on

Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, where it was held that "the rights embodied in the ICC Award were not created by the Award, but arise out of the [c]ontract. The ICC Award crystallized the parties' rights and obligations under the original contract" (at [127]). The tribunal in *White Industries v India* also observed that the tribunals in, amongst others, *Mondev v USA* and *Chevron v Ecuador*, had similarly "characterised arbitral awards as 'continuing' an investment under a contract" (at [7.6.5]). Finally, the tribunal concluded that there was a "developing jurisprudence … to the effect that awards made by tribunals arising out of disputes concerning 'investments' made by 'investors' under BITs represent a continuation or transformation of the original investment" (at [7.6.8]).

171 From the foregoing discussion, it is clear that the tribunals in *Mondev v USA*, *Chevron v Ecuador* and *White Industries v India* all considered that either ongoing lawsuits in the relevant courts (in the case of *Mondev v USA* and *Chevron v Ecuador*) or arbitral awards (in the case of *White Industries v India*) which had been brought or obtained pursuant to the alleged violation of rights in respect of the original investment constituted investments that had continued, or been transformed from, the original investments made by the claimants. On this basis, the SADC Claim might therefore similarly be construed as an investment that had continued or been transformed from the original investment, namely the Mining Leases, such that it could qualify as a stand-alone investment for the purposes of Art 28(1) of Annex 1.

172 On this basis, we accept that the SADC Claim may, *in principle*, qualify as a stand-alone investment under Art 28(1) of Annex 1 as it is an investment that had continued or was transformed from the Mining Leases. That said, this is nonetheless subject to the territorial nexus requirement, to which we now turn.

(II) THE TERRITORIAL NEXUS REQUIREMENT

173 In the preceding analysis, we have found that the right to refer did not and cannot fall within the bundle of rights constituting the Mining Leases nor qualify as a stand-alone investment because it fails to meet the territorial nexus requirement (see [136]–[145] above). In our judgment, the same can also be said of the SADC Claim. The SADC Claim is a chose in action which was to be heard before the SADC Tribunal, an international tribunal constituted by the SADC Treaty and the Tribunal Protocol. The source of the SADC Claim lies in international law, and the scope of the rights contained therein is also to be determined under international law. Therefore, even if the SADC Tribunal had jurisdiction to hear the SADC Claim, the SADC Claim would only exist as a matter of international rather than domestic law. Further, for the same reasons as those which apply to the general right to refer, the SADC Claim also falls outside the Kingdom's enforcement jurisdiction and cannot be a protected investment under the relevant treaties.

174 The Appellants contend that the SADC Claim is a stand-alone investment in the sense that this was what the Appellants' original investment, namely the Mining Leases, had transformed into. But the putative transformation here is distinguishable from that found in the other cases we have referred to, where the claimants' original investments were found to have been replaced by the crystallisation of a right that fell within the investment's bundle of rights. This is illustrated by the decisions of the tribunals in *Mondev v USA* and *Chevron v Ecuador*, where the tribunals recognised the claimants' pending actions in the respective host States' *domestic courts* were eligible for protection as investments that had continued or been transformed from the claimants' original investments (see [164]–[168] above). These domestic legal claims fell squarely within the host States' domestic laws and enforcement jurisdictions,

and the host States were competent to protect them. The decision in *White Industries v India* is also consistent with this. There, although an international arbitration claim had been brought in the form of the ICC arbitration proceedings, those proceedings eventually culminated in a final award against India, the host State. Hence, the investor, White, had acquired the right to enforce that award against India as a matter of Indian domestic law, or at least a right which the Indian courts were obliged to guarantee and give effect to by hearing the enforcement proceedings expeditiously.

175 On the other hand, as we have explained, the SADC Claim is an international law claim which could not be said to have been the pursuit of one or more of the bundle of *domestic* law rights that constituted the Mining Leases. The present case is therefore different from *Mondev v USA*, *Chevron v Ecuador* and *White Industries v India* in that the Appellants' original investment did not continue or transform into a right that fell within that original investment's bundle of rights. Instead, the SADC Claim entailed the pursuit of a right that was distinct from the original bundle of rights constituting the Mining Leases. To that extent, in determining whether it is correct to view the SADC Claim as a stand-alone investment, it is necessary to subject the asserted right to the same analytical process we have applied in respect of the general right to refer: first, whether this is a right that exists only as a matter of international law; and second, whether it lies beyond the Kingdom's enforcement jurisdiction. For the reasons we have already found, we are satisfied that it fails this threshold because the asserted right to pursue the SADC Claim depends entirely on the continued existence of the SADC Tribunal mechanism under international law and the continuing consent of the SADC Member States to keep the SADC Tribunal operative. For both these reasons, the SADC Claim lacks the requisite territorial nexus with the Kingdom, and the Appellants cannot reasonably expect

to be accorded protection by the Kingdom in this regard. For these reasons, we find that the SADC Claim cannot be considered a qualifying investment under Art 28 of Annex 1, whether as an integrated part of the Mining Leases or as a stand-alone investment in its own right.

176 Having found that neither the SADC Claim nor the right to refer qualify either as investments or as inherent parts of a qualifying investment, this leaves the Mining Leases (without the right to refer or the SADC Claim in its constituent bundle of rights) as the only viable qualifying investment under Art 28 of Annex 1. As we found at [112]–[114] above, the Mining Leases comfortably fall within the definition of an investment under Art 1(2) and fulfil the territorial nexus requirement. But as we will explain shortly (at [182]–[204] below), treating the Mining Leases as the relevant investment for the purposes of Art 28 gives rise to intractable difficulties in the sense that there can no longer be a relevant dispute concerning any obligation that may be owed in relation to this investment. But for now, we proceed with the analysis of whether the Mining Leases *simpliciter* could be said to fulfil the remaining criteria set out in Art 28 such that, except for the intractable difficulties just described, the PCA Tribunal would have had jurisdiction to hear and determine the Appellants' claim.

Admission of the Mining Leases

177 Article 28(1) of Annex 1 provides that "[d]isputes between an investor and a State Party concerning an obligation of the latter in relation to an *admitted* investment of the former … shall … be submitted to international arbitration if either party to the dispute so wishes" [emphasis added]. The requirement of admission also appears in Art 1(2), which defines an "investor" to mean "a person that has been *admitted* to make or has made an investment" [emphasis

added], as well as in Art 2(1), which obliges each State party to "promote investments in its territory, and *admit* such investments in accordance with its laws and regulations" [emphasis added].

178 On the basis that the Appellants' qualifying investment was the right to bring the SADC Claim, the Judge held that the admission requirement was not fulfilled, noting at [238] of the Judgment that the question of admission "illustrates the awkwardness of characterising such a right to relief as an 'investment' in the first place". However, as we have identified the *Mining Leases* as the relevant investment, the problems associated with the admission requirement quickly fall away.

179 As the Judge observed at [252] of the Judgment, there is ample evidence of the Kingdom's acceptance and admission of the Mining Leases. The Mining Leases were issued, approved and registered by the Kingdom's government officials and ministries after a formal application process, and granted to Swissbourgh by the King. The Tributing Agreements were also registered by the Kingdom's Registrar of Deeds. Even if the Mining Leases were later found to be technically invalid (as was the case for the Rampai lease after the Rampai Lease Proceedings), this would not mean that there was no valid admission by the Kingdom. As noted in Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2nd Ed, 2012) at p 94, citing *Desert Line Projects LLC v The Republic of Yemen*, ICSID Case No ARB/05/17, Award, 6 February 2008 at [97]–[123], "a host state which has for some time tolerated a legal situation is thereafter precluded from insisting later, against the investor, that the situation was unlawful from the beginning." We therefore find that the Mining Leases satisfy the requirement of admission under Art 28(1) of Annex 1.

180 For completeness, if we had found that the right to refer a dispute to the SADC Tribunal fell within the bundle of rights constituting the Mining Leases, we do not think that the present analysis regarding the requirement of admission would be any different. In our judgment, given our earlier observation that a right is conceptually distinct from an investment (see [120] above), it is not only unnecessary but also analytically incorrect to subject each *right* falling within the bundle of rights comprising an investment to the requirements of admission that are demanded in relation to separate and distinct *investments*. This is borne out by the text of Art 28(1) and the surrounding textual context (see [177] above), which all speak of the need to admit *investments* and *not* the individual *rights* constituting an investment (see [92] above). This also finds support in the fact that requiring an investor to adduce evidence to prove the host State's admission of every single right that comprises the investment would impose an unduly onerous and unreasonable burden on the investor. That would be contrary to the object and purpose of the Investment Protocol, which, as we have earlier identified, is to promote and protect investments in the SADC Member States (see [94] above).

181 Further, if the SADC Claim had been found to be a continuance or transformation of the Mining Leases, our analysis would remain unchanged. As the *amici curiae* point out, citing *Churchill Mining Plc v Republic of Indonesia*, ICSID Case No ARB/12/14 and 12/40, Decision on Jurisdiction, 24 February 2014 at [295], the admission of an investment is a "one-time occurrence" and this requirement generally applies only "at the time of entry into the host State and not during the entire operation of the project". Therefore, the continuation or transformation of an existing investment similarly "does not give rise to the need for a new admission", save perhaps in exceptional circumstances such as

where the investment treaty in question expressly provides that reinvested funds must satisfy the conditions for admission of the original investment.

Identification of a dispute concerning obligations in relation to the Mining Leases

182 The next step in the analysis is to consider whether there is a dispute "concerning an obligation of the [Kingdom] in relation to [the Appellants'] admitted investment" as required under Art 28(1) of Annex 1. We have already established that the admitted investment in question is the Mining Leases. At this stage, we are therefore concerned with what qualifies as the "dispute", and what are the "obligations" that might be owed by the Kingdom in relation to the Mining Leases.

183 The Appellants submit that the Shuttering Dispute is the qualifying dispute for the purposes of Art 28(1) of Annex 1. But this submission is untenable in the light of our previous findings. The Shuttering Dispute is, in essence, about whether the Appellants had a right to have the SADC Claim heard by the SADC Tribunal. The correlative obligation to that right must be one owed by the Kingdom to guarantee the Appellants' access to the SADC Tribunal or to establish an alternative forum for the pending SADC Claim to be heard. However, we have already found that the right to refer does not fall within the bundle of rights constituting the Mining Leases as a protected investment, and similarly, the Appellants' investment in the Mining Leases did not give rise to any corresponding obligation on the part of the Kingdom to guarantee that the pending SADC Claim would be heard. Because of this, it cannot be said that the Shuttering Dispute is concerned with any obligation in relation to the Mining Leases, and therefore that dispute logically cannot fall within the terms of Art 28(1).

184 Having found that the Shuttering Dispute cannot be the qualifying dispute under Art 28(1) of Annex 1, and given that the Expropriation Dispute falls outside of the PCA Tribunal's jurisdiction *ratione temporis* (see [35] above), there is no qualifying dispute which could have fallen within Art 28 and the scope of the Kingdom's consent to arbitration before the PCA Tribunal. We therefore conclude that the PCA Tribunal lacked jurisdiction to hear and determine the Appellants' claim.

185 Nevertheless, for completeness, we shall assume for the sake of argument that the Shuttering Dispute qualifies as a dispute duly referred to the PCA Tribunal for the purposes of Art 28(1) of Annex 1, and shall address the Appellants' arguments regarding the possible obligations owed by the Kingdom which allegedly arise in relation to the Mining Leases and which allegedly concern the Shuttering Dispute. The Appellants contend that the following treaty provisions give rise to obligations that qualify for the purpose of Art 28(1):

(a) Arts 4(c) and 6(1) of the SADC Treaty, which impose an obligation on the Kingdom to act in accordance with the rule of law and to refrain from taking any measures likely to jeopardise the objectives of the SADC Treaty;

(b) Arts 14 and 15 of the Tribunal Protocol, which allegedly impose an obligation on the Kingdom to ensure access to the SADC Tribunal;

(c) Art 6 of Annex 1 to the Investment Protocol, which imposes an obligation on the Kingdom to accord FET to the Appellants' investment; and

(d) Art 27 of Annex 1, which imposes an obligation on the Kingdom to provide investors "the right of access to the courts, judicial and administrative tribunals, and other authorities competent under the laws of the host State for redress of their grievances".

186 Assuming the Shuttering Dispute to be the qualifying dispute, we find that none of these obligations qualify as obligations that concern the Shuttering Dispute and that are owed in relation to the Mining Leases.

187 On appeal, the meaning of the term "obligation" referred to in Art 28(1) of Annex 1 does not appear to be in dispute. It is common ground that the relevant "obligation" must be, as the Judge below found, an obligation owed by the Kingdom to the investor, and not obligations owed by the Kingdom to the other SADC Member States *inter se* (Judgment at [268]). The parties also do not dispute the Judge's finding that the relevant obligations need not arise *solely* under Annex 1 as such a reading would be inconsistent with the wording of the Investment Protocol in general and Art 28(1) in particular (Judgment at [266]–[268]). However, the parties remain in disagreement over the proper interpretation of "concerning" and "in relation to".

(1) Definition of "concerning" and "in relation to"

188 The Appellants argue that the terms "concerning" and "in relation to" should both be read broadly to simply refer to any "broad link between two concepts". In particular, they contend that the phrase "dispute concerning an obligation" has a broad ambit, and should be read to simply require that the dispute relate to or arise out of the relevant obligation. They also submit that, as regards the words "obligation in relation to an admitted investment", any

linkage between the obligation and any aspect of the investment would suffice, and even obligations of a general nature would meet this requirement.

189 In our judgment, the phrase "disputes … concerning an obligation of the [State] in relation to an admitted investment" should be interpreted to mean all disputes that *relate to or arise out of* obligations that bear a *legally significant connection* with the specific investment, and not merely disputes that relate to or arise out of obligations of a general character. In arriving at such a construction of this phrase, we accept the Appellants' contention that the phrase "disputes concerning an obligation" should be read to simply refer to all disputes that relate to or arise out of the relevant obligation owed in relation to the investment, but reject their contention that an obligation will be considered to be one that is "in relation to an admitted investment" as long as it relates to any aspect of the investment. We explain our reasons in greater detail below.

190 First, as regards the term "disputes concerning an obligation" in particular, we are content to adopt the Appellants' proposed reading that a dispute would fall within the scope of this term as long as it relates to or arises out of the relevant obligation. The Judge did not make any finding as to the proper interpretation of this term in the absence of any submissions on this point below. On appeal, the Appellants rely on the decision of the English High Court in *Czech Republic v European Media Ventures SA* [2007] EWHC 2851 (Comm) ("*Czech Republic v EMV*").

191 In *Czech Republic v EMV*, Simon J interpreted the phrase "disputes between one of the Contracting Parties and an investor of the other Contracting Party *concerning compensation due*" [emphasis added] in Art 8(1) of the Agreement Between the Belgian-Luxembourg Economic Union and the Czechoslovak Socialist Republic Concerning the Reciprocal Promotion and

Protection of Investments (24 April 1989) (entered into force 13 February 1992) ("the Belgium–Luxembourg–Czech Republic BIT") to include disputes not only as to the amount of compensation to be paid to an investor following expropriation by the State, but also disputes concerning the liability of the State to compensate the investor in the first place. In arriving at this conclusion, Simon J reasoned as follows (at [43]–[44]):

> 43 … The starting point is, in my judgment, the width of the ordinary meaning of the phrase. I am unable to accept that the phrase must be read as meaning '*relating to the amount of compensation*' as a matter of its ordinary meaning. On the other hand the phrase clearly provides some limit to the jurisdiction of the arbitral tribunal.
>
> 44 The use of the word '*compensation*' limits the scope of the arbitration. It may be contrasted with broad phrases such as '*any disputes*' which may be found in other BITs. Its impact is to restrict the jurisdiction of the tribunal to one aspect of expropriation. ***The word 'concerning', however, is broad. The word is not linked to any particular aspect of 'compensation'. 'Concerning' is similar to other common expressions in arbitration clauses, for example 'relating to' and 'arising out of'.*** Its ordinary meaning is to include every aspect of its subject: in this case '*compensation due by virtue of Paragraphs (1) and (3) of Article 3*'. As a matter of ordinary meaning this covers issues of entitlement as well as quantification.
>
> [emphasis in original in italics; emphasis added in bold italics]

192 Simon J also found that such an interpretation of the word "concerning" gave effect to the object and purpose of the Belgium–Luxembourg–Czech Republic BIT, which was to create conditions favourable to the making of investments by investors by conferring on investors a right to arbitrate (at [40] and [48]).

193 In our judgment, the reasoning employed by Simon J in *Czech Republic v EMV*, in interpreting the word "concerning" as a broad term analogous to "relating to" or "arising out of", is sound. Adopting similar reasoning, we find

that a dispute should be considered a "dispute concerning an obligation" as long as it relates to or arises out of the relevant obligation for two reasons. First, such a reading accords with the ordinary meaning of "concerning", which is defined in the *Oxford English Dictionary* (Oxford University Press, 2nd Ed, 1989) to mean "as regards to" or "as relates to". Second, this reading finds support in the object and purpose of the Investment Protocol, which we have previously determined to be the promotion and protection of investments in the SADC Member States (see [94] above). In any event, the Kingdom has not proffered any competing interpretation of this phrase.

194 Next, as regards the term "obligation … in relation to an admitted investment", we affirm the Judge's reliance on the arbitral decision in *Methanex Corporation v United States of America*, Partial Award, 7 August 2002 ("*Methanex v USA*") (see Judgment at [265]). We note that the Judge had also relied on *Société Généale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004 (see Judgment at [264]). However, that decision concerned a specifically-worded treaty provision which was in terms quite different from Art 28(1). We prefer the formulation adopted in *Methanex v USA*. In that decision, the tribunal considered the meaning of the term "relating to" in Art 1101(1) of the NAFTA, which provides as follows:

> This Chapter applies to measures adopted or maintained by a Party *relating to*:
>
> (a) investors of another Party;
>
> (b) investments of investors of another Party in the territory of the Party; and
>
> (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party"
>
> [emphasis added]

The tribunal interpreted the term "relating to" as requiring a "legally significant connection between the measure and the investor or the investment" (at [139]). To this end, the tribunal rejected Methanex's submission that the phrase "relating to" should be interpreted to simply mean "affecting", finding that such a reading "imposes no practical limitation; and an interpretation imposing a limit is required to give effect to the object and purpose of Chapter 11 [of the NAFTA]". The tribunal instead preferred the submission of the US that "there must be a legally significant connection between the measure and the investor or the investment", finding that this interpretation imposes a reasonable limitation on the scope of Art 1101(1) and accordingly gives effect to the object and purpose of Chapter 11 of the NAFTA.

195 Like Chapter 11, the Investment Protocol is a treaty chapter concerned with the protection of investors, and such protection cannot be limitless. In our judgment, applying the reasoning in *Methanex v USA*, the term "obligation … in relation to an admitted investment" in Art 28(1) should be construed as requiring a legally significant connection between the obligation and the admitted investment. We would add that we acknowledge that the requirement of a legally significant connection is not capable of simple definition, and this was a point acknowledged by the tribunal in *Methanex v USA* itself, which recognised that in identifying what constitutes a legally significant connection, "it is perhaps not easy to define the exact dividing line, just as it is not easy in twilight to see the divide between night and day" (at [139]). The requirement must instead "be examined case-by-case" (*Newcombe & Paradell,* at p 457). Notwithstanding the difficulties of defining the requirement, we consider that the concept of a legally significant connection is useful in so far as it clearly excludes obligations which merely *affect* an investment, or bear a purely incidental connection to it (*Newcombe & Paradell,* at pp 457–458).

(2) Identification of the relevant obligation

196 We now turn to apply these principles to the specific obligations that the Appellants claim arose in relation to the Mining Leases (see [185] above). In our judgment, none of the provisions relied on by the Appellants prescribe obligations in relation to the Mining Leases, and which the Shuttering Disputes are concerned with.

197 We begin with Arts 4(c) and 6(1) of the SADC Treaty, which read as follows:

> ARTICLE 4
>
> **PRINCIPLES**
>
> SADC and its Member States shall act in accordance with the following principles:
>
> …
>
> (c) human rights, democracy and the rule of law;
>
> …
>
> ARTICLE 6
>
> **GENERAL UNDERTAKINGS**
>
> 1. Member States undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty.
>
> …

198 In our judgment, these provisions do not impose any obligations on the Kingdom which are owed to the Appellants or to any given investor. As set out earlier (at [147], [149], [151] and [152] above), the SADC Treaty is the instrument that constitutes the SADC as an international organisation. It is not

an investment protection treaty. Indeed, Arts 4(c) and 6(1) of the SADC Treaty make no reference to "investments" whatsoever, and appear only to create obligations owed amongst the SADC Member States *inter se*. Accordingly, they do not endow the Appellants with any rights that are enforceable against the Kingdom. In any event, even if it were possible to construe Arts 4(c) and 6(1) as providing for obligations owed by the SADC Member States to investors under the SADC Treaty, we agree with the Judge's finding that the undertaking under Art 4(c) to promote the rule of law and the undertaking under Art 6(1) to promote the achievement of the objectives of the SADC are "too general and abstract to have given rise to an obligation 'in relation to' an admitted investment" (Judgment at [274]).

199 Next, as regards Arts 14 and 15 of the Tribunal Protocol, we are satisfied that these provisions likewise do not give rise to any obligation that a SADC Member State would owe to investors under the SADC Treaty, let alone obligations that bear a legally significant connection to the Mining Leases. We have earlier found that these provisions do not give rise to any obligation on the part of the Kingdom to ensure access to the SADC Tribunal. Assuring such access was not a matter within the control of the Kingdom as it was entirely dependent on the existence and maintenance of a mechanism established under international law by the consent of the SADC Member States. We therefore do not think that this could, on any basis, be an obligation that the Kingdom would owe in relation to the Mining Leases.

200 We turn to consider Arts 6 and 27 of Annex 1, which read as follows:

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

201 We agree with the Judge that both obligations can constitute obligations owed "in relation to" the Mining Leases (Judgment at [276]). In our view, this is evident from the fact that the obligation under Art 6 of Annex 1 to accord investors FET is widely regarded as an autonomous substantive standard of protection that, broadly speaking, requires host States to act reasonably, in good faith and in accordance with internationally recognised standards of due process. This standard of protection is similarly offered in most other investment protection treaties. As for the obligation under Art 27 to "ensure that investors have the right of access to the courts, judicial and administrative tribunals, and other authorities competent under the laws of the Host State", this appears to be an obligation that essentially gives effect to the general secondary right of an investor to vindicate its primary right to enjoy the investment. We are thus satisfied that both Arts 6 and 27 are obligations that bear a legally significant connection to the Mining Leases.

202 However, we do not think that the Shuttering Dispute is *concerned with* the obligation under Art 6 of Annex 1. Article 6(1) expressly states that investors shall be accorded FET *in the territory of the host State*. The allegedly wrongful act that the Shuttering Dispute arises out of is the shutting down of the SADC Tribunal and the failure to provide an alternative forum to hear the pending SADC Claim. In our view, this does not take place *in the territory of the Kingdom* as we have found that the SADC Claim and the right to refer could only have existed on the international law plane and would not have fallen within the Kingdom's enforcement jurisdiction. We therefore do not think that the Shuttering Dispute can be regarded as a dispute that "concern[s]" the obligation to accord FET in the territory of the Kingdom.

203 In the same vein, we do not think that Art 27 of Annex 1 is an obligation that the Shuttering Dispute is *concerned with*. Article 27 states that investors should have the right of access to authorities *competent under the laws of the host State* to redress their grievances concerning their investment. In our view, the Shuttering Dispute does not "concern" the obligation owed pursuant to Art 27 because even assuming that the SADC Tribunal is competent as a matter of international law to hear investment protection claims, *the domestic laws of the Kingdom* do not provide for, or recognise, the competence of the SADC Tribunal to do so.

204 Hence for this additional reason, the appeal fails. We nonetheless go on to consider the issue regarding whether the Appellants have exhausted all their local remedies, in view of the extensive treatment given to this issue by the Judge below, the parties on appeal, as well as the *amici curiae*.

Whether the Appellants exhausted their local remedies

205 While the requirement for a claimant to exhaust all of its local remedies before submitting its dispute to arbitration is not, as the *amici curiae* note, a common feature in most investment treaties, it *is* an express requirement provided for under the relevant treaty instruments here. In this regard, Art 15(2) of the SADC Treaty expressly states that "[n]o natural or legal person shall bring an action against a State unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction".

206 More relevantly for present purposes, and as we have noted earlier (at [96] above), Art 28(1) of Annex 1 also provides that investor-State disputes shall be submitted to international arbitration if either party to the dispute so wishes "after exhausting local remedies". In our judgment, the inclusion of the requirement that an investor must exhaust his or her local remedies in Art 28(1) as an express pre-condition for the SADC Member State's offer of consent to arbitration under Art 28(1) is significant. The failure of a claimant to exhaust local remedies has traditionally been regarded by international courts as a matter that goes towards the *admissibility* of the claim, and *not* the *jurisdiction* of the tribunal: see Chittharanjan Felix Amerasinghe, *Local Remedies in International Law* (Cambridge University Press, 2nd Ed, 2004) at p 294; see also *The Panevezys-Saldutiskis Railway Case (Estonia v Lithuania)* [1939] PCIJ (ser A/B) No 76 ("*The Panevezys-Saldutiskis Railway Case*") at 22 and *Interhandel Case (Switzerland v United States of America)*, Preliminary Objections [1959] ICJ 6 ("*Interhandel Case*") at 27. Generally, most investment arbitration tribunals also tend to regard the requirement for investors to exhaust their local remedies as a matter that concerns the *admissibility* of the claim brought by the investors, given that it is only a temporary obstacle to the exercise of the tribunal's jurisdiction and is a requirement that may be waived: see, for instance,

RosInvestCo UK Ltd v The Russian Federation, SCC Case No V079/2005, Award on Jurisdiction, 1 October 2007 at [153].

207 Jurisdiction is commonly defined to refer to "the power of the tribunal to hear a case", whereas admissibility refers to "whether it is appropriate for the tribunal to hear it": *Waste Management, Inc v United Mexican States*, ICSID Case No ARB(AF)/98/2, Dissenting Opinion of Keith Highet, 8 May 2000 at [58]. To this, Zachary Douglas adds clarity to this discussion by referring to "jurisdiction" as a concept that deals with "the existence of [the] adjudicative power" of an arbitral tribunal, and to "admissibility" as a concept dealing with "the exercise of that power" and the suitability of the claim brought pursuant to that power for adjudication: *Douglas* at paras 291 and 310. Finally, in Chin Leng Lim, Jean Ho & Martins Paparinskis, *International Investment Law and Arbitration: Commentary, Awards and other Materials* (Cambridge University Press, 2018) ("*Chin Leng Lim*"), it is usefully observed that there are two ways of drawing the distinction between jurisdiction and admissibility (at p 118):

> … The more conceptual reading would focus on the legal nature of the objection: is it directed against the tribunal (and is hence jurisdictional) or is it directed at the claim (and is hence one of admissibility)? The more draftsmanlike reading would focus on the place that the issue occupies in the structure of international dispute settlement: is the challenge related to the interpretation and application of the jurisdictional clause of the international tribunal (and hence jurisdictional), or is it related to the interpretation and application of another rule or instrument (and is hence one of admissibility)?

208 The conceptual distinction between jurisdiction and admissibility is not merely an exercise in linguistic hygiene pursuant to a pedantic hair-splitting endeavour. This distinction has significant practical import in investment treaty arbitration because a decision of the tribunal in respect of *jurisdiction* is reviewable by the supervisory courts at the seat of the arbitration (for non-ICSID arbitrations) or before an ICSID *ad hoc* committee pursuant to Art 52 of

the ICSID Convention (for ICSID arbitrations), whereas a decision of the tribunal on *admissibility* is *not* reviewable: see Jan Paulsson, "Jurisdiction and Admissibility" in *Global Reflections on International Law, Commerce and Dispute Resolution*, Liber Amicorum in honour of Robert Briner (Gerald Aksen *et al*, eds) (ICC Publishing, 2005) at p 601, *Douglas* at para 307, *Waibel* at p 1277, paras 257 and 258, Hanno Wehland, "Jurisdiction and Admissibility in Proceedings under the ICSID Convention and the ICSID Additional Facility Rules" in *ICSID Convention after 50 Years: Unsettled Issues* (Crina Baltag, ed) (Kluwer Law International, 2016) at pp 233–234, and *Chin Leng Lim* at p 124.

209 But notwithstanding the conventional understanding that the requirement of exhaustion of local remedies pertains to the question of admissibility (as explained at [206] above), it has been observed that "States may require exhaustion of local remedies as a pre-condition for their consent to arbitration. That it is a pre-condition for consent would make it a jurisdictional requirement and not an admissibility requirement": see *Waibel* at pp 1283–1284, para 283. Accordingly, given the express inclusion of the exhaustion of local remedies as a pre-condition for the SADC Member State's consent to arbitration under Art 28(1) of Annex 1, we find that any failure on the part of the Appellants to exhaust their local remedies should be taken to be an issue that concerns the *jurisdiction* of the PCA Tribunal. In any event, the Appellants never argued, at any point in the proceedings before us or the Judge below, that the exhaustion requirement is a question of admissibility. We are therefore satisfied that the review of the Kingdom's objections regarding the Appellants' alleged failure to exhaust their local remedies was rightly regarded by the Judge to be an issue affecting the PCA Tribunal's *jurisdiction*, and it thus fell within the court's purview.

The applicable legal principles

210 We turn to consider the legal principles governing the exhaustion of local remedies. As the Judge observed at [292] of the Judgment, the exhaustion requirement derives from the international law on diplomatic protection. The rationale for the requirement is that "the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic system" (Report of the International Law Commission on the work of its fifty-eighth session, *Draft Articles on Diplomatic Protection with commentaries*, reprinted in *Yearbook of the International Law Commission, 2006*, vol II, Part Two, UN Doc A/CN4/SERA/2006/Add1 (Part 2) ("the Draft Articles" and "ILC Commentary") at p 71 (Draft Art 14, para 1), quoting the *Interhandel Case* at 27). This accords respect to the State's sovereignty and also allows its courts to conduct the initial inquiries into the matter more expediently (*The Loewen Group Inc and Raymond L Loewen v United States of America*, ICSID Case No ARB(AF)/98/3, Award, 26 June 2003 ("*Loewen v USA*") at [156]; *Brownlie* at p 711).

211 It is widely accepted that the Draft Articles codify the customary international law on the exhaustion of local remedies at Draft Arts 14 and 15: see ILC Commentary, p 71 (Draft Art 14, para 1). Draft Article 15 sets out several exceptions to the exhaustion requirement, of which only Draft Art 15(*a*) is relevant for the present purposes. That provides that local remedies need not be exhausted where "[t]here are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress". The parties accept as common ground that this discloses two elements: (a) "reasonable availability" and (b) "reasonable possibility of providing effective redress". As the Judge noted at [300] of the Judgment (citing *ST-AD GmbH (Germany) v The Republic of Bulgaria*, PCA Case No 2011-06,

Award on Jurisdiction, 18 July 2013 at [365] as an example), these elements form a two-limb test that has been applied in the existing case law.

212 The Appellants however submit that the courts should adopt the "less formalistic" approach taken by the European Commission of Human Rights in relation to the exhaustion requirement in *human rights treaties*. A key difference in this approach is that the second limb of the test considers whether local remedies offer any "reasonable prospect of success". This variant of the test has been eschewed in the ILC Commentary as it imposes a *higher* threshold than "reasonable possibility of providing effective redress". The Appellants ultimately do not dispute that the accepted two-limb test in the law of diplomatic protection should apply, and appear to be mainly contending that the two limbs should be applied in a less exacting manner in the investment arbitration context where disputes exist between investors and States rather than between States *inter se*. We reject this submission. The Appellants have not cited any authorities in support of such a proposition. Nor have they advanced any satisfactory reason why the "less formalistic" approach to the exhaustion requirement in human rights treaties would be more contextually appropriate than the established principles in the law of diplomatic protection which concern investors' rights.

Burden of proof

213 The parties are largely in agreement that there is no requirement to exhaust local remedies prior to commencing arbitration proceedings if either of the two limbs, namely "no reasonable availability" or "no reasonable possibility of providing effective redress", are applicable. However, they take different positions as to who should bear the burden of proof on this issue. The Appellants contend that the Judge erred in finding that the burden lay with them, as it should

be for the Kingdom, as the host State, to prove the existence of any particular local remedy that is reasonably available and capable of providing effective redress. On the other hand, the Kingdom relies on the ILC Commentary on Draft Art 15(*a*), which states that the "reasonable possibility of providing effective redress" limb "*imposes a heavy burden on the claimant* by requiring that he prove in the circumstances of the case, and having regard to the legal system of the respondent State, there is no reasonable possibility of effective redress offered by the local remedies" [emphasis added].

214 In our judgment, there is no established rule as to which party has the burden of proof. For instance, in *Akdivar v Turkey* 23 EHRR 143, the European Court of Human Rights stated at [68] that "there is a distribution of the burden of proof". The court then elaborated as follows:

> … It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, … However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement.

215 Similarly, in *Ahmadou Sadio Diallo (The Republic of Guinea v The Democratic Republic of the Congo)* 2007 ICJ 582 (24 May 2007) at [44], the ICJ stated that "it is incumbent on the applicant to prove that local remedies were indeed exhausted or to establish … exceptional circumstances", while "[i]t is for the respondent to convince the Court that there were effective remedies in its domestic legal system that were not exhausted". This was followed by the tribunal in *Apotex Holdings Inc and Apotex Inc v United States of America*, ICSID Case No ARB(AF)121/1, Award, 25 August 2014 at [9.57].

216 The ILC's Special Rapporteur John Dugard therefore remarked in the *Third Report on Diplomatic Protection*, UN Doc A/CN4/523 and Add1, 7 March 2002 (at para 117) as follows:

> … [T]he only conclusion that can be drawn from the examination of cases in the literature is that it is difficult – and unwise – to state any concrete rule other than that the burden of proof should be shared by the parties, shifting between them continuously throughout the case, and that the burden lies in the party which makes a positive claim to prove it.

We agree. We also share the Special Rapporteur's view (at para 116) that where the initial legal burden falls will depend on the circumstances of the case and the legal instruments in question.

217 In this case, as the Appellants are advancing a justifying excuse for not having pursued any local remedies, the initial burden is on them to raise sufficient doubts as to the availability or effectiveness of local remedies: see *Alemanni v Argentina* at [313]. The wording of Art 15 of the SADC Treaty and Art 28(1) of Annex 1, which places a positive obligation on the party bringing the claim against the State to exhaust all available local remedies, further suggests that it is the *claimant* who bears the initial burden of showing exhaustion. This burden will shift if the claimant raises sufficient doubts as to the availability or effectiveness of local remedies. Having said this, we recognise the point made by the *amici curiae* that the question of who bears the burden of proof may be a matter of academic interest more than it is of practical significance because the burden can easily become a shared one.

Whether the Appellants had any domestic law rights or suffered any wrong to remedy

218 Before evaluating the availability and effectiveness of any local remedies, we address the Appellants' argument that there could not have been

any local remedy when the highest court in the Kingdom had already found that the Rampai lease was invalid (see [23] above). The Appellants contend that this finding would similarly apply to the other Mining Leases which had come into existence under the same conditions as the Rampai lease. This in turn would suggest that the Appellants have no viable claim against the Kingdom to be compensated for losses suffered as a result of the Kingdom's alleged expropriation of the Mining Leases. If this is correct, then no issue of exhaustion of local remedies would arise as the Appellants would not have suffered any wrong to be remedied. But at the same time, we think it would be perverse if the Appellants were allowed to seek a remedy before an international forum despite not having any rights in domestic law to begin with. The critical point is that the Appellants' argument regarding the validity of the Mining Leases may defeat the Kingdom's objection on exhaustion of local remedies, but absent any argument that the holding in relation to the Rampai lease was itself a breach of international law (*cf*, *Loewen v USA,* where the claimant argued that the judgments and orders made by the Mississippi courts breached the US's international law obligations owed under the NAFTA (see [39], [40] and [42])), it seems to us it would in turn destroy their whole claim for investment protection. Having said that, we shall proceed with the exhaustion analysis on the basis that the Appellants did have a valid investment and rights in domestic law which were capable of receiving investment protection.

The availability of an Aquilian claim

219 The focus of the parties' submissions was on the contention that the Appellants should have first pursued an Aquilian action for the lost opportunity to bring the SADC Claim. An Aquilian action is a claim in the law of delict for pure economic loss resulting from the wrongful conduct of the State (see Judgment at [283(a)]).

220 The Appellants contend that the Kingdom has not identified any case law in which the existence of the Aquilian action in Lesotho law has been expressly recognised. However, in international law, the mere absence of precedents showing the availability of a remedy does not mean that an international tribunal should conclude that it is unavailable: *The Panevezys-Saldutiskis Railway Case* at 19; *Brownlie* at p 713. Further, according to Justice Nienaber, who was formerly a Judge of South Africa's Supreme Court of Appeal, the Aquilian action had been "vigorously developed" by the South African courts and would have had a "strong persuasive effect" in the Kingdom's courts as both legal systems are based on Roman-Dutch law: see Dissenting Opinion at [4.12]–[4.15]. The Kingdom was also able to point to a case in which the Lesotho Court of Appeal recognised the existence of a claim of pure economic loss and cited two South African cases on Aquilian liability for this proposition (*Mpota Moiloa v Raohang Banna Le Basali* [2009] LSCA 20 at [10]). We therefore agree with the Judge that it would be premature to infer from the dearth of existing precedents alone that the Kingdom's courts would not recognise an Aquilian action (Judgment at [309]).

221 We further note that the Appellants had previously commenced an action in 1996 in the Lesotho courts for pure economic loss resulting from the Kingdom's wrongful conduct, which appears to be similar to an Aquilian action in substance (see [22] above). While they did not pursue these proceedings after the Rampai lease was declared invalid, the fact that they had brought these claims at least suggests that they did believe that an Aquilian action might reasonably have been available in the first place.

The possibility of effective redress in the Kingdom's courts

222 As to whether there exists a reasonable possibility of effective redress, the Appellants cite intractable problems of case backlog and a lack of judicial independence in the Kingdom's courts. In our view, these allegations lack evidential basis. Shortly before the hearing of this appeal, the Appellants sought to include articles and reports on the Kingdom's judicial system in a supplemental bundle of authorities. The Kingdom objected on the basis that this amounted to new evidence which the Appellants had not sought leave to adduce pursuant to O 57 r 13(2) of the ROC. The Appellants subsequently withdrew their request. There is therefore no evidence before us to support the allegations concerning the Kingdom's courts. In any event, we find the allegations as to the lack of judicial independence spurious given that the Court of Appeal and the High Court of Lesotho both struck down the Military Council's 1992 revocation order (see [18] above). Further, the domestic courts in the Kingdom had not hesitated to be "critical and dismissive of the actions of [their] own government even during the earlier stages" of the proceedings in the Expropriation Dispute: see Dissenting Opinion at [4.29].

223 We also reject the Appellants' argument that s 5 of the Kingdom's Government Proceedings and Contracts Act (Act 4 of 1965) precludes them from obtaining effective redress. Similar to s 31(4) of Singapore's Government Proceedings Act (Cap 121, 1985 Rev Ed), this provision only prohibits execution against or attachment of the State's property. It does not mean that damages cannot be paid out of the State's revenues. On the contrary, s 5 expressly states that "the nominal defendant … may cause to be paid out of the revenues of [the Kingdom] such money as may, by a judgment or order of the court, be awarded to the plaintiff". Further, the Appellants have not shown that the Kingdom would refuse to make good on any judgment of its courts.

224 Accordingly, we think that there may be a reasonably available and effective remedy in the way of an Aquilian action and this too would have foreclosed the present claim. If so, the Appellants' failure to exhaust its local remedies would have been a bar to the PCA Tribunal's assertion of jurisdiction under Art 28(1) of Annex 1, warranting a dismissal of this appeal in any event.

Conclusion

225 For these reasons, we dismiss the appeal with costs. Unless the parties come to an agreement on quantum, they are to furnish submissions (not exceeding ten pages each) to this court on the costs of this appeal within 14 days of this judgment. The usual consequential orders shall apply.

226 We once again record our deepest appreciation to Mr Thomas *QC* and Prof Calamita for graciously accepting the invitation to assist the court as *amici curiae* in these proceedings. Although we departed from their analysis in certain respects, we found their written brief thoughtful and thorough and their oral submissions cogent and concise. Finally, we would also like to commend and

thank counsel for both parties for the considerable assistance they gave us in dealing with the novel and challenging issues of public international law and international investment law that were raised in this appeal.

Sundaresh Menon Chief Justice	Andrew Phang Boon Leong Judge of Appeal	Judith Prakash Judge of Appeal

Tay Yong Kwang Judge of Appeal	Steven Chong Judge of Appeal

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J Christopher Thomas *QC* and Prof N Jansen Calamita (Centre for International Law, National University of Singapore) as *amici curiae*.