IN THE MATTER OF THE ARBITRATION ACT 1996 AND

IN THE MATTER OF AN UNCITRAL ARBITRATION

IN THE COURT OF APPEAL

ON APPEAL FROM THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

B E T W E E N

REPUBLIC OF INDIA

Appellant / Defendant

and

RAS AL KHAIMAH INVESTMENT AUTHORITY

Respondent / Claimant

References to {C/X/Y} and {S/X/Y} are to the Core and Supplementary Bundle in the format {Core or Supplementary/Tab/Page}

APPELLANT'S SKELETON ARGUMENT

A Introduction

1. This is an appeal against the order of Robin Knowles J dated 29 September 2025 {C/8/98} accepting the section 67 challenge brought by the Ras Al Khaimah Investment Authority ("**RAKIA**") under the Arbitration Act 1996 (the "**1996 Act**"). The Tribunal in the underlying arbitration (William Rowley KC, Justice Chandramauli Kumar Prasad, Lord Hoffmann presiding) was correct to hold that it had no substantive jurisdiction in respect of RAKIA's claim.

2. The appeal concerns the interpretation and application of the offer of investor-State arbitration in the UAE-India BIT (the "**Treaty**") contained in Article 10 of the Treaty and, in particular, the term "Measure". Article 10 provides in relevant part (emphasis added):

> "1. Disputes arising between a Contracting Party and an Investor of the other Contracting Party in respect of an Investment under this Agreement shall be governed by this Article.
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> 2. In the context of Republic of India, this Article [i.e. Article 10] shall cover Measures underlying a dispute taken by the Central Government and/or the state governments while exercising their executive powers in accordance with the Constitution of India.
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> …
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> 5. If such dispute cannot be settled amicably within a period of six months from the date of receipt of Notice of Dispute, the dispute may be submitted to one of the following dispute settlement mechanisms: …
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> b. an arbitral tribunal established under the Arbitration Rules of the [UNCITRAL] in force at the time of commencement of the dispute; …".[1]

3. It is now common ground that Article 10.2 operates as a limitation on the scope of the offer to arbitrate (RAKIA having abandoned its argument to the contrary shortly before the hearing before Robin Knowles J[2]). It follows that for a tribunal to have jurisdiction:

   a. The dispute must concern a "*Measure … taken by the Central Government and/or the state governments while exercising their executive powers in accordance with the Constitution of India*" {C/14/148}; as to which

   b. Article 1.8 defines a Measure as "*any form of binding action taken by a Contracting Party under any law, rule or regulation and applied directly to an Investment*" {C/14/140}; and

   c. Article 1.1 contains an asset-based definition of the term "*Investment*" in wording frequently used in investment treaties. Investment is defined as "*every kind of asset invested by the Investors of one Contracting Party in the territory of the Contracting Party*…." (followed by a non-exclusive list of assets) {C/14/138-139}.

4. The Tribunal correctly found that there was no Article 1.8 Measure with respect to RAKIA's Investment. The Judge erred in concluding that there was such a Measure.

5. The relevant factual background is set out in the Judgment at [14]-[62] {C/9/105-116}, with the Tribunal's conclusions set out at [63]-[65] {C/9/116-117}. In brief, RAKIA was (at the time of the alleged Measure) a c.12% shareholder in the Indian company, ANRAK, which is majority owned by the Indian company, Penna Group.[3] Substantial money was raised by ANRAK, including in large part from Indian state banks, to build and operate a refinery and

[1] {C/14/147-150}
[2] {C/33/468}
[3] To India's knowledge RAKIA retains all of its shares in ANRAK, however its percentage shareholding in the local Indian company has subsequently been diluted to approximately 6.3% (Langley 1 at para 27(a)) {S/3/122-123}. At the time of the putative Measure, RAKIA's shareholding stood at 12% which will be the figure adopted for present purposes.

smelter in Andhra Pradesh. The refinery was built (but not the smelter). ANRAK had a contract (containing its own dispute resolution clause) with APMDC – the state mining company – to supply the refinery with bauxite from mines some 90km away (the Bauxite Supply Agreement, "**BSA**") {S/9/213-249}. There was significant social unrest regarding the proposed mining. A governmental order ("**GOM 44**") {S/17/329-332} was adopted by the Government of Andhra Pradesh ("**GoAP**") cancelling its prior orders giving permission for conclusion of the BSA. The BSA was later terminated by APMDC (athough there has subsequently been some operation of the project refinery with alternative supplies[4]). As the Tribunal found, applying the Treaty language, the matters which led to the BSA being terminated are not measures "*applied directly to*" RAKIA's Investment, i.e. to its 12% shareholding in ANRAK.

6. The Judge erred in four respects:

   a. He incorrectly found that the long-since spent acquisition funds used by RAKIA to purchase its shares themselves formed an Investment, separate to the shares; and likewise the pledge by RAKIA of those same shares to an Indian bank. Neither the long-spent cash nor the pledge were assets of RAKIA at the relevant time (i.e. when GOM 44 was promulgated), and did not fall within the Treaty's asset-based definition of "*Investment*". The only relevant asset and the only Investment was the shareholding in ANRAK, as the Tribunal correctly held. See paragraphs 39 to 41 below.

   b. When deciding that there was an Investment to which GOM 44 was directly applied, he incorrectly treated the "Alumina and Aluminium Industry" into which RAKIA had invested as, or as part, of the Investment, or equated the Investment with that wider Industry. See paragraphs 42 to 58 below.

   c. When interpreting and applying the term "*applied directly*" in Article 1.8, he incorrectly considered the "*directly*" requirement to be met if binding action was "*targeted*" at a particular project (rather than being of wider/more general application), when on a correct interpretation that term performed a narrowing function, emphasising that it was only those actions that applied directly to the specific Investement invested by the Investor that would qualify as a Measure. See paragraphs 59 to 69 below.

[4] Langley 1 at para 27(c) {S/3/123}.

d. As a matter of the relevant facts, he found that, by GOM 44, GoAP acted directly to end the supply of bauxite and "*with that*" the establishment of the "Industry" in the State. Yet GoAP did not act to end and had no reason to end an Industry into which very substantial sums had been invested by ANRAK and by Indian banks. See paragraphs 70 to 71 below.

7. The remainder of this skeleton is structured as follows:

a. **Section B** highlights various features of the Judgment.

b. **Section C** addresses the proper approach to treaty interpretation under Article 31 of the Vienna Convention on the Law of Treaties (VCLT) and also Article 32 (supplementary means).

c. **Section D** addresses India's Ground 1, i.e. the incorrect identification of the Investment and the incorrect treatment of the wider Industry as the relevant Investment.

d. **Section E** addresses India's Ground 2, i.e. the incorrect interpretation of "*applied directly*" in Article 1.8 and the factual error with respect to GoAP acting to end the Industry.

B The Judgment

8. The Judgment (rightly) rejected RAKIA's case that it had an Investment in the form of (i) rights under the MoU; (ii) an interest in the refinery or plant; or (iii) as a sponsor with Penna Cement. None of these could be described as an asset of RAKIA: Judgment at [85] {C/9/121}. The Court found that "*the basic answer*" to what RAKIA invested was that "*it invested US$42.5 million, the shares and the pledge of shares in the territory of Andhra Pradesh*": Judgment at [85] {C/9/121}.

9. In seeking to establish that Article 1.8 was satisfied by GOM 44, RAKIA had contended that the scope of its "*Investment*" was not limited to the assets that it had actually invested in India but had to encompass "*the project as a whole*". It contended that this was justified by reference to the "*holistic*" approach to Investment: Judgment at [82] {C/9/121} and [89-92] {C/9/122}. As to this:

a. In *Czech Republic v Diag Human* [2024] EWHC 2102 (Comm), Foxton J considered that the holistic approach could be used to distinguish between assets which were, or were not, investments within the meaning of the relevant treaty: *Diag* at [85].

b. Foxton J's approach is accepted in the Judgment at [92]. Correctly, the Judgment finds at [92] that: *"Where, as here, a definition of "Investment" is involved that is confined to "assets", the holistic approach does not treat as an Investment something that is not an asset."* {C/9/122} Consistent with this, as the Court noted at [90], RAKIA's descriptions of having invested "*in the project as a whole*":*"...provide a characterisation that helps confirm that the assets invested by RAKIA were investments. They do not add to what the assets invested were."* {C/9/122}.

10. The Court then turned to consider at [93] and [94] whether the assets which it had identified as invested by RAKIA - namely the cash, shares, and pledge - were Investments {C/9/121}. The Court concluded at [94] that these three sets of assets had the quality of an Investment under the BIT, because they were invested into the wider project.

11. Thus at [94] the Court used the holistic approach to place the *assets* invested by RAKIA into their wider context, so as to confirm that *those assets* were "Investments", because they were part of a wider project *"to establish Alumina and Aluminium Industry in the State of Andhra Pradesh"* {C/9/122}. However, when the Court then considered Article 1.8, the Judgment at [111] equated the Investment with that wider context and project, even though the project "*to establish Alumina and Aluminium Industry in the State of Andhra Pradesh"* was not itself an asset, and not an asset invested by RAKIA. In the Court's view:

> "There was application to the Investment in that the action was applied to the proposed establishment of an Alumina and Aluminium Industry in the State of Andhra Pradesh. And in GOM 44 the Government of Andhra Pradesh acted directly to end the supply of bauxite and with that the establishment of an Alumina and Aluminium Industry in the State of Andra Pradesh. (India points to evidence that the refinery is operating using alternative sources of bauxite, but that does not affect the position at the time.)" (Emphasis added.) {C/9/125}

12. The Court has thus used the "*holistic*" approach in two ways, the first of which is permissible and the second of which is not:

a. First, when deciding whether particular asset(s) constituted "*Investments*" to which the BIT applied, the Court has looked to the wider context (*viz*. the proposed establishment of an Alumina and Aluminium Industry) to decide whether those assets can be characterised as "Investments".

b. Second, the Court incorrectly treated that wider activity *itself* as or as part of the "*Investment*" of RAKIA (and/or equated the Alumina and Aluminium Industry as a whole with the "*Investment*"), when deciding that this was the "*Investment*" to which GOM 44 was applied.

13. By adopting that second approach, the Court has incorrectly extended Treaty protection (in the form of Articles 10.2 and 1.8) to matters which are not *assets*; or are not assets which were invested by RAKIA in India (as Article 1.1 requires).

C Treaty interpretation

14. The Treaty is to be interpreted in line with the rules set down in the VCLT, which reflect customary international law. In accordance with Article 31(1) VCLT: "*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.*"

15. Also of relevance, Article 31(3)(c) provides that:

> "3. There shall be taken into account, together with the context: … (c) any relevant rules of international law applicable in the relations between the parties."

16. The relevant rule in the current context is the well-established customary international law recognition of the separate legal personality of a company, such that an act directed at the rights and assets of a company is not to be conflated with an act directed at the shareholder and its rights and assets (including the shares). As held by the ICJ in the *Barcelona Traction* case in the context of a diplomatic protection claim:

> "The concept and structure of the company are founded on and determined by a firm distinction between the separate entity of the company and that of the shareholder, each with a distinct set of rights. The separation of property rights as between company and shareholder is an important manifestation of this distinction. So long as the company is in existence the shareholder has no right to the corporate assets.
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> …
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> Persons suffer damage or harm in most varied circumstances. This in itself does not involve the obligation to make reparation. Not a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected."[5]

17. This rule may not be of relevance in the BIT context insofar as BITs typically allow for derivative loss claims, i.e. where a share is the investment and a claim is permitted in relation to the dimunition in value of the share caused by harm to the company or its assets (and see at paragraph 30 below). But it must be considered here in particular when interpreting the definition of "Measure" in Article 1(8) and the notion of binding action "*applied directly to*" an Investment, as customary international law recognizes a clear distinction between (i) a

[5] *Barcelona Traction,* Judgment, ICJ Rep. 1970, 33-36, paras. 38-47, esp. 38 and 46. See also *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo),* ICJ Rep. (2007) 605-606, [61], [63].

measure applied directly to a share and (ii) a measure applied directly to rights or assets of the company (in which a share is held).

18. Pursuant to Article 32 VCLT, recourse may also be had to supplementary means of interpretation, depending upon whether that recourse is being made in order (i) to "confirm" the meaning resulting from the application of the rules in Article 31 or (ii) to "determine" the meaning where application of Article 31 leads to a meaning that is ambiguous or absurd.[6] This was confirmed by the UKSC in *JTI Polska v Jakubowsi* [2024] AC 621 [31] –[32]; and the UKSC also noted that supplementary materials can only assist in a case in which they are being relied upon to "determine" the interpretation of a treaty if they "clearly and indisputably point to a definite legislative intention".

19. India also notes two other points on the correct approach to interpretation of the Treaty.

20. First, there is no presumption of a broad effect to arbitration clauses in international law (e.g. as exists in English law, under the *Fiona Trust* "one stop shop" rule): see *Gold Reserve v Venezuela* [2016] EWHC 153 (Comm), [2016] 1 WLR 2829 at [22].

21. Second, there is no presumption that an offer to arbitrate made to investors should be co-extensive with substantive obligations in a treaty.[7] In international law, the default position is that there is no forum with jurisdiction to resolve disputes about compliance with treaty obligations. That does not mean that a given treaty provision lacks effect. Some investment treaties do not contain an offer to arbitrate to investors at all.[8] Others restrict the scope of an offer to arbitrate to certain matters arising under the treaty (e.g. expropriation).[9]

22. RAKIA has now accepted that Article 10.2 limits the scope of the offer to arbitrate, and hence it accepts that this offer is <u>not</u> co-extensive with the substantive obligations in the Treaty. Further, it is to be noted that:

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[6] Article 32: "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."

[7] See e.g. *Inceysa v El Salvador* Award 2 August 2006, para. 184: "States that sign an agreement for reciprocal protection of investments have broad powers to limit their consent only to the disputes that meet the characteristics indicated by them. Therefore, it is perfectly valid and common for States to exclude from their consent to the jurisdiction of the Centre a certain type of dispute, to impose certain requisites for the investments made in their territory by an investor from the other State to benefit from the protection of the agreement in question and to limit their consent only to those that are within the limits indicated in the agreement."

[8] For example, the investment chapter of the UK-Australia Free Trade Agreement does not provide for investor-State dispute settlement but is subject only to the state-state dispute settlement regime provided in Chapter 30 of the FTA.

[9] For example, it was commonplace in USSR or Chinese BITs to have a jurisdictional provision restricted to disputes concerning the amount of compensation with respect to an expropriation.

a. various substantive provisions within the Treaty are not confined to "Measures" (e.g. the obligation to ensure fair and equitable treatment (FET) provision at Article 5.1) {C/14/142}; and

b. jurisdiction under Article 11 re. state-to-state arbitration is not confined to "Measures" and allows for arbitration of any dispute concerning "interpretation or application or execution" of the Treaty {C/14/150-152}. Article 11 was the focus of considerable argument before the Tribunal and referred to in the Award at [100] {S/1/29-30}.

D Ground 1 – error in identifying RAKIA's Investment {C/2/15}

23. India addresses (1) the correct approach to identification of RAKIA's Invesment in this case; (2) the Court's incorrect identification of the cash and pledge as part of the Investment; (3) the Court's incorrect elision of the Investment and the wider Alumina and Aluminium Industry.

(1) Identification of RAKIA's Investment

24. Article 1.1 of the BIT defines "Investment" as follows:

> "The term "Investment" means <u>every kind of asset invested by the Investors</u> of one Contracting Party in the territory of the other Contracting Party in accordance with the laws, and regulations of the Contracting Party in whose territory the Investment is made and in particular, though not exclusively, includes: …" (emphasis added) {C/14/138}.

25. There then follows a list of such assets, that includes "*movable and immovable property as well as any other property rights in rem such as mortgages, liens, pledges, …*"; "*shares….and any other similar forms of participation in a company…*"; and "*rights to or claims to money or to any performance under contract having financial or economic value*" {C/14/139}. Accordingly, to qualify as an Investment under the BIT, there must be:

a. An identifiable "*asset*" i.e. some form of property or right.

b. The asset must be "*invested by*" RAKIA;

c. The Investment must be made be in the territory of India; and be in accordance with Indian laws and regulations.

26. All this follows from the ordinary meaning of the words used. As to context, there is nothing in the Treaty language that suggests that things that are not identifiable assets (or that are assets invested by some other party) constitute an Investment. To the contrary:

a. The wording of Article 1.8 demonstrates that the parties intended the Investment to be something to which legally binding action could be applied directly, i.e. some form of identifiable asset with a legal existence.

b. Article 7.3 draws a clear distinction between (i) the "*assets*" of a local subsidiary in which the foreign Investor owns shares; and (ii) the Investment of that Investor, which is represented by those shares {C/14/145}. Article 7.3 does not treat the "*assets*" of the local subsidiary *as* the shareholder's Investment. Instead, the shareholder is entitled to fair and equitable compensation to the extent necessary to compensate it in respect of any diminution in value in its shareholding. It is the actual Investment (i.e. the shares) that is protected, and the Investment is to be distinguished from the assets held by a separate legal person (cf. Judgment [119] {C/9/126}).

27. As to object and purpose, it is noted that the Preamble of the Treaty refers to "*fostering greater Investment by Investors*" but this tells one nothing about the intended scope of the term "*Investment*". That is a matter of express definition, and the concepts of object and purpose do not greatly assist.

28. India's interpretation is supported by four further points.

29. First, in order to determine whether an Investor holds an asset capable of constituting an Investment under the Treaty, i.e. whether an Investment exists, it is necessary to refer to the municipal law of the host state. The Investment is some form of property or right recognised in the applicable domestic law. That is plain on the face of the Treaty, but also the general position more broadly: see the judgment of the Singapore Court of Appeal in *Swissbourgh v Lesotho*, referring to *Emmis v Hungary* and *Venezuela Holdings v Venezuela.*[10] Public international law does not contain substantive rules of property law and does not create property rights.[11] Investment treaties establish international law protections for assets existing in domestic law.[12]

[10] *Swissbourgh Diamond Mines (Pty) Limited v Kingdom of Lesotho,* PCA Case No.2013-29, Singapore Court of Appeal, 27 November 2018 at [103]-[109] and [124]. If the chose in action in question is governed by a different applicable law, then one can refer to that law: *Diag* at [121]. See also *Emmis International Holding BV et al v Republic of Hungary, I*CSID Case No. ARB/12/12, Award 16 April 2014 at [161]-[162]; *Venezuela Holdings v Venezuela, , I*CSID Case No. ARB/07/27, Decision on Annulment, at [170]-[174].

[11] Douglas, *The International Law of Investment Claims* (4th ed), Cambridge University Press (2012) at [101]; cited with approval in *Swissbourgh v Lesotho* at [103].

[12] It is possible that a right to bring a claim in international law may also form part of what is protected: *Swissbourgh Diamond Mines (Pty) Limited v Kingdom of Lesotho,* PCA Case No.2013-29, Singapore Court of Appeal, 27 November 2018 at [144].

30. Second, where a foreign investor has invested in a host state through the acquisition of shares in a local company, those shares represent an investment. Loss caused to the local subsidiary by the actions of the host state can (assuming all relevant jurisdictional requirements are met under the applicable treaty) be the subject of an investor/state claim by the foreign shareholder investor for the diminution caused to the value of its shareholding. See e.g. Foxton J in *Czech Republic v Diag Human SE* at [204(i)].

31. Third, as to the assets owned by that local subsidiary, as already identified above, customary international law recognises the principle of separate corporate personality.[13] Thus, the default position is that where a local subsidiary holds title to assets, those belong and remain the property of that local company, not the shareholder who owns shares in the company (still less a minority shareholder like RAKIA).

32. Numerous tribunals have reached the conclusion that assets of a local subsidiary are not part of the investment made by a shareholder of that subsidiary.[14] Thus in *ST-AD v Bulgaria*, the tribunal noted that:

> "It has been repeatedly held by arbitral tribunals that an investor has no enforceable right in arbitration over the assets and contracts belonging to the company in which it owns shares, that "an investor whose investment consists of shares cannot claim, for example, that the assets of the company are its property and ask for compensation for interference with these assets" and that instead the investor can "claim for any loss of value of its shares resulting from an interference with the assets or contracts of the company in which it owns the shares."

33. The terms of the Treaty at issue here support that analysis (which was quoted at Award [133] and considered at [134] {S/1/38-39}). In particular, Article 1.1 provides that the term "*Investment*" means "*every kind of asset invested by the Investors…*". Not every BIT contains such language. The ordinary meaning of the term "*invested by*" within the definition is to create a link between the subject asset and the investor, such that it is those assets that are invested by the investor which meet the definition of "*Investment*".

34. Fourth, India recognises that some tribunals have nonetheless adopted a "control theory",[15] which has treated assets of a local subsidiary as the investment of the foreign investor

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[13] See, in the context of diplomatic protection**,** *Case Concerning Barcelona Traction, Light and Power Company (Belgium v Spain)* Judgment [1970] ICJ Rep 1, applied in *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo),* ICJ Rep. (2007) 605-606, [61], [63].

[14] See, for example, *Karkey Kardeniz Elektrik Uretim AS v Pakistan* ICSID Case No. ARB/13/1, Award, 22 August 2017 at [716]; *El Paso Energy International Company v Argentina* ICSID Case No. ARB/03/15, Award, 31 October 2011 *at [178] et seq.; BG Group Plc v Argentina* UNCITRAL, Final Award 24 December 2007 at [210]*; CMS Gas Transmission Company v Argentina* ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003 at [66]-[68]; *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Mongolia, UNCITRAL, Award on Jurisdiction and Liability, April 28, 2011,* at [202].

[15] See *von Pezold v Republic of Zimbabwe ,* ICSID Case No. ARB/10/15, Award, 28 July 2015 at [321]

shareholder where (unlike here) the shareholder exercises control over the local company. See e.g.:

a. *Bernhard Von Pezold and Ors v Republic of Zimbabwe* at [317]-[327].

b. *Mera v Republic of Serbia* (discussed by the Tribunal at Award [135]), where *Von Pezold* was treated as reflecting a principle that: "…*where a company is controlled, legally or factually, by a certain shareholder or group of shareholders, the latter may be entitled to a direct claim in respect of the assets of the former. Accordingly, in situations where a shareholder controls the company that owns the assets in issue, tribunals may consider those underlying assets to be the investments of the shareholder.*" (Emphasis added.)

35. Hence such cases turn on the relevant investor being a majority shareholder. In *Republic of Korea v Dayyani and Others (Dayyani)*, Butcher J considered the circumstances in which a shareholder may be entitled to treat the assets of a local subsidiary as an investment "*invested by*" it, and stressed the element of control. He noted at [76] that:

> "…the relevant question is whether the BIT itself confers a wide enough protection such that a shareholder may be protected in relation to damage to the assets of the company in which the shares are held. I consider that it does. The shareholder(s), at least if it/they exercise control over the company as there was no issue that the Dayyanis did in the case of D&A, can, in accordance with the ordinary meaning and understanding of the word, be termed "investors" in the assets of the company in such circumstances, and the assets of the company can fairly be described as "investments" "invested by" those shareholders. The terms of the BIT are in this respect very wide."[16]

36. Similarly, at [80] Butcher J noted that:

> "….claims may be made under bilateral investment treaties, if in wide enough terms, by shareholders who control a company in respect of the assets of the company…".

37. Applying the above observations to the present facts:

a. There is no dispute that RAKIA's approximately 12% minority shareholding in ANRAK is an Investment.[17] Indeed, this was the only Investment identified by RAKIA in its 100-page plus Statement of Claim. Consistent with this, the quantification of RAKIA's claim in the arbitration was – and remains – framed on the basis of the alleged diminution in the value of its shares.

[16] *The Republic of Korea v Dayyani and Others* [2019] EWHC 3580 (Comm).
[17] Initially it had a 30% shareholding; that had been diluted to approximately 12% by the time of the reply pleading in the arbitration and, by February 2023, further diluted to 6.29%. See Langley 1 [8] {S/3/115-116}.

b. There is, rightly, no suggestion from RAKIA that it has any legal or beneficial interest in any of the assets of ANRAK as a matter of any applicable law.

c. There is similarly (and correctly) no suggestion that RAKIA's minority shareholding in ANRAK has ever granted it control over ANRAK's operations, such that it could be said that RAKIA was in practice the person who alone could decide on the disposition of the company's assets (cf. *Von Pezold* at [321]).

38. In those circumstances, RAKIA's "Investment" is its shares in ANRAK, as the Tribunal rightly held. It follows that, so far as concerns the application of Articles 1.8 and 10.2, the Investment is the shares in ANRAK, and the only question is whether there was binding action applied directly to those shares such that there was a qualifying Measure falling within arbitral jurisdiction (there was not).

(2) Incorrect identification of the assets invested by RAKIA

39. The Judge erred in concluding that the $42.5m paid for the shares and the pledge of the shares also constituted Investments: see at [85]-[87] {C/9/121-122}.

40. As to the $42.5m paid for the shares, India has three points:

a. First, as recognised at [86] of the Judgment, RAKIA received shares in ANRAK "in return for all or some of the money". In fact, it paid all the $42.5m for shares. Upon that exchange, it no longer had any asset in the form of that cash, and the Investment was (and still is) the shares. The "change of form" provision in Article 1.1 does not affect this analysis: cf. Judgment [86]. This provision simply allows an Investor to treat an asset purchased with cash as its Investment. It does not permit RAKIA to treat the cash paid for shares and the shares simultaneously as the Investment. Indeed, if such cash had been intended to remain as an Investment, there would be no need for the "change of form" provision.

b. Second, the Court appears incorrectly to have understood the Treaty as protecting as the Investment the assets (e.g. cash) "put in" as part of an investment process, as opposed to the asset thereby acquired: see Judgment at [86]. That it is the asset acquired that qualifies as the Investment is clear from the nature of the assets listed in Article 1.1, as well as provisions such as Article 1.4 and 1.8 and the substantive protections. See also:

i. Butcher J in *PAO Tatneft v Ukraine* [2018] EWHC 1797 (Comm) at [64]-[65] (although cf. Butcher J analysing different treaty wording in *Dayyani v Korea* at [46]).

ii. *Inmaris v Ukraine* at [99]-[101].

c. Third, and in any event, RAKIA brought its equity investment up to $42.5m by 2009. Accordingly, at the time of the executive action complained of in 2016, which is the relevant point in time for consideration of whether there was executive action applied directly to an Investment for the purposes of Article 1.8, RAKIA did not have an asset, in the form of that $42.5m in cash. GOM 44 could not have been "directly applied" to the cash that RAKIA had long since paid for its shares.

41. As for the pledge, RAKIA pledged its shares to Axis Bank: [46] {C/9/113}. The Court analysed the pledge *qua* an Investment at [87], noting it was on the list of assets in Article 1.1 {C/9/122}. However:

a. the pledge was an asset only in the hands of Axis Bank, because it gave that bank security over RAKIA's shares (in exchange for monies lent to ANRAK). That is a right of security granted in favour of the bank as creditor, and which encumbered RAKIA's shares. The pledge did not constitute an asset of RAKIA.

b. In both *Joy Mining v Egypt* [42]-[45] and *White Industries v India* [section 7.5], it was held that a bank guarantee was a contingent liability, not an asset, and not an investment. The same analysis should apply here.

(3) Incorrect equating of the Investment with the wider project

42. There is no finding in the Judgment that GOM 44 was applied directly to the assets found by the Court to have been invested by RAKIA in India (that is, the shares, $42.5m in cash, or pledge). Indeed, the Court appears – rightly – to accept that GOM 44 was not directly applied to the shares: see [117] {C/9/123}.

a. The Judgment finds that GOM 44 was a binding action that was applied to "*alter or end the BSA*" (at [100] {C/9/123}).

b. It was, however, common ground that the BSA was not an asset invested by RAKIA in India, being a contract to which RAKIA was not a party. It cannot qualify as an Investment; and the Judgment does not (when earlier considering RAKIA's "*Investment*") consider it as such.

43. Critically, the basis for the finding that the requirement that GOM 44 was nevertheless directly applied to the Investment is at [111], namely that: "*There was application to the Investment in that the action was applied to the proposed establishment of an Alumina and Aluminium Industry in the State of Andhra Pradesh*." {C/9/123}

44. That is a finding that "*the Investment*" was (or comprised or took on the quality of) the "*proposed establishment of an Alumina and Aluminium Industry in the State of Andhra Pradesh*". But, it is not correct to treat the "*proposed establishment*" of this Industry as "*the Investment*" or to equate the two:

    a. First, the "*proposed establishment*" of an Alumina and Aluminium Industry in the State of Andhra Pradesh was not an asset that could be protected by the BIT but an aspirational statement of intention. It is a phrase contained in a recital to the MOU, which states: "*AND WHEREAS, on 9-2-2007 at a high level meeting, it was decided to enter into an MoU with GoRAK, United Arab Emirates, to establish Alumina and Aluminium Industry in the State of Andhra Pradesh*". {S/5/189}

    b. Second, RAKIA's case that the MOU was itself an Investment had already been rejected. The Court found at [85] that the MOU was not an asset in which RAKIA had invested any rights. {C/9/121}

    c. Third, RAKIA's case that it had any Investment "*in the project as a whole, rather than a specific aspect of it*", was also rejected by the Court. The Court found at [89]-[90] that this was a description that "*provide[d] a characterisation that help confirm that the assets invested by RAKIA were investments. They do not add to what the assets invested were*". {C/9/122}

<u>Incorrect use of the "*holistic*" approach / mis-application re. the Investment</u>

45. One cannot treat the "*proposed establishment*" of the Alumina and Aluminium Industry as "*the Investment*" by reference to a "*holistic*" approach. As the Court noted at [92], the purpose of the holistic approach is to assist in identifying whether a specific asset invested by the Investor has the qualities that make it an "*Investment*" {C/9/122}. For example, in *Diag*, the Czech Republic contended that the term "investment" "*has an inherent meaning which requires more than simply the investor owning or controlling an asset…*". In considering that question, Foxton J applied a holistic approach and at [125] held that, "*Looked at globally*"

the investment was "*very far removed indeed from a cross-border sale contract of the kind which has tested the limits of the concept of an investment in ITA jurisprudence*".[18]

46. What the cases show is that, as with the Judgment at [90]-[92] {C/9/122}, the holistic approach assists in identifying whether assets of the Investor qualify as an Investment. The key point is that the holistic approach does not permit an Investor to claim as its Investment other parts of the same project which do not constitute its assets.

    a. RAKIA was not able to point to any authority where this had been done (or where the assets comprising the Investment were then treated as or as equivalent to the wider project/projected industry). This is not surprising, given the effect of such an approach would be radically to expand the scope of an Investor's protected "Investment" beyond the assets invested by it.

    b. Nor can the holistic or any other permitted approach otherwise change the scope or nature of the Investment when it comes to an issue of application.

47. However, when considering whether GOM 44 was applied directly to the Investment, the Judgment finds at [108] that:

> "As seen earlier, as a matter of interpretation of the BIT, the mere existence of an asset of a type listed in Article 1.1 of the BIT does not mean that the asset is an "Investment". It has to have the quality of an investment. So also, the 'direct application' that matters for the purpose of Article 1.8 is not simply to an asset, but to an asset as an investment ("applied directly to an Investment")." {C/9/124}

48. The first and second sentences of [108] look back ("*As seen earlier*") to the Court's approach of considering whether a particular asset invested by RAKIA had the "*quality of an Investment*" because it was part of a wider project: see at [94] {C/9/122}.

49. Critically, however, the third sentence, when read with [111] ("*There was application to the Investment in that the action was applied to the proposed establishment of an Alumina and Aluminium Industry in the State of Andhra Pradesh*" {C/9/125}), takes a further and erroneous step. It treats the wider project – indeed, the whole proposed "*Alumina and Aluminium Industry*"– in which the shares were invested as or as part of the Investment (or otherwise equates the two).

50. This is an incorrect approach to the interpretation and application of the term "Investment", which confines itself to an asset-based definition in the Treaty, as is typical. It is one thing to find that a minority shareholding held by an investor in a local company was (itself) an

[18] See also *Joy Mining Machinery Ltd v Arab Republic of Egypt* ICSID Case No ARB/03/11, Award on Jurisdiction of 6 August 2004.

Investment, when seen as part of a wider project. It is quite another to characterise the specific Investment made by the foreign minority shareholder that falls within the definition of the BIT as (or as part of or equivalent to) the wider project in which the local company was intended to participate.

51. The consequences of this approach will not just be felt in a case such as this – where there is particular wording limiting the scope of the offer to arbitrate to binding action applied directly to an Investment. It will be felt in all cases where there is treaty protection of "*Investments*": the scope of protection offered by, for example, a prohibition of the expropriation of "*Investments*", and all other substantive protections provided to "*Investments*", naturally depends on what is (and is not) covered by the word "*Investment*".

52. In an effort to avoid the above conclusions, RAKIA contended in its Consequentials skeleton before Knowles J that the Court at [111] was merely explaining that there was application to the Investment <u>because</u> there was application to the establishment of the proposed Industry, and that the two concepts were not being equated.[19] Insofar as that point is maintained:

    a. That is not a fair reading of the Judgment, in particular when [111] is read (as intended) with the prior reasoning including [103], [108] and [110] {C/9/124-125}. The Court's conclusion that Article 1.8 was satisfied was inextricably bound up with its findings regarding the "*Investment*".

    b. It is not a reading of the Judgment that makes any sense. GOM 44 was applied directly <u>to the BSA</u> (which was not alleged to be, and which the Court did not find to be, an Investment of RAKIA). I.e., GOM 44 was applied directly to a contract between APMDC and ANRAK, the company in which RAKIA had its 12% shareholding. As a matter of fact and law it could not be correct to say that the direct application to ANRAK's contract, or even to ANRAK, meant the direct application to the shares held by RAKIA in ANRAK (or to the long since spent money which had been paid to acquire those shares, or to the pledge). RAKIA's Investment and the wider Industry are not two sides of the same coin and there is no reasoning to support any such conclusion.

<u>No "*problem*" with the BIT's scope of shareholder protection</u>

53. An important factor in the Court's reasoning appears to have been its perception that there was a problem with the practical outcome of the Tribunal's analysis. The Judgment states:

[19] RAKIA's Consequentials Skeleton at para 41.2.

> "[116] Standing back, the Tribunal's analysis would in practice mean that a major form of investment structure fell outside the compass of the BIT without apparent reason for that choice. Investors would be advised to avoid investing that took the form of establishing and taking shareholdings in companies incorporated in "the territory of the other Contracting Party".
>
> [117] Of course, it is possible for parties to a BIT to intend that effect, but there is no explanation why they should or did with the BIT in this case…" {C/9/125}

54. The Judgment then notes that India's examples of binding action that could be taken as applying directly to the shares "*do not save its interpretation from the problem just mentioned*": [117]. {C/9/125}

55. Yet there was no "*problem*" with the Tribunal's approach: the highly limited scope of the offer to arbitrate is an inherent feature of this Treaty. It was not a consequence of the Tribunal's analysis, but a consequence of the agreement the Contracting Parties made and, to the extent any investor was consulting the terms of the Treaty before investing, they would have seen as much.

    a. Even on the Court's analysis, the ability of a foreign shareholder to bring a claim would always have been very restricted. As follows from Article 10.2, directly applicable legislative or judicial intervention could <u>not</u> be challenged in an investor-state arbitration under the Treaty (as Article 10.2 is expressly limited to action taken by the Central Government and/or the state governments while exercising their executive powers).

    b. A prospective investor would also note and be informed by other unusual features of the BIT that demonstrate an evident intention on the part of the Contracting Parties to restrict the bringing of investor-state claims, even where there is a Measure taken by the executive, including Article 10.8(a) which accords primacy to the dispute clause in a written contract between state and investor (i.e. excludes ISDS){C/14/150}. Investment by means of a contract with the state can also be seen as a "*major form of investment structure*" (Judgment at [116] {C/9/125}) and yet was excluded.

56. The dispute resolution provisions of this Treaty cannot be approached as if they were intended to provide a more usual wide access to investor-state arbitration to foreign shareholders (in particular, minority shareholders) investing in India. The Judgment took no or no adequate account of this point and hence saw a "*problem*". This is compounded by the reliance at [117] {C/9/125} on the Preamble to the Treaty, as creating conditions favourable for fostering greater "Investment" – that wording cannot assist in answering the prior question of what is an "Investment", whether in the context of Article 1.8 or otherwise.

57. Further, it is not necessarily to be expected that there would be any "*explanation*" for the BIT parties' limits on jurisdiction (and nor does the VCLT look for such). However, there *was* a good explanation for the Contracting Parties agreeing to this outcome:

a. The circumstances of the Treaty's conclusion in late 2013 are important. At that time, there was no existing BIT in place between India and UAE and, specifically in response to an adverse investor-State arbitral award (*White Industries v India*), India had put its BIT programme on hold whilst reviewing its portfolio of some 89 or so BITs. India was very concerned about access to arbitral jurisdiction.[20]

b. Both Parties plainly wished to confine access to arbitral jurisdiction, and this is amply demonstrated by the BIT's terms (discussed above).

c. The Treaty was also intended to be interim in nature, the Contracting Parties having agreed that within less than three years they had to commence negotiations for entry into a new or revised agreement: see Article 18 {C/14/153}. Whilst in its Judgment at [120] the Court considered the observations of the Tribunal to this effect to be "*ancillary*" and that they "*did not advance matters*" {C/9/126}, they are important. Limitations on the scope of the jurisdictional offer were necessarily short term, pending the full-scale review of India's treaty portfolio and promulgation of an acceptable "model" treaty.

d. Pursuant to the draft model BIT published by India in 2015 (and in the actual model text of 2016), minority shareholders were not protected at all. The investor was only protected by reference to having "*an enterprise*", i.e. a locally incorporated company, over which it had ownership or control (the 2015 text); or which the investor had constituted, organised and *operated* in good faith (the 2016 text). A minority shareholding such as held by RAKIA would not have qualified as a protected "investment" under that treaty regime.[21]

58. Finally, the Tribunal's approach would not deprive minority shareholders of all protections under this BIT. Minority shareholdings constitute a protected Investment, to which all the substantive provisions in the BIT applied. Not all of those were dependent on showing the existence of a Measure. Thus, a failure to treat that shareholding fairly and equitably (for example), could be the subject of investor/state arbitration (where the executive action

[20] See Ranjan 'India and Bilateral Investment Treaties – A Changing Landscape' (2014) ICSID Review 419, in particular 421, 431 – 432, 441 – 446. See also MB1/471 {S/34/469} (Government response to question in Parliament regarding BITs) and MB1/573-574 {S/35/471} on background to BITs and White Industries.
[21] See [Day 2/56-58] {S/37/476}.

complained of was applied directly to it); or the subject of the wider State-to-State arbitration provision (in other cases, even if there was no "Measure").

Ground 2 – incorrect interpretation and application of "*applied directly to an Investment*" in Article 1.8 {C/2/16}

59. Pursuant to Article 1.8, the Measure is "*any form of binding action taken by a Contracting Party under any law, rule or regulation and applied directly to an Investment*". The Court identified the "*binding action*" as GOM 44. See at [100]: "*by GOM 44 the Government of Andhra Pradesh was taking binding, executive action to alter or end the BSA*".

60. The Court considered that "*binding action*" is "*directly*" applied if "*targeted at the investment*", noting that: "*The position may be different with measures of wider, general, application*": [112]. Thus, and consistent with RAKIA's case, the Court interpreted "*directly*" as requiring action on an individual basis as opposed to where, for example, an executive action of general application applies to the Investment. It stated at [113]: "*The result is a balance. It is one thing to include an offer to arbitrate that is addressed to executive action that does not apply more widely; it is another to do so where it would inhibit wider executive action.*" This is not a correct interpretation.

61. First, as a matter of ordinary meaning, and once the asset(s) making up the Investment has been identified, there are two elements to "*applied directly to an Investment*": namely (i) that the binding action be "*applied to*" the Investment; and (ii) that the application be direct. The terms used denote a form of direct legal application to an asset, such as an expropriatory decree, or an act that regulates how an Investment can be used or exploited within the host state.

    a. There is nothing in the wording that suggests that "*wider executive action*" is excluded from the scope of "*applied directly*". All that matters is that the application be direct. As a matter of ordinary meaning, it is irrelevant whether the application is targeted at one Investment, or instead concerns a whole class (or different classes) of Investment, such as for example a regulation generally restricting the sale of all tobacco products.

    b. If one considers Article 1.8 without the term "*directly*" (i.e. "*applied to an Investment*"), it is clear that its insertion was intended to perform a narrowing function, emphasising that it was only those binding actions applied directly to the specific Investment invested by the Investor that would qualify. There is a distinction between (i) the words chosen, "*applied directly to*", which requires a form of direct legal connection between the state action and that Investment; and (ii) wording such

as "*directed at*", which would be more closely synonymous with the targeting or singling out of a particular project, and which was the interpretation adopted by the Judge. The former is the only "*targeting*" that counts – and it is not material on the wording actually used that one project has been subject to direct executive action on an individual as opposed to generally applicable basis. An example of the latter might be a regulation imposing plain packaging on all cigarettes, which would "*apply directly*" to the intellectual property rights held by each individual cigarette company which they could no longer use. Another example might be an environmental regulation which regulates emissions from certain types of factory.

62. Second, focusing on the context, the Court's interpretation cannot be reconciled with various provisions of the Treaty, and most obviously Article 14.2, which provides: "*Nothing in this Agreement precludes the Contracting Party from taking necessary reasonable Measures in accordance with its laws applied generally on a non-discriminatory basis, in circumstances of extreme emergency for the specific purposes of prevention of diseases or pests.*" {C/14/152-153}

a. Article 14.2 is predicated on the understanding that the term "*Measure*" includes actions taken by a State which are "*applied generally on a non-discriminatory basis*". It demonstrates that generally applicable Measures *do* fall within the scope of Article 1.8, and it is thus inconsistent with the proposition that the definition of "*Measure*" in Article 1.8 applies only to "*targeted*" as opposed to "*wider executive*" action. Further, on the Court's analysis, there would be no reason for the specific exception in Article 14.2 – generally applicable and non-discriminatory acts would already be excluded from the concept of "*Measures*".

b. The Judgment suggests at [115] that the working of Article 14.2 is not affected by the Court's analysis of "*Measure*" {C/9/125}. However, the Court's analysis cuts across both the content and existence of Article 14.2. It is the strongest possible contextual indicator that "Measures" under Article 1.8 <u>do</u> include generally applicable non-discriminatory measures, i.e. action that is <u>not</u> targeted in the sense of the term used in the Judgment.

c. The same basic points apply with respect to Article 7.4 which clarifies that the prohibition of expropriation also applies with respect to "*regulatory Measures*" that have a *de facto* expropriatory effect {C/14/145}. The concept of "*regulatory*

Measures" is inconsistent with the understanding that "*Measures*" must be "*targeted*" and do not include "*wider executive action*".

63. Third, as to object and purpose, it is unclear whether the Court was accepting RAKIA's argument that a principal focus of the Treaty, to be taken into account when interpreting Article 10.2 and 1.8, was protecting the State's "*right to regulate*" *i.e.* through generally applicable action: cf. Judgment [114] {C/9/125}. There is nothing in the preamble of the Treaty (or elsewhere in the Treaty) to support any such object and purpose.

a. The preamble merely refers to the desire of creating "conditions favourable for fostering greater Investment by Investors", and:

> "Recogniz[es] that the encouragement and reciprocal protection of such Investment made in accordance with the laws and regulations of the host Contracting Party will be conducive to the stimulation of individual business initiative and will increase prosperity in both Contracting Parties." {C/14/138}

b. This tells one little about how the Treaty parties elected to achieve such goals when it came to arbitral consent under Article 10 and the definition of the term "*Measure*", in particular in circumstances where they were agreeing express treaty language that is very unusual in the BIT context.

c. Further, if protecting the State's "*right to regulate*" were the true intention, the only way to achieve this would have been through the use of a provision which applied across the whole Treaty (e.g. a less restricted version of Article 14.2), as opposed to Article 1.8 which is only engaged where the Parties have chosen in the Treaty to regulate or refer specifically to "*Measures*".

d. For example, the substantive obligation to accord fair and equitable treatment to an Investment at Article 5.1 is <u>not</u> restricted to the occasion where a State adopts a Measure (and can be enforced without an investor pointing to a Measure, through the State-State arbitration agreement at Article 11). If the parties had truly intended the term "*Measure*" to achieve a balance intended to preserve the "*right to regulate*", they would presumably have used that term in this provision, whose scope of application gives rise to acute concern about over-encroachment on the State's regulatory space.

e. Moreover, policy and regulatory issues do not just arise in respect of generalised Measures. A Measure that affects just one Investment can also be based in policy and regulatory concerns. Indeed, this claim is a good example of that. Other examples can readily be thought of e.g. cancellation of a particular oil licence or project because of (specific) environmental concerns. Such a Measure would seemingly be "*targeted*

at" an individual Investment and hence fall within the Court's conception of "*Measure*", although that would be inconsistent with an interpretation of "*Measure*" which sought to reflect the aim of protecting the State's "*right to regulate*".

64. Fourth, there is no indication in the Treaty (or elsewhere) that the insertion of the word "*directly*" was intended to achieve a "*balance*" in the offer to arbitrate between action targeted at one project (for which arbitration was offered) and wider executive action (for which it was not), as reasoned at Judgment [113] {C/9/125}. The offer to arbitrate in Article 10 is of a very unusually restricted scope, and the focus is very much on exclusion from the scope of the offer as opposed to achieving any "*balance*". It follows from Article 10.2 that (as became common ground) there is no offer to arbitrate even where the State had taken legislative or judicial action that was deliberately targeted at a single Investment, which appears inconsistent with achieving a balanced result in favour of permitting access to investor/state arbitration for "*targeted*" conduct.

65. Fifth, customary international law strongly supports the interpretation that "*applied directly to*" a share requires some form of binding executive action taken *against that share*, and that action against the separately owned assets of the company in which that share is held does not suffice. The Judgment at [106]-[107] failed to understand and/or give effect to this point {C/9/124}. It is stated at [107]: "*There is no claim of a company in which an Investor has shares. The only relevant claim for consideration is that of the Investor.*" Insofar as this is correct as a matter of fact,[22] it does not take the analysis forward any further: the correct focus was not on the standing of the Investor, RAKIA, to bring a claim in respect of its shares, which was not in doubt. The issue was whether there was a Measure, i.e. a binding action applied directly to an asset invested by RAKIA.

66. Finally, as to supplementary means of interpretation, the circumstances of the Treaty's conclusion can be used to confirm the meaning of Articles 10.2 and 1.8 that results from the application of Article 31. The particular circumstances of this Treaty's conclusion were that India had in late November 2011 lost the *White Industries* case (which concerned an alleged failure of effective justice in the Indian courts), a result which caused considerable consternation in India - including as to the extent of assertions of jurisdiction by arbitral tribunals, and encroachment into India's right to regulate.[23] As India argued before the

[22] There were separate claims by ANRAK before the Indian courts with respect to GOM 44 and the termination by APMDC of the BSA. These were not pursued by ANRAK (for reasons unknown to India): See Award at §§78-80 {S/1/23-24}.
[23] See the references in footnote 20 above.

Tribunal, such circumstances confirmed that Article 10.2 was indeed intended to operate as a jurisdictional provision, limiting the scope of jurisdiction. India's interpretation of "Measure" is confirmed by reference to that underlying concern to restrict arbitral jurisdiction. By contrast, any use of the circumstances of conclusion to confirm the term "*Measures*" being understood so as to protect "*wider executive action*" would be inconsistent with the express terms of the Treaty (most obviously Article 14.2).

67. In conclusion, once it is recognised (as it should be) that (i) the meaning of Investment is confined to assets (of the Investor); (ii) an Investment cannot be expanded beyond such assets by reference to a holistic or any other approach; and (iii) the Contracting Parties chose to require via Article 1.8 there to be "*direct application*" of that binding action to the Investment (as defined), there then needs to be the direct application of binding action to the assets invested by the Investor, in order to access investor/state arbitration. Here, there was no such action, no Measure, and hence no jurisdiction.

68. That reading is entirely consistent with the approach of the Contracting Parties to this Treaty, who were concerned to limit the jurisdictional offer they were making to foreign investors in multiple ways (as is, to a significant degree, uncontested). It is coherent for the treaty parties to seek to achieve that by means of a requirement that legal action has been directly applied to the asset invested by the Investor. India's interpretation is thus consistent with and faithful to the instrument's overarching intention and purpose.

69. By contrast, the Judge's approach invites an interpretation of the offer to arbitrate which requires the Tribunal - and then reviewing courts - to have to consider, whether some binding action which was applied to one asset (e.g. the BSA) was in reality being "targeted" at others. India's approach is much more likely to have been the Contracting Parties' intention.

GOM 44 did not directly end the establishment of an Alumina and Aluminium Industry

70. Finally, at [111] {C/9/125}, the Judgment finds that by GOM 44, the Government of Andhra Pradesh ("**GoAP**") acted directly to end the supply of bauxite and "with that" the establishment of the "Industry" in the State. If that is intended to be a finding that the Government of Andhra Pradesh acted so as to end the establishment of the Industry (as appears to be the case, given the statement at the end of [111] that the actual factual position now is irrelevant), that is (with respect) incorrect. The Court had found at [100]{C/9/123} that by GOM 44 GoAP took executive action to alter or end the BSA. There is no basis for concluding at [111] that the only aim was to end the BSA and that GoAP acted so as to end

the establishment of the Alumina and Aluminium Industry within the State. Indeed, no such case had been advanced by RAKIA in its evidence or written submissions for this s.67 claim.

71. It would have been counter-intuitive of GoAP to wish or act to bring an end to that "Industry" – not least as ANRAK was more than 85% owned by Indian investors and where a refinery had been built in Andhra Pradesh almost entirely with money loaned by Indian banks, including the State Bank of India. No such decision was taken by the Legislative Assembly in the meeting to which the Judgment refers at [51] nor by GoM 44.[24] Consistent with there having been no such decision, in 2017 the Andhra Pradesh Pollution Control Board extended ANRAK's Consent for Operations, an environmental permit required for the refinery to operate. In those circumstances, it cannot be said that GOM 44 was applied, let alone applied directly, to that alleged Investment.

SAM WORDSWORTH KC

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20 October 2025

[24] A balanced summary of the discussions in the Assembly {S/16/277-328} is contained in the Award at [77] {S/1/23}: "On 22 December 2015 there was a debate on bauxite mining in the Legislative Assembly. The former governing party appears to have stayed away, but no one spoke in favour of the deal embodied in the BSA. It is not easy to distil, from the somewhat rambling speeches of the legislators, what the precise nature of their objections were. But they were all against it. Some were opposed altogether to mining, some thought that the tribals were not getting enough out of the deal, some were suspicious of Mr Prathap Reddy of Penna and the son of the former Chief Minister who had negotiated the MoU, who was now leader of the opposition. At the end of the debate the Chief Minister announced a U-turn: he proposed to cancel the BSA by revoking GOMs 222 and 289, the orders by which GoAP had authorised APMDC to enter into it. The decision was greeted with applause."