

Neutral Citation Number: [2025] EWCA Civ 905

Case No: CA-2024-002080

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS

OF ENGLAND AND WALES

COMMERICAL COURT

MR JUSTICE FOXTON (KBD)

[2024] EWHC 2037 (Comm)

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 17 July 2025

**Before:**

LORD JUSTICE BEAN

LORD JUSTICE PHILLIPS
and

LADY JUSTICE FALK

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**Between:**

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| --- | --- | --- |
|  | **REPUBLIC OF KOREA** | Appellant/ Claimant |
|  | **- and –** |  |
|  | **ELLIOTT ASSOCIATES, L.P.** | Respondent/ Defendant |

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**Samuel Wordsworth KC, Peter Webster** and **Richard Hoyle** (instructed by **Arnold & Porter Kaye Scholer (UK) LLP**) for the **Appellant/Claimant**

**Constantine Partasides KC, Georgios Petrochilos KC, Andrew Stafford KC** and

**Richard Clarke** (instructed by **Kobre & Kim (UK) LLP**) for the **Respondent/Defendant**

Hearing dates: 12 and 13 March 2025

Further written submissions 28 March 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on Thursday 17 July 2025 by circulation to the parties

or their representatives by e-mail and by release to the National Archives.

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**Lord Justice Phillips:**

1. The issue on this appeal is whether an arbitral tribunal had substantive jurisdiction to determine whether a claim by an investor fell within the scope of the protections afforded to investors under a free trade agreement between States (including the right to bring claims by way of arbitration), or whether the jurisdiction of the tribunal is amenable to challenge under section 67 of the Arbitration Act 1996 (“the 1996 Act”) on the grounds that, contrary to the tribunal’s determination, the subject matter fell outside that scope.

**The essential facts**

1. Chapter 11 of the free trade agreement between the appellant (“Korea”) and the United States of America (“the USA”) signed on 30 June 2007 (“the KORUS FTA” or “the Treaty”) provides protections for nationals of one of those States when investing in the other, the Chapter amounting in effect to a bilateral investment treaty (“BIT”). Article 11.1(1) provides that the protections, including National Treatment standards and Minimum Standards of Treatment as specified in Articles 11.3 and 11.5 respectively, relate to “measures adopted or maintained” by the State “relating to” investors of the other State or their investments (defined as “covered investments”).
2. Article 11.16 of the Treaty provides that an investor of one State may submit to arbitration claims that the other State has breached one of the protection obligations, by reason of which the investor has suffered damage. By Article 11.17 that other State consents to the submission of such a claim to arbitration in accordance with the Treaty.
3. In April 2018 the respondent (“Elliott”), a USA investment fund, purported to commence an UNCITRAL arbitration against Korea pursuant to the above provisions. The claim was, in outline, that the office of the President of Korea (referred to as “the Blue House”) and the Korean Ministry of Health and Welfare had improperly interfered, through the National Pension Service of Korea (“the NPS”), to procure a merger involving a Korean company in which Elliott had invested, Samsung C&T Corporation, contrary to Elliott’s interests and wishes. Elliott alleged that Korea had thereby breached the National Treatment standards and Minimum Standards of Treatment obligations in the Treaty, causing Elliott damage.
4. Korea objected to the jurisdiction of the UNCITRAL tribunal (“the Tribunal”), asserting that the claim did not fall within Chapter 11, including its dispute resolution provisions, because (i) there was no relevant “measure”, (ii) there was no measure “adopted or maintained” by Korea and/or (iii) any measure did not “relate to” Elliott or its investment.
5. On 20 June 2023 the Tribunal issued its award (“the Award”), determining that the conduct of the Blue House and the Ministry of Health and Welfare in influencing NPS’s merger vote was State conduct which fell within the term “measure” as used in the Treaty, despite being neither regulatory nor administrative action. The Tribunal further held that the measure had been adopted or maintained by Korea and related to Elliott. The Tribunal went on to find a breach of the Minimum Standard of Treatment obligation and awarded Elliott damages in the sum of US$53,586,931, subsequently corrected by the Tribunal to US$48,490,438.

1. On 17 July 2023 Korea issued an Arbitration claim form seeking to set aside the Award pursuant to section 67 of the 1996 Act on the grounds that the Tribunal acted outside its substantive jurisdiction, challenging each aspect of the Tribunal’s decision in that regard. A contingent challenge under section 68 of the 1996 Act was resolved when the Tribunal corrected the quantum of the Award.
2. By his order dated 1 August 2024 Foxton J (“the Judge”) dismissed Korea’s section 67 claim. In a reserved judgment of the same date the Judge held that the States’ offer to investors to arbitrate in Article 11.16 of the Treaty was freestanding and not conditional on the requirements of Article 11.1(1) being met. It followed that Korea’s challenges did not go to the substantive jurisdiction of the Tribunal, the Tribunal having jurisdiction to determine disputes between States and investors, including as to whether the requirements of Article 11.1(1) were satisfied. Recognising that the contrary argument had a real prospect of success, however, and also that the point was of some importance in the context of challenges to investment treaty awards, the Judge granted permission to appeal.
3. In the light of the Judge’s decision, on 29 October 2024 the United States Department of State wrote to the Ministry of Justice in Korea enclosing a diplomatic note confirming “the United States’ view that Article 11.1 of the KORUS FTA defines the scope of KORUS FTA Chapter 11 in its entirety” and that “a tribunal constituted under Chapter 11 has no jurisdiction unless Article 11.1(1)’s requirements are satisfied”. On 15 November 2024 the Ministry of Justice replied, stating that Korea “shares the [USA’s] understanding set out in the Diplomatic Note and agrees with it”. Korea applies to adduce that diplomatic exchange as fresh evidence in support of its appeal, contending that it is admissible as to the proper interpretation of the Treaty which was not in existence at the time of the hearing before the Judge.

**Chapter 11 of the KORUS FTA**

1. Chapter 11 of the Treaty is headed “Investment”. It is divided into three sections. Section A is also entitled “Investment” and starts with the following provisions:

“ARTICLE 11.1: SCOPE AND COVERAGE

1. This Chapter applies to measures adopted or maintained by a Party relating to:

(a) investors of the other Party;

(b) covered investments; and

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

2. For greater certainty, this Chapter does not bind either Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.

3. For purposes of this Chapter, **measures adopted or maintained by a Party** means measures adopted or maintained by:

(a) central, regional, or local governments and authorities; and

(b) non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities.

ARTICLE 11.2: RELATION TO OTHER CHAPTERS

1. In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.

2. A requirement by a Party that a service supplier of the other Party post a bond or other form of financial security as a condition of the cross-border supply of a service does not of itself make this Chapter applicable to measures adopted or maintained by the Party relating to such cross-border supply of the service. This Chapter applies to measures adopted or maintained by the Party relating to the posted bond or financial security, to the extent that such bond or financial security is a covered investment.

3. This Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter Thirteen (Financial Services).”

1. In the same section, Articles 11.3 to 11.9 set out the substantive obligations on each State in relation to the treatment of investors and covered investments of the other State. These include the National Treatment standards in Article 11.3 and the Minimum Standard of Treatment in Article 11.5 referred to above, as well as Most-Favoured Nation treatment obligation in Article 11.4, prohibition on expropriation and nationalisation in Article 11.6, requirements to permit free transfers into and out of the State’s territory in Article 11.7 and prohibition on the imposition of performance requirements in Article 11.8.
2. Section A further provides as follows:

“ARTICLE 11.11: DENIAL OF BENEFITS

1. A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party:

(a) does not maintain normal economic relations with the non-Party; or

(b) adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.

2. A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party and persons of a non-Party, or of the denying Party, own or control the enterprise….

….

ARTICLE 11.14: SUBROGATION

1. If the Korea Export Insurance Corporation or the Overseas Private Investment Corporation makes a payment to an investor of the Party in which the respective Corporation is established under a guarantee or a contract of insurance it has entered into in respect of an investment, the Corporation shall be considered the subrogee of the investor and shall be entitled to the same rights that the investor would have possessed under this Chapter but for the subrogation, and the investor shall be precluded from pursuing such rights to the extent of the subrogation….”

1. Section B of Chapter 11 is headed “Investor-State Dispute Settlement”. Article 11.15 provides for an initial process of consultation and negotiation. The subsequent Articles provide for arbitration of disputes that cannot be settled in that way:

“ARTICLE 11.16: SUBMISSION OF A CLAIM TO ARBITRATION

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:

(a) the claimant, on its own behalf, may submit to arbitration under this Section a claim

(i) that the respondent has breached

(A) an obligation under Section A,

(B) an investment authorization, or

(C) an investment agreement;

and

(ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and

(b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim

(i) that the respondent has breached

(A) an obligation under Section A,

(B) an investment authorization, or

(C) an investment agreement;

and

(ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach,

provided that a claimant may submit pursuant to subparagraph (a)(i)(C) or (b)(i)(C) a claim for breach of an investment agreement only if the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement.

….

ARTICLE 11.17: CONSENT OF EACH PARTY TO ARBITRATION

1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement.

2. The consent under paragraph 1 and the submission of a claim to arbitration under this Section shall satisfy the requirements of:

(a) Chapter II (Jurisdiction of the Centre) of the ICSID Convention and the ICSID Additional Facility Rules for written consent of the parties to the dispute; and

(b) Article II of the New York Convention for an “agreement in writing.””

1. Article 11.16(2) to (6) and Articles 11.18 to 11.21 make provision for commencement of and the procedure for an arbitration, including that a claim may be submitted (subject to time bar provisions) under the ICSID Convention or the UNCITRAL Rules.
2. Article 11.22(1) provides that claims alleging a breach of an obligation under Section A shall be decided in accordance with “this Agreement and applicable rules of international law”. However, by virtue of Article 11.22(2), claims in relation to breach of an investment authorization or an investment agreement are to be decided by the application of:

“(a) the rules of law specified in the pertinent investment authorization or investment agreement, or as the disputing parties may otherwise agree; or

(b) if the rules of law have not been specified or otherwise agreed,

(i) the law of the respondent, including its rules on the conflict of laws; and

(ii) such rules of international law as may be applicable.”

1. Section C of Chapter 11, consisting solely of Article 11.28, contains definitions for the purposes of that chapter, including the following:

“**claimant** means an investor of a Party that is a party to an investment dispute with the other Party;

**investment** means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include…

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

“Investment agreement” and “investment authorization” are also defined in Article 11.28. The former covers certain agreements with a national authority in relation to natural resources, services or infrastructure relevant to a covered investment, and the latter is an authorization granted by the foreign investment authority of a Party in relation to a covered investment or investor of the other Party.

1. The definition of covered investment is to be found in the General Definitions in Article 1.4 as follows:

“**covered investment** means, with respect to a Party, an investment, as defined in Article 11.28 (Definitions), in its territory of an investor of the other party that is in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter.”

1. The General Definitions also provide that:

“**measure** includes any law, regulation, procedure, requirement or practice.”

**The judgment**

1. The Judge’s judgment set out the issues and arguments fully and his decision was carefully and closely reasoned. For that reason it is both necessary and helpful to provide a fuller account of it than is usually required on an appeal principally concerned with an issue of interpretation.
2. The Judge noted at [17] that it was common ground that the KORUS FTA was to be interpreted in accordance with the principles set out in the Vienna Convention on the Law of Treaties 1969 (“the VCLT”). He summarised the relevant provisions as follows:

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

“1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

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

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

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

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

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

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

19. Article 32 of the VCLT establishes when recourse can be had to “supplementary means” of interpretation:

“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.””

1. At [22]-[23] the Judge rejected the suggestion that jurisdictional provisions in investment treaties are to be interpreted narrowly, following the view of the Singapore Court of Appeal in *Swissbourgh v Lesotho* [2018] SGCA 81 at [61]-[63] that they are to be interpreted neither liberally (i.e. pro-investor) nor restrictively (i.e. pro-State). The Judge regarded that approach as consistent with the VCLT and even-handed.
2. The Judge next explained the “threshold question” as to whether the Award was amenable to challenge under section 67 of the 1996 Act as follows:

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

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

i) “whether there is a valid arbitration agreement”;

ii) “whether a tribunal is properly constituted”; and

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

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

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

1. The Judge recognised at [28] that it was common ground before the Tribunal that the objections raised by Korea, if valid, would deprive the Tribunal of jurisdiction to adjudicate on the merits of the dispute. He went on to say:

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

1. From an examination of the English case law and of *Swissbourgh v Lesotho*, at [37] the Judge drew the following principles:
	1. Issues which define those to whom the offer to arbitrate is made (which will generally be an offer to “investors”, which in turn is likely to require someone to have made an investment) will be jurisdictional for s.67 purposes, raising a core jurisdictional issue, namely whether the parties have agreed to arbitrate.
	2. Similarly, where the scope of the offer to arbitrate is limited to disputes of a particular kind – e.g. “with respect to investments” – the making of an investment and a link between the dispute and the investment are also likely to be jurisdictional, raising another core jurisdictional issue, namely what disputes have the parties agreed to arbitrate.
	3. Where there is no express limitation in the offer to arbitrate (including, for that purpose, those which arise from the use within the offer to arbitrate of defined terms), there is likely to be a greater challenge in persuading the court that the offer to arbitrate is limited beyond its express terms. That simply reflects the application of the VCLT principles of interpretation to the arbitration offer in a treaty.
	4. Where an issue involves the application of protean legal concepts in a highly fact sensitive context, it may be more difficult in the absence of express language in the offer to arbitrate to establish that the issue is jurisdictional in nature. However, if that is the effect of the language used in the treaty when interpreted in accordance with VCLT principles, the complexity or sensitivity of the task is neither here nor there.
	5. Where determination of the issue said to be jurisdictional would require the supervisory court to determine issues which are integral to the merits, that in itself may suggest that the issue is not jurisdictional in the s.30 sense, as this would involve a municipal court and potentially enforcement courts determining issues which are the natural domain of the arbitral tribunal.”
2. The Judge then turned to the interpretation of the KORUS FTA. After pointing out at [38] that Chapter 11 contains a combination of substantive provisions on the one hand and dispute resolution provisions (which would be described as procedural, at least in a municipal law context) on the other, the Judge stated at [40] that Section A of the Chapter “is principally concerned with the substantive protections afforded by the treaty”. Whilst recognising that Article 11.1(1) identifies what “this Chapter refers to…”, the Judge stated that:

“…the argument that Article 11.1(1) places limits on the scope of the offer to arbitrate is inherently less compelling than the position where reliance is placed on the express terms of the offer to arbitrate for the purposes of establishing a jurisdictional limitation.”

1. The Judge continued his analysis of the nature of the provisions in Section A of Chapter 11 in [40] by noting that Article 11.2 addresses the relationship between substantive provisions of Chapter 11 and provisions in other Chapters, and concludes by noting that “The remainder of Section A sets out the substantive protections afforded by the Treaty in respect of investments.”
2. At [41] the Judge noted that Article 11.1(1) provides that “*this Chapter* applies to …”, not “this Section”, in contrast with other Articles of the Treaty, but he accepted Elliott’s submission that Article 11.1(1) (which is itself substantive in content) can be read as defining the scope of the substantive provisions in Chapter 11. The Judge supported that decision by further stating:
	1. that so interpreted, the concepts of scope and coverage still make sense, defining the extent of the substantive protection given;
	2. that although other Chapters of the Treaty contain a “scope and coverage” clause, Chapter 11 is the only Chapter where that clause appears under a particular Section heading, and the only Chapter “with such an apparently clear divide between substantive provisions (Section A) and procedural provisions (Section B)”;
	3. that the use of “scope and coverage” clauses within the Treaty suggests that their principal role is to differentiate the subject-matter of the separate Chapters, which would be achieved by a reading of Article 11.1(1) as applying to the substantive investment protections offered;
	4. that it was difficult to interpret “scope and coverage” provisions in certain of the other Chapters of the Treaty as creating a pre-condition for the application of every provision in the relevant Chapter.
3. At [42] the Judge stated that, in contrast to Section A, Section B of Chapter 11 has an avowedly “procedural” character. At [43] he noted that there was no definition of “investment dispute”, but expressed the view that, on the face of things an “investment dispute” would include a dispute as to whether the matters in Article 11.1(1) are satisfied.
4. The Judge described Article 11.16 as the crucial article for present purposes. At [45] he stated that the distinction between Section A (dealing with substantive protections) and Section B (dealing with dispute resolution) is reinforced by the language of that Article, referring to “arbitration under this Section” of a claim (*inter alia*) “for breach of an obligation under Section A”. The Judge then considered the definition of “claimant” and “investment”, concluding that their effect is to limit the offer to arbitrate to claimants who meet a nationality requirement and have made a qualifying investment. Article 11.16 therefore contains matters which, in many BITs, are jurisdictional, such that it cannot be said to be lacking in “jurisdictional fibre” such that it is necessary to look elsewhere in the Chapter. The Judge concluded:

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

1. The Judge further regarded it as highly significant that the right to arbitrate is not limited to claims for breach of the obligations arising under Section A, but extended to claims for breach of an “investment authorization” or an “investment agreement”. At [46] the Judge pointed out that the effect of Korea’s arguments would be that, contrary to the ordinary meaning of Article 11.16, the States were not offering to arbitrate *all* claims for breach of such authorizations or agreements, but only those where the claimant could also satisfy Article 11.1(1). That would mean that disputes under the same investment agreement would be determined in two different fora, however closely those disputes might be related. The Judge also noted that, whereas Article 11.22 provides that claims submitted in relation to investment authorizations and agreements are to be decided by the law specified in the authorization or agreement, or otherwise as agreed, with a default choice of “the law of the respondent”, on Korea’s construction it would be necessary also to apply “this Agreement” and international law in determining whether Article 11.1(1) is satisfied.
2. Turning to Article 11.17, at [48] the Judge recognised that the consent of the States to the submission of a claim to arbitration “under this Section and in accordance with this Agreement” provides some support for the argument that the limitation for that consent is not only to be found in Section B. But he considered the weight carried by those words to be limited, due to their generality, because they “can readily be interpreted as a reference to the procedural restrictions on submitting a claim” in Article 11.16, and due to the absence of any reference in Article 11.17 to Article 11.1(1), Section A or even Chapter 11.
3. At [49] the Judge further relied on the fact that Article 11.18 sets out “conditions and limitations of consent”, including a time limit, but does not refer to Article 11.1(1).
4. The Judge next considered the nature of issues which the supervisory court might be required to determine on the competing constructions of Chapter 11. At [50] the Judge accepted Korea’s submission that that cannot be determinative of whether a particular issue is jurisdictional, but he was persuaded that “if a particular issue is integrated to a significant extent into the merits of a dispute, that weighs to some extent against according it a jurisdictional characterisation”. At [51] the Judge examined how the three issues raised by Article 11.1(1) were engaged in the dispute between Elliott and Korea, concluding in [52] that “these issues engage questions which are closely connected with the merits of [Elliott’s] complaints”.
5. The Judge next considered decisions of ITA tribunals sitting under the arbitration regime established by the North American Free Trade Agreement (“NAFTA”). NAFTA contains at Article 1101(1) a provision equivalent to Article 11.1(1) in the KORUS FTA (including its position at the start of Section A). As the Judge recognised at [53], a number of ITA awards have treated that provision as jurisdictional. The Judge first set out extracts from the Partial Award in *Methanex Corporation v United States of America* 7 August 2002 (Rowley, Christopher, Veeder), where the tribunal had to consider challenges of jurisdiction and admissibility:

“54… At [106], the tribunal found that its “power to rule on the USA’s challenges necessarily derives from Chapter 11” the scheme of which was described as follows:

“(i) Article 1101(1): This is the gateway leading to the dispute resolution provisions of Chapter 11. Hence the powers of the Tribunal can only come into legal existence if the requirements of Article 1101(1) are met;

(ii) Articles 1116-1117: If Chapter 11 applies, an investor of a NAFTA Party has the right to submit a claim to arbitration in accordance with Articles 1116- 1117.”

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

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

1. The Judge accepted at [57] that this highly respected tribunal adopted an interpretation of NAFTA which analysed the requirements of Article 1101(1), the equivalent of Article 11.1(1) of the KORUS FTA, as conditions of the States’ consent to arbitrate. But he noted that it was common ground that at the jurisdiction phase Methanexwas not obliged to prove its factual case, merely to make credible allegations, a different concept of “jurisdiction” than that contained in section 30 of the 1996 Act and at issue in a section 67 challenge.
2. However, the Judge noted at [58] that there was a second jurisdictional award in *Methanex* following an amendment to Methenex’s claim and a rolled-up jurisdiction and merits hearing. The tribunal made a finding on the evidential record on the balance of probabilities that the “relating to” requirement of Article 1101 was not met in relation to the amended case, with the result that the USA succeeded on its jurisdictional challenge, and would have succeeded on the merits. Although the Judge does not say so expressly, this indicates that the tribunal did ultimately regard Article 1101 as jurisdictional as that concept is recognised in section 30 of the 1996 Act. Its approach in the Partial Award, by consent, was only partially to determine that issue of jurisdiction.
3. At [59] the Judge referred to another ITA award as follows:

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

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

1. At [60] to [63] the Judge referred to *The Canadian Cattlemen for Fair Trade v USA* Award on Jurisdiction, 28 January 2008 (Böckstiegel, Bacchus, Low), *Grand River Enterprises v USA* Award, 12 January 2011 (Nariman, Anaya, Crook) and *Apotex Inc v USA* Award on Jurisdiction and Admissibility, 14 June 2013 (Smith, Davidson, Landau), each an ITA award on jurisdiction under Chapter 11 of NAFTA and each following the approach in *Methanex*.
2. The Judge accepted at [63] that these decisions adopted the same interpretation of Article 1101 of NAFTA which Korea asked him to adopt for Article 11.1(1) of the Treaty, and he recognised the force of the consistent views of distinguished international arbitral tribunals. He was nonetheless not persuaded to adopt the same interpretation, noting that there did not appear to have been any argument on the point before the tribunals, that there were other routes to the same jurisdictional result and that NAFTA did not provide for arbitration in relation to breaches of investment authorizations and investment agreements as provided for in Article 11.16(1)(a)(i)(B) and (C) and (b)(i)(B) and (C) of the Treaty. Nor does NAFTA contain equivalent provisions to Article 11.22 of the Treaty.
3. At [64] the Judge recognised that the same points could not be made in relation to two awards under the Treaty, the first being *Mason Capital LP v Republic of Korea* Final Award, 11 April 2024 (Sachs, Gloster, Mayer) and the Award in the present case. However, whilst both the tribunal in *Mason* and the Tribunal in this case treated Article 11.1(1) as creating a “jurisdictional filter”, the Judge noted that there was no argument on the point, which was without practical consequence. He therefore viewed them as of little assistance. This aspect of the Award in *Mason* was, in any event, recently reviewed by the Singapore International Commercial Court (“the SICC”), a decision I consider below.
4. The Judge further rejected Korea’s argument that the NAFTA awards (and a 2006 commentary probably referencing the decisions in *Methenex*) were not merely persuasive but constituted “supplementary means of interpretation” including as part of “the circumstances of [the Treaty’s] conclusion” within the meaning of Article 32 of the VCLT. At [68] the Judge explained his view that the only decision which was in public circulation and available to inform the drafting process of the Treaty was *Methenex.* He considered that the interpretation adopted by one tribunal in a dispute involving one State relating to a different treaty, where there does not appear to have been argument on the issue, cannot realistically be said to establish a “meaning generally ascribed to [a] term by the broader international community of States” or represent a “surrounding circumstance” of a kind which can meaningfully inform the interpretation of the Treaty or be said to reveal the parties’ shared understanding of its terms.
5. In the light of the above reasoning, the Judge came to the clear view, summarised at [69], that the requirements in Article 11.1(1) do not constitute a limitation to the offer to arbitrate in Article 11.16, and, accordingly, that the issues which Korea seeks to raise by reference to Article 11.1(1) are not jurisdictional for the purposes of sections 30(1) and 67 of the 1996 Act.
6. The Judge considered whether to rule on the merits of Korea’s challenge on a contingent basis but decided at [79] that it was inappropriate to do so and simply dismissed the section 67 application.

**The decision in Republic of Korea v Mason Capital L.P.**

1. It is convenient to note at this point that on 20 March 2025, one week after the hearing of this appeal, the SICC gave judgment in *Republic of Korea v Mason Capital L.P.* [2025] SGHC(I) 9, a first instance judgment (equivalent to the decision of the Judge in the present case) on an application to set aside on jurisdictional grounds the arbitration award under the Treaty referred to in paragraph 40 above.
2. In *Mason* Korea advanced the same argument, namely, that the requirements of Article 11.1(1) of the Treaty were conditions of the offer to arbitrate in Section B and so were subject to re-argument by way of jurisdictional challenge in a supervisory court. After referring to the Judge’s decision in this case, the SICC rejected Korea’s argument, effectively following his reasoning:

“41. In our view, the ordinary meaning of Chapter 11 and in particular Arts 11.1 and 11.16, determined in the contextual and purposive manner mandated by Art 31 of the VCLT, is that the statement in Art 11.1 that the chapter applies to “measures … relating to” investors of the other party does not operate as a jurisdictional requirement or as a limitation to each party’s standing unilateral offer to arbitrate disputes under Chapter 11, made to investors of the other party. There are two principal reasons for our conclusion. These reasons concern first the function the respective articles play and second the arrangement of similar articles in the context of the treaty as a whole.

42. First, there is the function each article plays within Chapter 11. Article 11.16 on its face operates as a self-contained gateway for the submission of all claims under the chapter to arbitration. This point has two aspects to it. The first is that Art 11.16 is fully workable on its own. There is no necessity arising whether from logic or workability to treat apparent limitations on the scope of each party’s substantive obligations (and thus corresponding limitations on the scope of the investor’s protections) to be found in other articles as additional jurisdictional requirements. The second point is that Art 11.16 is the gateway for the submission of all claims under Chapter 11 to arbitration. Such claims include claims in relation to breach of Section A obligations but also extend to two other types of claims, namely those for breach of an investment authorization and those for breach of an investment agreement. Because Art 11.16 functions as a gateway for three types of claims, one would expect all jurisdictional limitations to be set out in it, especially where such limitations are specific to only one of the types of claims. Fulfilling and reinforcing this expectation, Art 11.16.1 contains in the proviso a limitation that a claim for breach of an investment agreement may be submitted “only if the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired … in reliance on the relevant investment agreement”…

43. Turning to the function of Art 11.1, on its face it describes the contents of the chapter and thus differentiates it from other chapters. Its placement within Section A supports the reading that it relates to the scope of the obligations set out in that section.

44. Second, in our view, the function of Art 11.1 identified above accords with the context of the rest of the treaty, where some other chapters similarly start with either “Scope” or “Scope and Coverage” articles. An instructive example is Chapter 8 which concerns sanitary and phytosanitary measures. Article 8.1 sets out the measures to which the chapter applies but by Art 8.4 there is specifically no recourse to dispute settlement. Thus, a similarly worded article to Art 11.1 plays in Chapter 8 the function of merely describing that chapter without playing any role in relation to dispute settlement (because there is no recourse to dispute settlement). Contrary to ROK’s submission that Art 11.1 also imposes jurisdictional requirements for the submission of claims under Art 11.16, when an article has on a contextual reading a particular function within the arrangement of the treaty as whole, this weighs against imputing a dual or secondary function to that article.

45. We would add that we do not consider that much weight should be given to the contention that an issue which is fact-sensitive is less likely to be jurisdictional in nature. Logically, it should be presumed that parties who have chosen arbitration as their method of dispute resolution will ordinarily structure how the arbitral process works to minimise the overlap between jurisdiction and the merits. This is because any points of overlap would raise the possible duplication of time and costs entailed in a de novo review by the supervisory court. However, this argument from presumed intention must yield to the text of the treaty interpreted in accordance with Arts 31 and 32 of the VCLT if the text shows otherwise.

46. Indeed, this accords with Foxton J’s statement of principle at [37(iv)] of Elliott…”

**The grounds of appeal**

1. Korea’s principal ground of appeal is that, on a proper interpretation, Article 11.1(1) of the Treaty sets down jurisdictional requirements which must be satisfied in order for there is to be an offer to arbitrate in Section B of Chapter 11 and the Judge was wrong to hold otherwise.
2. Subsidiary to and supporting that central ground, Korea relies on the following two further arguments:
	1. First, that the Judge erred in introducing into the interpretation of the Treaty the concept of national policy reasons;
	2. Second, the Judge should have found that the interpretation of the Treaty for which Korea contends is supported by “supplementary means of interpretation” within the meaning of Article 32 of the VCLT and that he should have been willing to consider material later in time than the date of signature of the Treaty.

**The approach to interpreting the Treaty**

1. As the Judge recognised, the Treaty is to be interpreted in accordance with the principles set out in the VCLT, reflecting customary international law. The whole point and purpose and effect of the Treaty is that that approach to interpretation is to be applied equally and uniformly by the courts of all signatory jurisdictions, including the courts of England and Wales, it being plainly desirable that a treaty is interpreted consistently across jurisdictions. As Lord Hope stated in *Islam v Secretary of State for the Home Department* [1999] 2 AC 629, 657A-B:

“As a general rule it is desirable that international treaties should be interpreted by the courts of all the states uniformly. So, if it could be said that a uniform interpretation of this phrase was to be found in the authorities, I would regard it as appropriate that we should follow it.”

1. It is therefore unclear what scope there is for the English court to consider issues of *national* policy, as suggested by the Judge at [28], when considering whether and to what extent a treaty, on its proper interpretation, imposes conditions on a State’s offer to arbitrate a dispute so as to give rise to a valid arbitration agreement. Whilst that may give rise to an issue as to whether the arbitral tribunal has substantive jurisdiction by virtue of English domestic legislation (section 30 of the 1996 Act), the answer to the treaty interpretation question is a matter of international law and must be the same (or at least approached in the same way) whether being determined by an ITA tribunal or the English court. In my judgment, and as submitted by Korea, there is no basis on which the English court can or should factor into its interpretation of an international treaty the fact that one of two competing interpretations would engage “the ability to re-argue on a *de novo* basis before a municipal court issues relating to the application of an international law treaty, and to set aside or declare of no effect the determination of an international tribunal”. I note that this Court in *The Czech Republic v Diag Human SE* [2025] EWCA Civ 588 has recently expressed the view at [130] that the “caution” expressed by the Judge at [28] in his judgment in this case was well-founded, but I understand that to refer to the Judge’s point that caution may be needed in reading what ITA tribunals decide about jurisdiction as they may be less concerned about distinguishing between jurisdiction, standing and admissibility. I do not read it as approval of the Judge’s invocation of national policy in interpreting an international treaty. Indeed, in *Diag* this Court emphasised at [125] and [128] that the question of whether there was an offer to arbitrate in a BIT was ultimately a question of interpretation of the Treaty in accordance with the principles in Article 31 of the VCLT.
2. Further, given the approach of Articles 31 and 32 of the VCLT, starting with the ordinary meaning to be given to the terms of the treaty in question, in their context and in light of its object and purpose, I do not accept that it is relevant to draw “principles” from English authorities as to whether particular issues “will be jurisdictional for section 67 purposes”, or to suggest that so categorising an issue will give rise to a “greater challenge”, “may be more difficult in the absence of express language” or “may suggest that the issue is not jurisdictional” (judgment at [37]).
3. The sole question of interpretation engaged in this case is whether, applying the straightforward approach to interpretation set out in the VCLT, the satisfaction of the requirements of Article 11.1(1) is a condition of Korea’s offer to arbitrate. There is no suggestion that, in drafting the relevant provisions, Korea and the USA had in mind English domestic law as to jurisdictional challenges to arbitration awards, and there is therefore no basis for importing and applying “rules” of construction or presumptions drawn from a collection of first instance decisions of the English courts.
4. I would therefore uphold Korea’s first subsidiary criticism of the Judge’s approach. To what extent the principles of interpretation identified by the Judge at [37] (wrongly, in my judgment) affected his ultimate conclusion is unclear: his analysis focused closely on the meaning of the provisions of the Treaty, and in particular Chapter 11, to which I shall now turn.

**The interpretation of Chapter 11**

1. The ordinary meaning of “This Chapter” in Article 11.1(1) is the whole of Chapter 11, not merely Section A, notwithstanding that the Article is located at the start of Section A. On its face, therefore, the “scope and coverage” provision applies straightforwardly to the whole of Chapter 11, including the offer to arbitrate in Section B. That is the interpretation that has been accepted and applied, uniformly, in each of the ITA awards referred to by the Judge in which Article 11.1(1) of the Treaty or Article 1101 of NAFTA were considered, there being no countervailing view expressed (until the SICC supported the Judge’s conclusion). Whilst there might be consequences which the Judge considered unfortunate in terms of Korea being able to re-litigate *de novo* whether Elliott’s arbitration claim falls within Chapter 11 by way of a section 67 challenge in this jurisdiction, there is nothing surprising or unworkable about the Contracting Parties to NAFTA and the Contracting Parties to the Treaty having limited the right of investors to arbitrate to circumstances in which the substantive protections under the Treaty were engaged, not merely when it was alleged that they were engaged.
2. As Korea points out, the Judge declined to give the phrase “This Chapter” its ordinary meaning, instead reading Article 11.1(1) as starting with “This Section”, effectively deciding that the former phrase had been included by mistake in both NAFTA and again, by different parties, in the Treaty. The Judge justified that reading because, in his view, there was a clear dividing line between what he regarded as the substantive provisions of Section A and the procedural dispute resolution provisions of Section B. In that context he considered that Section B should be read as an independent regime, with its own jurisdictional requirements, remote from and not governed by the scope and coverage wording in Article 11.1(1).
3. Apart from the inherent improbability that successive treaties used and have retained the wrong word (having expressly used the term “this Section” multiple times in Article 11.16 and once more in Article 11.17 when that was what was intended), the immediate difficulty with the Judge’s approach is that certain other provisions in Section A of Chapter 11 clearly apply to and potentially qualify the right to accept the offer to arbitrate in Section B. First, Article 11.11 provides for a State to deny the benefits of “this Chapter” to an investor in defined circumstances, which must include the benefit of the offer to arbitrate in Section B. Second, Article 11.14 provides for subrogation of the investor’s rights “under this Chapter” in certain circumstances where the investor has been paid under a guarantee or contract of insurance, and for the investor to be precluded from exercising those rights. Such subrogated rights must include the offer of arbitration. In the case of both Article 11.11 and Article 11.14 the provision is undoubtedly governed by Article 11.1(1), even on the Judge’s interpretation, but then it is unclear why the rights “under this Chapter” to which the provisions refer, including the right to accept the offer to arbitrate, are not also so governed. It is noteworthy that the Judge did not refer specifically to either of these provisions, let alone their potential impact on the “independence” of the offer to arbitrate and the clear division he saw between Section A and Section B of Chapter 11.
4. It is also noteworthy that there is nothing in Section B that makes it a condition of the right to arbitrate a claim for a breach of the obligations in Section A that the claim is in relation to an investment in the territory of Korea (or, in other cases, the USA), rather than that being an issue for potential determination in an investment dispute; no territorial restriction can be found, at least expressly, in the definition of “investment” or “investor of a Party”, and as the Judge noted the term “investment dispute” is undefined. Yet, given that the proviso to Article 11.16 in relation to claims for breach of an investment agreement expressly makes it a condition that the claim directly relates to a covered investment, it would be very surprising if the existence of an investment in the territory of a Contracting State was not a condition of the offer to arbitrate claims more generally. Such a condition can be found, but only found, through the application of the scope and coverage provision in Article 11.1(1) and its use of the concepts of “covered investment” and “in the territory of the Party”.
5. Further, the temporal restriction as to the matters in respect of which Chapter 11 is binding on the Contracting Parties in Article 11.1(2) and the disapplication of the Chapter in relation to Chapter 13 (Financial Services) that is provided for in Article 11.2(3) both plainly relate to the whole of Chapter 11 including Section B, and therefore further condition the offer to arbitrate. Article 11.2(1), which provides for other Chapters to prevail in the event of inconsistency, also must apply to the whole of Chapter 11, and the same must be the case for Article 11.2(2). The Judge did not suggest that each of those references to “this Chapter” should be read as “this Section”, and it would be difficult to so read them. But it makes it all the more difficult to make an exception just for the first usage of that phrase in Article 11.1(1).
6. Once it is recognised that matters outside Section B of Chapter 11 are capable of affecting the offer to arbitrate in Articles 11.16 and 11.17, the Judge’s further reading-down of the words “in accordance with this Agreement” in Article 11.17 becomes unsupportable, particularly where it follows and is plainly intended to qualify the consent of the States to the submission of a claim to arbitration under “this Section”. Korea points out that, in addition to Articles in Section A of Chapter 11, reference must also be had in determining the scope of the offer to arbitrate to the clarification in footnote 2 to Chapter 12 of the Treaty which states that nothing in that Chapter is subject to investor-state dispute settlement under Section B of Chapter 11.
7. The Judge regarded it as highly significant that the offer to arbitrate in Section B of Chapter 11 of the Treaty, in contrast with the position in NAFTA, extends beyond claims for breach of the obligations in Section A to include claims for breaches of investment authorizations and investment agreements. He regarded it as an unattractive aspect of Korea’s interpretation that it would entail that the latter type of claims could only be made if the requirements of Article 11.1(1) were satisfied, meaning that disputes airing under an investment agreement might have to be determined in different fora, however closely related, with difficult issues as to jurisdiction arising. I do not see the force of this point. If the wording of Chapter 11 is given its ordinary meaning, as in all ITA tribunal awards to date, it can be seen that the extension makes it possible to bring claims for breach of an investment authorization or agreement when matters giving rise to a claim under Section A also give rise to such claims. The provision enables claims which are based on the same alleged wrongdoing to be brought in the same arbitral forum rather than bifurcated because of their different nature. If there are further claims which do not fall within the scope and coverage of the obligations undertaken by the relevant State in the Treaty, it is neither surprising nor troubling that they are not included in the offer to arbitrate. I see no difficulty that applying Article 11.1(1) in determining whether claims for breach of an investment agreement fall within the offer to arbitrate might entail the application of a different governing law to that otherwise applicable to the investment agreement, pursuant to Article 11.22. Any consideration of whether a claim is within the provisions of the offer to arbitrate will engage the law applicable to the interpretation of the Treaty, whether or not Article 11.1(1) is engaged.
8. The Judge also placed weight, which he recognised must be limited, on the use of scope and coverage clauses in other chapters of the Treaty, pointing out that certain following provisions cannot sensibly be viewed as falling within the delineated scope of the Chapter. Those provisions, however, do not contain arbitration provisions and no question of “jurisdiction” arises, for example, in relation to the agreement in Article 8.3 to establish a committee on sanitary and phytosanitary matters, even though it does not strictly relate to a “measure” of one of the parties within Article 8.1. As the Judge recognised, Chapter 11 can be seen as a form of BIT, complete with arbitration provisions, and the Contracting Parties must be taken to have intended to define the scope of the offer to arbitrate with a precision which might not have been required in other contexts.
9. In my judgment the “scope and coverage” requirements of Article 11.1(1) do apply to Section B of Chapter 11 and impose jurisdictional limitations on the offer to arbitrate. The Judge was wrong to conclude otherwise. I recognise that his view was followed and supported by the SICC, and that its judgment must be given independent weight and considerable respect. But I am not persuaded by that judgment for the reasons set out above, to the extent that they are applicable to the SICC’s reasoning. If, as seems likely in the circumstances, that decision is also appealed, the Singapore Court of Appeal will have this judgment to consider as well as that of the Judge.
10. It follows that I would uphold Korea’s main ground of appeal.

**Matters that need not be decided**

1. In view of that conclusion I do not propose to consider the question, posed by Korea’s second subsidiary ground of appeal, of whether recourse can be had to ITA tribunal awards and other materials, including material post-dating the signature of the Treaty, not merely for their persuasive force but as supplementary means of interpretation pursuant to Article 32 of the VCLT. It is sufficient to note for present purposes that the awards, published by tribunals comprising a long list of highly respected international arbitrators, uniformly reached the same conclusion as I have as to the proper interpretation of the Treaty.
2. Neither is it necessary or appropriate to consider the admissibility and, if admissible, the effect of the exchange of diplomatic notes. The SICC in *Mason* admitted the very same exchange as evidence for the purposes of Korea’s application, but did not accept that it was a “subsequent agreement between the parties” for the purposes of Article 31.3(a) of the VCLT, not being an interpretation issued by the Joint Committee established by Article 22.2 of the Treaty, nor that it was a “subsequent practice in the application of” the Treaty for the purposes of Article 31.3(b) of the VCLT. The exchange was admitted solely as the opinions of the Contracting States, even though they were issued long after the “critical date”, but the SICC was not persuaded by them. I do not propose to venture into those contentious issues, but simply note that the conclusion I have reached as to the interpretation of Chapter 11 of the Treaty coincides with the shared view expressed by the Contracting Parties as to the meaning of the agreement between them.

**Conclusion**

1. For the above reasons I would allow the appeal. As anticipated by the Judge, this would entail that Korea’s application under section 67 of the 1996 Act be referred back to the Commercial Court for determination on its merits, by the Judge if he is available.

**Lady Justice Falk**

1. I agree. The sole issue on this appeal is the correct interpretation of Chapter 11 of the KORUS FTA, and specifically whether Article 11.1(1) imposes conditions on the offer to arbitrate in Article 11.16. There is no dispute that, if it does, section 67 of the 1996 Act is engaged.
2. The principles to be applied in interpreting a treaty are well established. As the Judge explained, they are set out in Articles 31 and 32 of the VCLT. Those provisions have been considered by courts in this jurisdiction on numerous occasions, including most recently by this court in *Czech Republic v Diag Human and Stava* [2025] EWCA Civ 588 (in the context of a bilateral investment treaty) and in *VietJet Aviation v FW Aviation* [2025] EWCA Civ 783 (in the context of a double tax treaty). It is not necessary to review them again. However, it is worth reiterating that the required focus is on the “ordinary meaning” of the words used, interpreted in their context and in the light of the object and purpose of the treaty.
3. The ordinary meaning of the words “This Chapter” in Article 11.1(1) are clear. For the reasons given by Phillips LJ, that their effect is indeed to make the offer to arbitrate in Article 11.16 subject to the provisions of Article 11.1(1) is supported both by the context (including other provisions in Section A of Chapter 11) and by considerations of object and purpose. In particular, I would emphasise that it is only in Article 11.1(1) that a restriction can be found confining the offer to arbitrate to investments made in the territory of one of the States.
4. Further, I do not attach the same significance as the Judge to the fact that Article 11.16 also extends to breaches of investment authorizations and agreements. The proviso in Article 11.16(1) in any event places limits on what sorts of disputes under an investment agreement are subject to the offer to arbitrate, so the risk of disputes under investment authorizations and agreements being determined in different fora exists irrespective of whether Article 11.1(1) also applies. The application of Article 11.1(1) is simply a further qualification. And while it may be that determining whether Article 11.1(1) applies involves issues that might be regarded as ones that are integrated with the merits of the dispute, that will be fact-dependent and cannot of itself determine the correct interpretation of the Treaty.

**Lord Justice Bean**

1. I agree with both judgments.