Case No. CA-2025-002567

IN THE COURT OF APPEAL (CIVIL DIVISION)

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 SUPPLEMENTAL SKELETON ARGUMENT

A Introduction

1. This supplemental Skeleton addresses the three grounds raised in the Respondent's Notice of the Ras Al Khaimah Investment Authority ("**RAKIA**") dated 7 November 2025 {C/5/50}, as developed in RAKIA's Skeleton of 21 November 2025 at paras. 4-5, 30-34 (referring back to 12-22), 49 and 52-69 {C/6/57-83}. They are that:

    a. RAKIA's "Investment" allegedly included rights and obligations under the Bauxite Supply Agreement – a contract to which RAKIA is not a party, but which is instead a contract between ANRAK (in which RAKIA is only a small minority shareholder) and APMDC.

    b. Regardless of this, the Measure in this case was "*applied directly to*" RAKIA's Investment, even if that Investment is just the shares (and the cash and the pledge).

    c. Article 10.2 is not part of and does not constrain the offer to arbitrate in Article 10 of the Treaty – a point which RAKIA had abandoned before the Judge.

B Respondent's Notice Ground 1 – RAKIA's Investment allegedly included rights under the BSA concluded by APMDC and ANRAK {C/5/50}

2. There has never been any debate that RAKIA has an Investment protected under the BIT in the form of its c.12% shareholding[1] in the Indian incorporated company, ANRAK (the remaining shares were at the relevant time owned by Penna Cement Industries, an Indian company). As set out in India's Skeleton, India's case is that these shares are RAKIA's investment; and that the relevant question is whether GOM 44 is a Measure i.e. qualifies as "*binding action … applied directly to"* that Investment.

3. For the first time, RAKIA has now alleged that its Investment under the BIT includes the Bauxite Supply Agreement (the "**BSA**") between ANRAK and APMDC, as an asset falling within Article 1(1)(iii) ("*rights or claims to money or to any performance under contract having financial or economic value"*) that was invested by RAKIA in India.

4. That was not RAKIA's case before Robin Knowles J[2], or before the Tribunal[3]. The case as formerly put was based on an argument that a "holistic" approach to the meaning of "Investment" meant that "*RAKIA's investment was in the project as a whole*".[4] RAKIA contended at para. 2 of its skeleton before the Judge that RAKIA's investment included "*rights under the MOU; cash contributions of over USD 42.5 million; shares in ANRAK; the pledge of those shares to obtain loans (…); and its interest in the refinery and the plant overall.*"[5]

5. The "holistic" approach is no longer advanced by RAKIA on this appeal. Its case is now that the term "Investment" in Article 1.1 of the BIT (in particular the words "*every kind of asset invested by the Investors of one Contracting Party in the territory of the other*

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[1] The shareholding has subsequently reduced in size and is now approximately 6.29%: First Witness Statement of James Langley [27(a)] {S/3/122-123}.

[2] See RAKIA's Skeleton before Robin Knowles J at para. 2 {S/26/387} and para. 91 {S/26/388}.

[3] See, similarly, the Award at para. 129 {S/1/37}.

[4] Judgment at para. 82 {C/9/121} referring to the elements of the Investment identified by RAKIA at para. 2 of its skeleton before Robin Knowles J {S/26/387}.

[5] The Respondent's Notice refers to the MOU as an Investment at para. 1 {C/5/50}. However, the MOU is not an Investment for the reasons given at Award, paras. 112-128 {S/1/33-37}, and see the Judgment at para. 85 {C/9/121}. RAKIA's Skeleton refers to the MOU by way of background support to its new case on the BSA, at para. 34 {C/6/71-72}.

Contracting Party") is apt to cover not only RAKIA's minority shareholding in ANRAK, but extends to cover all assets held by ANRAK itself, including ANRAK's rights and obligations under the BSA.

6. There is an abundance of case law concerning whether there is a protected investment under an investment treaty. Despite this, RAKIA is unable to point to a single case where the words "*asset invested by the Investor*" (or any remotely similar wording) have been interpreted so as to include the assets of a separate legal entity that the Investor neither owns nor controls.[6] A fortiori, it has been unable to point to such a case concerning rights and obligations under a contract to which, as a matter of its governing law, only the contracting parties are privy.

7. Under the Treaty, and as the general rule, an Investment is, and can only be, some form of property or right recognised in the applicable domestic law: see India's Skeleton, para. 29 {C/3/25} and the cases referred to therein. RAKIA does not contest this basic proposition, but seeks artificially to disconnect the interlocking elements of "*asset*" and "*invested by an Investor*". Its case is that (i) there is an asset i.e. a set of contractual rights under the BSA which exist in the applicable domestic law, and (ii) applying a "*broad*" and "*functional*" meaning, that asset can be said to have been "*invested by*" RAKIA (see e.g. RAKIA's Skeleton, para. 15 {C/6/62-63}), even though RAKIA has itself no rights regarding that contract, is not a party to it, and the actual party with rights in respect of the contract is ANRAK, the company in which RAKIA was (at the material time) only a c.12% minority shareholder. India contends that:

    a. When identifying the relevant "*asset*" under Article 1.1, it is not possible somehow to separate the asset from its legal characteristics as defined by the applicable domestic law. As a matter of Indian law, the rights under the BSA exist only as rights or an asset of the contracting parties i.e. APMDC and ANRAK, and the rights cannot somehow be attributed to a c.12% shareholder in ANRAK.

    b. It cannot be said that those contractual rights were "*invested by*" RAKIA. It had never had any rights under the BSA. It elected to make its investment in the form of shares, not contractual rights. RAKIA could have sought to structure its Investment differently and hence benefit from rights under the BSA, as well as taking the burden

[6] As the Tribunal noted, "*ANRAK is neither legally nor factually controlled by the Claimant"* (Award, para. 136 {S/1/40}).

of the obligations under the BSA including the exclusive dispute settlement provision (clause 35 {S/9/248}). It did not do so. On their ordinary meaning, the words "*assets invested by the Investor ... in the territory of [India]*" do not encompass the assets of a different legal person that have never been owned or even controlled by the Investor, and in respect of which assets the Investor has no legal interest.

c. As to context, the BIT Parties plainly did envisage that the Investor would hold the relevant domestic law rights inuring to a protected Investment.

    i. Pursuant to Article 4(4), the Investor is afforded access to justice "*for the purpose of assertion of the claims and the enforcement of rights with respect to their Investments*". Cf. the current situation, where RAKIA has no rights and no control with respect to asserting any claims under the BSA.

    ii. Article 9 is a Subrogation provision. Pursuant to Article 9(1), the BIT Parties must recognise (a) the assignment to the Indemnifying Party of "*part or all of the rights and claims resulting from such an Investment*", although (c) "*the subrogated rights or claims shall not exceed the original rights or claims of such Investor*". The "*original rights or claims of*" RAKIA in this case arise from its shares alone. It has no "*original rights or claims*" under the BSA, and the Treaty cannot otherwise create and protect rights or claims that are not recognised by domestic law; all the Treaty does is to protect the bundle of rights under domestic law that make up the Investment.

d. On the ordinary meaning of the words in their context, the relevant rights that comprise the Investment will belong to the Investor – either directly or indirectly through a subsidiary. This is a matter of treaty interpretation, not, as RAKIA would have it, an "*ownership fallacy*" that is dependent on a rule of customary international law applicable only in the diplomatic protection context: cf. RAKIA's Skeleton, para. 17 {C/6/63-64}.

    i. The rule that RAKIA focuses on, derived from the *Barcelona Traction* case, is concerned with whether a shareholder can claim for loss of value to its shares where the wrongful acts are directed not at shareholders' rights, but at the assets of the company in which shares are held. It is not relevant that such a rule has been rejected in many BIT cases: the point at issue here does not concern RAKIA's rights under the Treaty to claim for diminution of its

shares *qua* Investment.[7] The issue is whether the rights of a company in which an Investor has a minority shareholding can *themselves* be treated as the Investment of that Investor, for the purposes of then satisfying a Treaty requirement that an arbitration claim can only be brought in respect of action applied directly to that Investment. They cannot be.

ii. It is in this specific context – in circumstances where this Treaty contains very unusual wording in terms of the requirement that there be a law, rule or regulation "*applied directly to an Investment*" (Article 1.8) – that India refers to the customary international law that recognises the principle of separate corporate personality: see India's Skeleton at paras. 16-17 {C/3/23}.[8]

iii. It is also not in issue that, in certain cases, it has been found that the assets of a subsidiary can constitute an investment (cf. RAKIA's Skeleton, para. 18 {C/6/64-65). But even if correct,[9] those cases do not apply here. At the risk of repeating the point: RAKIA is only a minority shareholder in ANRAK. The point is that RAKIA cannot be said to hold – whether directly or (somehow) indirectly – the contractual rights that it wishes to claim as its Investment.

8. As to the two cases to which RAKIA refers at Skeleton, para. 15.2 {C/6/62-63}:

a. In *EAIB v. Slovakia*, the claimant (Euram Bank) held 51% of a Slovak health insurance provider (Apollo) through the claimant's 100% owned subsidiary (EIC). It claimed that those shares had been expropriated. The jurisdictional issue was whether shares held indirectly (through the 100% holding in EIC) constituted an investment. That is in no way analogous to the current situation. Indeed, the tribunal's reasoning in *EAIB* supports India's case. RAKIA's Skeleton at para. 15.2(a) {C/6/62-63} only provides a partial extract of the tribunal's reasoning. In that case the tribunal specifically emphasised the fact that Euram Bank controlled

[7] It may also be noted that the question whether it *should* be possible for a shareholder to claim for reflective loss in investment arbitration is itself controversial.

[8] See also e.g. *HICEE v Slovakia*, Partial Award of 23 May 2011, para. 147.

[9] Cf. India's Skeleton at paras. 31-33 {C/3/26}, and see also *Enkev Beheer v Poland*, Partial Award of 29 April 2014, para. 310-313.

the decisions made by EIC, which held the shares in Apollo.[10] By contrast, RAKIA neither owns nor controls the entity (ANRAK) which owns the asset in question (the BSA).[11]

b. Similarly, RAKIA takes the reasoning in *Republic of Korea v Dayyani* out of context. In the passage relied on, Butcher J was considering an objection based on the position that a protected investment must have certain inherent characteristics, including through use of the words "*invested by*". When later considering whether the claimant shareholder could claim in relation to the assets of the 100% owned and actively controlled subsidiary, Butcher J stressed the element of control and relied on a series of cases that turned on the fact of control by the shareholder of the assets of a locally incorporated subsidiary (at paras. 76 and 79-80). He did not have to consider, and his reasoning does not support, the proposition that contractual rights of a third party over which a claimant has no rights of ownership or control themselves qualify as an "Investment".

9. RAKIA suggests that it is a mere coincidence that, in the cases where analogous treaty wording has been interpreted to encompass the assets held by a local subsidiary, the foreign investor's control has always been established: RAKIA Skeleton, para. 20 {C/6/65}, referring to *Dayyani* and *Azurix v Argentina*. That is not a fair reading of the cases, in both of which the claimant owned 100% of the local subsidiary. It also refers to *Paushok v Mongolia* and *CMS v Argentina* (fn. 12 to para. 20 {C/6/65}), suggesting that these show that it makes no difference what size shareholding the investor holds. But these are cases where the claimed investment is the <u>shareholding</u> in the locally incorporated company, not

[10] RAKIA's skeleton omitted the following from the *EAIV v Slovakia* award at [321]: "*In the usage which was common in relation to investment by the time the BIT was concluded, an investor of State A which acquired control of a shareholding in a company incorporated in State B would be described as investing in the territory of State B irrespective of whether it had purchased the shares in its own name* ***or arranged that they be purchased by a locally incorporated subsidiary whose decision-making it controlled.*** *In the present case,* ***there is no doubt that Euram Bank controlled the decisions made by EIC, which was its 100% owned subsidiary.*** *Taking the words used in Article 1(1) of the BIT in their ordinary meaning, therefore, the Tribunal considers that they include the shareholding in Apollo, notwithstanding that those shares were owned by EIC rather than being directly owned by Euram Bank"* (emphasis added).

[11] See Award at para. 136 {S/1/40}.

the assets of that company. It has never been in doubt that RAKIA's shares constitute an Investment.

10. As to the elements of context to which RAKIA refers at Skeleton, para. 21 {C/6/66}:

    a. Article 7.3 reflects the distinction between the "*assets*" of the local subsidiary and the shareholder's Investment. The cases that RAKIA refers to – *EAIB v. Slovakia* and *Siemens v. Argentina* – are considering treaty wording in the very different context of assets held by a local subsidiary in which the foreign investor owns 100% of the shares.[12] The cross-reference to Article 7(1), on which RAKIA relies, does not assist it, as the "Investment" being referred to in Article 7(3) is the shares in the local company, not the underlying assets of that company.

    b. Article 3.2 merely provides for the encouragement and facilitation of "*formation and establishment of appropriate legal entities by Investors in order to establish, develop and execute Investment projects*". That does not somehow suggest that, where an investor has a 12% shareholding in the local SPV, the assets of that SPV are intended to be seen as a qualifying Investment.

11. As to object and purpose, the Preamble of the BIT refers to the desire to "*create conditions favourable for fostering greater Investment by Investors*" but this tells one little about the intended scope of the formulation currently at issue. Equally, there is little to be gleaned from the fact that the full title of the BIT refers to the promotion and protection of Investments, and likewise reference to other cases concerning different treaty wording and that do not have equivalents to the unusual provisions of this BIT including Articles 1.8 and 10.2 (cf. RAKIA's Skeleton, para. 21.3 {C/6/66}).

12. RAKIA also relies on the wording of the MOU to support its case that the BSA was an asset invested by RAKIA: Skeleton, para. 34 {C/6/71-72}. It does not support RAKIA's case. As to this:

    a. It is correct that the MOU provided for the conclusion of a "*detailed collaboration agreement*" between APMDC and ANRAK which, as RAKIA now accepts, took shape in the form of the BSA (cf. RAKIA's contrary position before the Tribunal at

[12] As stated in *EAIB* at [323], "*The clarification provided by Article 4(3) in respect of such a case by no means compels the conclusion* ***that assets held by a local subsidiary of which the investor owns 100% of the shares*** *cannot constitute an investment under the terms of Article 1(1)"* (emphasis added).

Award, paras. 123 and 126 {S/1/35-36}; and before Knowles J. at [Day 1/page 71] {S/36/473}).

b. RAKIA now contends that the BSA was the "*successor in form*" to a promise made to it in the MoU (para. 34.4 of its Skeleton {C/6/71-72}). That is incorrect. The MoU contemplated that RAKIA's investment would be in the form of shares in the project company, and not in the BSA. The MoU provided in Article XI that upon entry into the detailed collaboration agreement between APMDC and the project company the MoU would be superseded. It is not suggested by RAKIA that it could not also have been party to the further agreement (as it was to the MOU) had it wished to retain rights under what became the BSA.

c. It is also not suggested by RAKIA that it could not have made a greater investment such that it would have been in a position at least to control ANRAK. Indeed, as is noted in the Award at para. 63 {S/1/19}: "*The recitals to the MOU might give the impression that RAKIA, with its 'vast industrial experience', as a 'highly competent and financially sound entrepreneur' was proposing to take the lead in in investing US$2 billion and bringing the 'best energy efficient and best Aluminium technology available in the world' to Andhra Pradesh*". Reference to the MOU merely shows that RAKIA did not commit to the project in the way originally envisaged.

C Respondent's Notice Ground 2 – RAKIA's case that the Measure was "*applied directly to*" the Investment, even if that is just the shares (and the cash and the pledge) {C/5/52}

13. RAKIA argues that because its shares allegedly suffered a diminution in value as a result of GOM 44 (the alleged Measure, which concerned the BSA), GOM 44 is correctly seen as "*applied directly to*" those shares. RAKIA portrays this as following from the point that one characteristic feature of the investment treaty regime is its embrace of claims for reflective loss by shareholders, i.e. the diminution of value of the shares as a result of a breach of a BIT: RAKIA's Skeleton, para. 49 {C/6/76-77}.

14. The simple answer is that whether there can be a claim for reflective loss depends on the given treaty. The wording of the current Treaty is very much bespoke, including in requiring as a condition to jurisdiction that there be a Measure (defined as a binding action, etc.) "*applied directly to an Investment*". The Measure needs to be identified for the making of a claim under Article 10. A binding action that is applied directly to rights under a contract alone is not somehow also applied directly to a small minority shareholding in the contracting party. There is nothing in Article 31 VCLT to suggest that the interpreter can

be assisted by generalities as to what other investment treaties may seek to achieve. It is irrelevant that, in *GAMI v Mexico,* the tribunal found that claims for reflective loss are permitted under the NAFTA – a treaty that does not contain wording equivalent to Article 1.8 (cf. RAKIA's Skeleton, para. 49.3 {C/6/77}).

15. Ultimately, RAKIA's case on Article 1.8 turns on whether the project was "*directly impacted*" (RAKIA's Skeleton, para. 49.4 {C/6/77}). The Treaty Parties could have established a jurisdictional test by reference to the *direct impact* to a project of the executive action complained of. They did not; and it is wrong to conclude that a government order (GOM 44), which cancelled previous government orders that had given permission for APMDC to enter into the BSA with ANRAK, constitutes binding action "*applied directly to*" RAKIA's minority shareholding in ANRAK.

D Respondent's Notice Ground 3 – RAKIA's previously abandoned case on the offer to arbitrate under Article 10 {C/5/54}

16. By this ground, RAKIA seeks to resuscitate a point that it ran and lost in the arbitration; and which it ran at first instance but then abandoned shortly before the hearing.[13] The decision to abandon the point was taken by an experienced legal team, including two KCs with particular expertise in this field. It can only have been a carefully thought through decision taken to obtain the tactical advantage before the Judge of being able to focus on what were viewed as stronger points. Now RAKIA seeks to resuscitate the point, and the manner in which it seeks to do so would involve referring to evidence (translations) not deployed at first instance.

17. The general principles for being able to take "new" points on appeal can be seen in *Hudson v Hathway* [2022] EWCA Civ 1648, [2023] KB 345, referring back to *Singh v Dass* [2019] EWCA Civ 360 which set out the principles for deciding whether to permit a new point. It was noted at *Hudson* [36] that it is not entirely clear whether the same principles apply in a case (such as *Singh*) where an appellant was seeking to take a new point as in a case (such as *Hudson*) where a respondent seeks to. In *Singh* it was said:

    a. At [16] that "*an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court*".

[13] By letter dated 17 September 2024 at [7] – [8] {S/33/468}.

b. At [17] that "*an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that … it would necessitate new evidence*".

c. At [18] that "*even where the point might be considered a 'pure point of law', the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs*".

18. There is overall consideration of whether it is "just" to allow the point to be taken in light of all the relevant factors: *Hudson* [35].

19. Here, it would not be just to allow the point to be taken.

a. There was an express decision to abandon the point below, for perceived tactical advantage.

b. RAKIA's approach undermines the important "gatekeeper" function of the first instance court inherent in s. 67(4) of the 1996 Act, and it is inconsistent with the principle of "speedy finality" regarding the review of arbitration awards to allow a party to drop a point at first instance and then bring it back to life on appeal in the way that RAKIA seeks to do.

i. If RAKIA had advanced the point, and lost on it before the Judge (as it did before the Tribunal), it could have been in the position of only being able to appeal with the Judge's permission: if the Judge had granted a declaration regarding the proper construction of Article 10.2, RAKIA would have needed permission from the Judge to appeal that. RAKIA's approach therefore *does* prejudice India, as it has been deprived of the opportunity to oppose the grant of PTA before the Judge.

ii. Relatedly, if RAKIA had failed in its application before Robin Knowles J, and had sought permission including regarding its former case on Article 10.2, the judge would inevitably have refused permission, noting that the case had been dropped and that there was nothing for an appeal to bite on. It cannot be correct that, having abandoned the point, RAKIA can via a Respondent's Notice be put into a better position than a putative appellant seeking permission before the judge to appeal a lost s. 67 application.

c. Further, although RAKIA's skeleton does not acknowledge this, the argument as RAKIA now seeks to develop it would involve new evidence. RAKIA relies upon foreign language versions of the treaty, for which it offers an English translation only in its skeleton. If RAKIA wishes to advance the argument relying upon the meaning of Hindi and Arabic texts, it would need to apply to adduce evidence of the meaning of those texts.

20. As to the merits of the abandoned argument, the Court is respectfully invited to read paragraphs 82-100 of the Award {S/1/25-30}, which are entirely persuasive (and were plainly perceived as such by RAKIA and its Counsel at the time of the hearing before Robin Knowles J). There is very little new in the argument as now put, which notably fails to address satisfactorily or at all key elements of the reasoning:

a. RAKIA describes Article 10.1 as being merely "*introductory in nature*". That is not accurate. It is a governing provision: it establishes that disputes between a Contracting Party and an Investor "*shall be governed by this Article*".

b. RAKIA then says that the immediately following provisions (Articles 10.2 and 10.3) are "*not part of the standing offer*" to arbitrate, but rather "*contain treaty-based rules of attribution*": RAKIA's Skeleton, paras. 61-63 {C/6/81}.

i. This is inconsistent with the ordinary meaning and the location of these provisions, both within Article 10 i.e. immediately following Article 10.1 and by reference to Article 11, which establishes a broader jurisdiction with respect to State-State arbitration (see Award, paras. 96-98 {S/1/29}).

ii. RAKIA also fails to deal with the reasoning at Award, paras. 87-89. As the Award explains, it could make no sense to be confirming the application of basic rules of attribution in respect of just one limited area of State action, i.e. executive action in the form of a Measure (a binding action directly applied to an Investment) when this is the paradigm form of State action. Why confirm that, but not rules of attribution regarding judicial or legislative action?

iii. RAKIA asserts that what it calls "*such treaty-based federalism clauses are common*", referring to the Korea-US FTA and the decision in *Korea v Elliott Associates LLP* [2025] EWCA Civ 905. But such clauses are completely different. They define who is a Party for the purpose of the treaty or investment chapter, which includes all organs of the State (i.e. judicial and

legislative as well as executive) as well as non-governmental bodies acting in the exercise of delegated powers. Moreover, this point is not understood, because in *Elliott*, such a clause in the Korea-US FTA *was* held to be jurisdictional in effect i.e. to define the scope of the offer to arbitrate. The result is the same here.

c. RAKIA simply ignores the text and the Tribunal's reasoning on Article 10.8(b), which establishes a limitation period of five years from the date on which the Investor "*first acquired, or ought to have with reasonable diligence first acquired, knowledge of the Measure underlying the dispute in question and the knowledge that the Investment had incurred substantial loss or damage as a result of such Measure*".

   i. This time bar is drafted on the premise that there must be a "*Measure*" underlying a dispute in order to access Article 10 jurisdiction.

   ii. If, as RAKIA contends, there is jurisdiction under Article 10 regardless of whether the dispute is underlain by a Measure as established in Article 10.2 and 10.3 (read alongside Article 1.8), Article 10.8(b) would not establish a workable time bar. The claimant could claim by reference to some other act attributable to the State, but which did not qualify as a Measure, and say that there was no limitation of time.

   iii. This point is a complete answer to RAKIA's case, to which RAKIA has no answer. RAKIA ignores the persuasive reasoning at Award, para. 91 {S/1/27}, which explains why RAKIA's interpretation leads to an irrational outcome i.e. a limitation period for Measures, but not for the many acts of the State that would not amount to Measures.

d. RAKIA also ignores Article 5.3 of the Treaty, which provides that the most favoured nation provision "*shall not apply to procedural or jurisdictional matters*". Some tribunals have held that a "most favoured nation" clause in a treaty, which obliges a State to confer upon investors the most favourable treatment conferred upon investors of other States, applies to the terms of offers to arbitrate. On that approach, investors can seek to benefit from more favourable offers to arbitrate in other treaties. Article 5.3 of this Treaty makes clear that the most favoured nation provision in this Treaty *cannot* be used in that way. As the Award points out at para.

92 {S/1/27}, this restriction would make no sense if there were – as RAKIA contends – open-ended jurisdiction over any dispute under Article 10.

e. RAKIA also ignores the circumstances of conclusion of the Treaty, namely that India was reconsidering its entire BIT programme following its loss in *White Industries v India*, a case concerning delays in the Indian courts: see Award, paras. 94-95 {S/1/28}. In such circumstances, restriction to executive acts as provided for in Article 10.2 is readily explicable. RAKIA is wrong to contend (as it does at Skeleton para. 22 {C/6/66-67}) that reference cannot be had to that fact under Article 32 of the VCLT: it is part of the circumstances of conclusion of the Treaty.

21. In its Skeleton, RAKIA belatedly introduces a new argument based on the Hindi version of the text of Article 10.2. It alleges that relevant words in Hindi which are equivalent to "shall cover" (in the English version) connote "*includes*": RAKIA's Skeleton, paras. 57-60 {C/6/79-81}. Its reliance on this new point is misplaced, and it is the English text that governs:

a. No evidence as to the proper translation of the Hindi text into English is provided by RAKIA, though it would need to have been to run this point.

b. The Treaty in any event provides that "*in case of divergence of interpretation, **the English text shall prevail***", a provision to which effect must be given, per Article 33 of the VCLT.

c. RAKIA seeks to avoid this by saying that the words "*shall cover*" in Articles 10.2 and 10.3 may be read as *inclusive* such that there is no divergence of meaning between the texts. Pursuant to the ordinary meaning of "*shall cover*" in context (including in the context of Articles 5 and 10.8(b)), that is not correct.

d. But in any event, the Court could not begin to consider the merits of this point, and whether, on a proper interpretation of the Hindi version alongside the Arabic and English versions, there is or is not a divergence of meaning, without actually having evidence as to the proper translation of the Hindi (and Arabic) versions of the Treaty. It was of course open to RAKIA to advance its case in that way before the Tribunal and before the Judge, if this had been perceived to be a good point. It did not, and it is too late for it do so now. If RAKIA were permitted to adduce expert evidence on the point, India would likely wish to adduce its own evidence as to the meaning.

22. Curiously, and while ignoring key contextual provisions such as Articles 5(3) and 10.8(b), RAKIA asserts that the "*most important context for the interpretation of Article 10 … is provided by the substantive protections*". Its point is that some of these expressly require a Measure, most do not and – "*All else being equal, there is an obvious sense in the scope of substantive protection and the scope of investor-state arbitration in the same treaty coinciding*": RAKIA's Skeleton, paras. 64-65 {C/6/81}. What may be "*obvious sense*" to an investor has no bearing on the scope of jurisdiction that the States party to a treaty may be prepared to accept, in particular bearing in mind that absence of compulsory dispute settlement is the general rule and not the exception in international law, whilst the Treaty was negotiated at a time when India was revisiting its BIT programme precisely because of concerns over the jurisdiction of BIT tribunals.[14]

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PETER WEBSTER

6 February 2026

[14] See para. 57 of India's Skeleton {C/3/34}.