

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM:

THE HIGH COURT OF JUSTICE, COMMERCIAL COURT (KBD)

MR JUSTICE ROBIN KNOWLES CBE

[2025] EWHC 1553 (Comm)

B E T W E E N :

REPUBLIC OF INDIA

—and—

RAS AL KHAIMAH INVESTMENT AUTHORITY

Appellant

Respondent

RESPONDENT’S APPEAL SKELETON ARGUMENT

21 November 2025

[CB/x/y] = Core Bundle/page x/para y; [SB/x/y] = Supplementary Bundle/page x/para y

Table of contents

A.	Introduction.....	1
	<i>Summary of RAKIA’s case on appeal.....</i>	<i>1</i>
	<i>The parties’ grounds.....</i>	<i>3</i>
	<i>Issues on appeal and structure of this skeleton.....</i>	<i>4</i>
B.	RAKIA’s “Investment”—Article 1(1) of the BIT.....	5
	<i>Treaty interpretation: meaning of “every kind of asset invested by the Investor”</i>	<i>5</i>
	<i>RAKIA’s investment as found by Knowles J: the shares (and the cash and pledge).....</i>	<i>10</i>
	<i>RAKIA’s investment also encompassed the project assets, including the BSA.....</i>	<i>13</i>
C.	“Applied directly to an Investment”—Article 1(8) of the BIT	15
	<i>Treaty interpretation: meaning of “applied directly to an Investment”</i>	<i>15</i>
	<i>GOM 44 “applied directly to” the shares (and the cash and pledge)</i>	<i>18</i>
	<i>GOM 44 “applied directly to” the BSA.....</i>	<i>21</i>
D.	Scope of the standing offer to arbitrate—Article 10 of the BIT.....	21
	<i>Text.....</i>	<i>21</i>
	<i>Context.....</i>	<i>24</i>
	<i>Object and purpose.....</i>	<i>25</i>
E.	Conclusion.....	26

A. INTRODUCTION

1. This appeal is about the interpretation and application of the standing offer to arbitrate in the India–UAE bilateral investment treaty (or ‘BIT’), and whether an UNCITRAL arbitral tribunal has jurisdiction over RAKIA’s claims against India under that BIT.
2. The Judge below, Robin Knowles J, held that the tribunal does have jurisdiction. He therefore allowed RAKIA’s s. 67 challenge and set aside the tribunal’s award declining jurisdiction. The Judge’s decision was correct. This appeal should be dismissed.

Summary of RAKIA’s case on appeal

3. The decision below was correct for the reasons given in Knowles J’s judgment:
 - 3.1. If it is a jurisdictional requirement of the BIT, by virtue of Article 10(2) [CB/148], that there be a binding executive action “*applied directly to an Investment*”—the relevant part of the treaty definition of “*Measure*”¹ [CB/140]—that requirement was satisfied, by an order of the state government of Andhra Pradesh (or ‘GoAP’) known as ‘GOM 44’ [SB/329-332].
 - 3.2. Despite India trying to make something of it, there is no real dispute about the core component of RAKIA’s “*Investment*” defined in the BIT² and found by Knowles J: RAKIA’s shares in a local company, “ANRAK”. There is a debate about other parts of the investment found by the Judge, but they are not central.
 - 3.3. The real question is whether Knowles J was correct that GOM 44 was “*applied directly to*” those shares. The Judge **was right** about that, because there was a direct nexus between the action on the one hand, and the shares **as an investment** on the other.
 - 3.4. Much of India’s case on both inter-related issues—the identification of RAKIA’s “*Investment*”, and whether GOM 44 was “*applied directly to*” that investment—is premised on misreadings of Knowles J’s judgment: see ¶¶ 26–28 below.

¹ Article 1(8) (in the English text): “*Measure*’ means any form of binding action taken by a Contracting Party under any law, rule or regulation and applied directly to an Investment.” [CB/140]

² Article 1(1) (in the English text): “*The term ‘Investment’ means every kind of asset invested by the Investors of one Contracting Party in the territory of the other Contracting Party ... and in particular, though not exclusively, includes ...*”, followed by an illustrative list of assets. [CB/138-139]

4. There are also reasons additional to those given by Knowles J why his decision was correct:
- 4.1. RAKIA's "*Investment*" was not **only** its shares. On the plain language of the BIT's definition, and reflecting the orthodox position in awards under investment treaties, RAKIA's protected investment **also** extended to ANRAK's assets deployed in the investment project. In particular, those assets included a contract with an Indian state-owned company, called the Bauxite Supply Agreement or 'BSA'.
- 4.2. By reference to RAKIA's protected investment correctly characterised pursuant to Article 1(1), GOM 44 was "*applied directly to*" that investment:
- (a) It is common ground (and found by the Judge) that GOM 44 was "*applied directly*" to the BSA. If RAKIA is correct that its protected investment included the BSA, the appeal fails for that reason alone.
- (b) Even if India's criticisms of the Judge on the point were accepted,³ GOM 44 was "*applied directly to*" the shares, because it directly and necessarily affected the investment project and/or the value of the shareholding. If RAKIA is correct about that, the appeal also fails, because it is common ground that the shares comprise a protected investment.
5. Finally, there is a further and entirely freestanding reason why the tribunal has jurisdiction, which RAKIA expressly elected not to pursue below but is a pure point of law which it should be permitted to advance on appeal:⁴
- 5.1. On the true construction of Article 10 of the BIT applying the relevant public international law interpretative rules, the standing offer to arbitrate is found in Article 10(5) read with Article 10(4) [CB/148-149]. India does not dispute that the

³ Which it should not be, because it is premised on a misreading of the judgment.

⁴ See RAKIA's Respondent's Notice Grounds at ¶ 11 [CB/55-56], applying *Singh v. Dass* [2019] EWCA Civ 360 at [16]–[18] and *Notting Hill Finance* [2019] 4 WLR 146 at [23]–[28]. Of particular note, RAKIA elected not to pursue the argument just prior to the hearing before Knowles J, so it is traversed in the evidence prepared by both parties for the s. 67 application.

elements of the standing offer contained in those Articles⁵ are satisfied. Those elements do **not** include a requirement that there be a “*Measure*”.

- 5.2. The separate provisions in Article 10 referring to a “*Measure*”—Articles 10(2) and (3) [CB/148]—deal with state responsibility for conduct of political subdivisions of India and the UAE, both federal states. Those federalism clauses do not go to arbitral jurisdiction.

The parties’ grounds

6. India advances two grounds of appeal, headed respectively “*error in identifying RAKIA’s Investment*” (India’s Ground One) [CB/15] and “*incorrect construction and application of ‘applied directly to an Investment’ in Art. 1.8*” (India’s Ground Two) [CB/16].
7. There is very little of substance to **India’s Ground One:**
 - 7.1. Paragraph 1.1 of Ground One is premised on a misreading of the judgment, suggesting that the Judge defined the protected investment as “*the proposed establishment of an Alumina and Aluminium Industry*” [CB/15]. He did not. The Judge relevantly found that the investment consisted of the shares, cash and pledge. On that basis, it is not anticipated that this aspect of Ground One will be consequential.
 - 7.2. Paragraph 1.2 of Ground One [CB/16] takes issue with the inclusion as part of the investment of (i) the cash used to subscribe for the shares and thereby capitalise ANRAK, and (ii) the pledge of the shares by RAKIA as security for loans to ANRAK. Those are not central issues, because ¶ 2.1 of Ground One accepts that the shares are (part of) the protected investment [CB/16].
 - 7.3. Paragraphs 2.2 and 3 [CB/16] belong in Ground Two, not Ground One. They go to whether GOM 44 “*applied directly to*” the shares *qua* protected investment.
8. As to **India’s Ground Two:**
 - 8.1. Paragraph 4.1 [CB/16] takes issue with the Judge’s elaboration of the meaning of “*applied directly to*”. In combination with the question of application raised by ¶¶ 2.2

⁵ Namely, a “*dispute arising between a Contracting Party and an investor of the other Contracting Party in respect of an Investment under this Agreement*” [CB/148].

and 3 misplaced in Ground One [CB/16] (was GOM 44 “*applied directly to*” the shares?) this is the real issue raised by India’s Grounds.

- 8.2. Paragraph 4.2 [CB/16] challenges a factual finding about the effect of GOM 44, which India both misquotes and (again) misreads. Again, once the judgment is read fairly and properly understood, it is not anticipated this will be of much, if any, significance.
9. RAKIA has three Respondent’s Notice grounds. The first two track the basic structure of the judgment and India’s Grounds:
 - 9.1. **RAKIA’s Ground One** [CB/50-52] is that RAKIA’s protected investment went beyond its shares, and also extended to what may be termed ‘project assets’, held by ANRAK as the company incorporated specifically for the investment project.
 - 9.2. **RAKIA’s Ground Two** [CB/52-54] deals with (i) the meaning of “*applied directly to*”, and (ii) the application of those words to the relevant components of RAKIA’s investment: the shares (common ground as part of the protected investment), and the BSA (which it is common ground GOM 44 was applied directly to).
10. **RAKIA’s Ground Three** [CB/54-55] is the argument not pursued below: the BIT’s standing offer to arbitrate is not qualified by any requirement that there be a “*Measure*” (although there was one), because Articles 10(2) and 10(3) are federalism clauses, whereas the standing offer to arbitrate is in Article 10(5) read with 10(4).

Issues on appeal and structure of this skeleton

11. The issues on appeal therefore fall under three main headings, and the remainder of this skeleton argument is arranged as follows:
 - 11.1. **Section B—India’s Ground One and RAKIA’s Ground One**—the definition of “*Investment*” in Article 1(1), and the identification of RAKIA’s protected investment in this case.
 - 11.2. **Section C—India’s Ground Two and RAKIA’s Ground Two**—the meaning and application of “*applied directly to*”.
 - 11.3. **Section D—RAKIA’s Ground Three**—why the standing offer to arbitrate is found in Article 10(5) of the BIT read with Article 10(4); and why Articles 10(2) and (3) are federalism clauses which do not qualify that standing offer.

B. RAKIA'S “INVESTMENT”—ARTICLE 1(1) OF THE BIT

Treaty interpretation: meaning of “every kind of asset invested by the Investor”

12. The BIT protects the “Investments” of “Investors”: the principal subject of the substantive standards in Articles 3–9 is “Investments” made by “Investors” [CB/141-147]; and Article 10(4)–(5) provides a procedure for disputes between a state and an Investor “*in respect of an Investment*” [CB/148-149].

13. The relevant words of the BIT’s definition of “Investment” in Article 1(1) for present purposes are (in the English text) [CB/138]:

“The term ‘Investment’ means every kind of asset invested by the Investors of one Contracting Party in the territory of the other Contracting Party”

14. Those words fall to be interpreted by applying Articles 31–33 of the VCLT (applicable as customary international law,⁶ because neither India nor the UAE are party to the VCLT). The general rule of interpretation in Article 31 prescribes a “*single combined operation*”, seeking “*to ascertain the ordinary meaning of the relevant terms of the treaty having regard to their context and the object and purpose of the treaty*”: *JTI Polska* [2024] AC 621 at [26]–[27].

15. Starting with the **text** of Article 1(1) [CB/138], the definition may be distilled into two relevant components: (i) “*every kind of asset*”, (ii) “*invested by the Investor*”. However, it is important to emphasise that the BIT protects **investments**, not just individual assets.

15.1. Although an investment necessarily consists of one or more assets, assets are not protected unless they are “*invested by the Investor*”. Assets must function as an investment to be protected. The words “*invested by the Investor*” are as important as “*every kind of asset*”.

15.2. “*Invested by*” has a broader meaning than ‘owned by’. “*Invested by*” is **functional**, signifying the use of assets to a particular end. See:

(a) *EAIB v. Slovakia* (PCA Case No. 2010-17, 22 October 2012) at [321], per Sir Christopher Greenwood presiding:

*“The Tribunal is not persuaded ... that the BIT requires that the investor be the direct owner of the asset. **Article 1(1) makes no reference to ownership.** Rather, it stipulates that ‘the term ‘investment’ shall mean all*

⁶ See *Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, 17 March 2016, I.C.J. Reports 2016, p. 3 at [35].

assets which an investor of one Contracting Party invests in the territory of the other Contracting party in accordance with its legislation.’ This is broad language which is quite wide enough to encompass what is today the very common situation of a foreign company making an investment through a subsidiary incorporated in the host State.”

- (b) *Republic of Korea v. Dayyani* [2020] Bus LR 884 (QB) at [60], per Butcher J: “the verb ‘to invest’ must be taken to have **a similarly broad meaning to the product of investing**, namely investments.”

16. India is therefore correct in its skeleton at ¶ 33 [CB/26] to accept that “[t]he ordinary meaning of the term ‘invested by’ within the definition is to create a link between the subject asset and the investor”. However, India is wrong to suggest that that link requires ownership,⁷ excluding assets “invested by” an Investor through a company in which the Investor owns shares.
17. India’s ‘ownership fallacy’ is built on a false legal premise: that the interpretation of the BIT should be approached through the lens of customary international law on diplomatic protection, and in particular the ICJ’s judgment in *Barcelona Traction*.
- 17.1. India is correct that *in the diplomatic protection context*, customary international law recognises 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” (skeleton, ¶ 16) [CB/22]. However, that reflects the primacy of the state of incorporation or nationality in establishing standing to bring diplomatic protection claims: where a company is injured, the state of incorporation (not of its shareholders) may exercise diplomatic protection; reflective loss to a shareholder does not generate standing in that context.
- 17.2. Investor claims under bilateral investment treaties, including this BIT, are profoundly different. The injured Investor itself (not its home state) brings the claim; and (as India recognises in its skeleton at ¶ 17 [CB/22-23]), claims for reflective loss *are* permissible—they are in fact entirely commonplace.

⁷ See e.g. at ¶¶ 29 [CB/25] (“whether an Investor **holds** an asset capable of constituting an Investment under the Treaty, i.e. whether an Investment exists”), 31 [CB/26] (“where a local subsidiary holds **title to assets**, those belong and remain **the property of that local company**”), 32 [CB/26] (“assets of a local subsidiary are not part of the investment made by a shareholder in that subsidiary”); 37(b) [CB/28] (“[t]here is, rightly, no suggestion from RAKLA that it has any **legal or beneficial interest in any of the assets of ANRAK**”), and 67 [CB/39] (“the meaning of Investment is confined to assets (**of the Investor**)”).

- 17.3. India’s suggestion that customary international law governing standing for diplomatic protection has anything to do with this BIT and “*must be considered*” (skeleton, ¶ 17 [CB/22-23]) is therefore wrong. In terms of Article 31(3)(c) of the VCLT, customary international law on diplomatic protection contains no “**relevant rules of international law**” applicable between India and the UAE.
- 17.4. That is confirmed in clear terms in the authorities: See again:
- (a) *Dayyani* at [74] per Butcher J: “*A bilateral investment treaty thus constitutes a lex specialis and the rules governing diplomatic protection are not relevant and not applicable for the purposes of article 31(3)(c) of the Vienna Convention.*”
 - (b) *EAIIB* at [331] per Sir Christopher Greenwood: “*The Tribunal is not concerned with the ‘particular and relatively limited context’ of diplomatic protection ... The BIT constitutes lex specialis in that regard.*”
18. India is therefore wrong to suggest (at *e.g.* skeleton, ¶¶ 31–32 [CB/26]) that the separate personality of the local company through which an investment is made is significant, let alone determinative. To the contrary, an asset-based definition such as Article 1(1) encompasses ‘indirectly’ invested assets, *i.e.* assets invested through an intermediate company.
- 18.1. A large body of investor–state awards confirms that such ‘indirect’ investments are covered by an asset-based definition like Article 1(1). The leading case is *Siemens v. Argentina* (ICSID Case No. ARB/02/8, 3 August 2004) at [137]: “*The Treaty does not require that there be no interposed companies between the investment and the ultimate owner of the company*” (the investment in issue in *Siemens* being in the form of shares in a local company). The *Siemens* award has been consistently cited on that point since.⁸
- 18.2. Where the ‘interposed’ company is incorporated in the host state and shares in it are therefore themselves an investment, the same reasoning applies to its assets.

⁸ *Kardassopoulos v. Georgia* (ICSID Case No. ARB/05/18, 6 July 2007) at [123]–[124]; *Mobil v. Venezuela* (ICSID Case No. ARB/07/27, 10 June 2010) at [165]; *EAIIB* at [337]–[340]; *Guaracachi America v. Bolivia* (PCA Case No. 2011–17, 31 January 2014) at [354]–[356]; *Bahgat v. Egypt* (PCA Case No. 2012-07, 23 December 2019) at [195]–[198]; *Skubenko v. North Macedonia* (ICSID Case No. ARB/19/9, 21 July 2025) at [385]–[393].

See e.g. *Azurix v. Argentina* (ICSID Case No. ARB/01/12, Annulment, 1 September 2009) at [94].

- 18.3. By contrast, the handful of awards cited by India in ¶ 32 and fn 12 [CB/26, 25] of its skeleton for the asserted proposition that “[n]umerous tribunals have reached the conclusion that assets of a local subsidiary are not part of the investment by a shareholder of that subsidiary”, on proper analysis do not support that argument.⁹
19. *Dayyani* at [72]–[73] and [76] (quoted in India’s skeleton, ¶¶ 35–36 [CB/27]) endorses in the s. 67 context the approach of the jurisprudence cited at ¶¶ 18.1-18.2 above. As Butcher J says at [72], “[t]he terms of the BIT ... do not include any express requirement that the ‘investor’ own or have a direct legal interest in the property or asset which constitutes the ‘investment’”; and to read in such a limitation (including by reference to the *Barcelona Traction* rules of diplomatic protection) “would appear to me to be a rewriting of the treaty”. So too here.
20. India is wrong to suggest (skeleton, ¶ 34 [CB/26-27]) that that line of jurisprudence turns on a “control theory”, or amounts to a form of “look through”.¹⁰ The analyses of the tribunals cited above, and of Butcher J in *Dayyani*, do not depend on control: it rests on the treaty text. That control may have featured in the facts (as it did in *Dayyani* and *Azurix*, for example),¹¹ and may have been treated as on any view *sufficient*, does not mean it is *required* in every case. That too would amount to a rewriting of the treaty.¹²

⁹ *ST-AD v. Bulgaria*, on which India primarily relies, in turn relies heavily on two cases (*CMS v. Argentina* and *RosInvest v. Russia*) which involved claims for reflective loss *only*, such that the status of the investments of the local company was simply not in issue. The treaty in *CMS v. Argentina* and *El Paso v. Argentina* referred to investments “owned or controlled”. The very brief passage in *Karkey v. Pakistan* relied on by India concerned quantification of loss. A proper reading of *Pausbok v. Mongolia* (UNCITRAL, 28 April 2011) at [202] supports RAKIA’s case, not India’s.

¹⁰ A term used by the tribunal in its award at ¶ 135 (“the Tribunal may ‘look through’ the subsidiary and treat its assets as assets of the foreign investor”) [SB/39]. That reasoning also suffers from India’s ‘ownership fallacy’, wrongly eliding indirect investment for the purposes of the Article 1(1) definition (“asset[s] invested by the Investor”) with ownership. (“assets of the foreign investor”).

¹¹ And in *Azurix*, the treaty definition of “Investment” required control or ownership. Here, RAKIA exercised negative control over ANRAK in relation to “Reserved Matters” pursuant to article 6.2 of the Shareholders’ Agreement between RAKIA and Penna Cement.

¹² And see *Pausbok* at [205] (“nowhere in the Treaty is there a mention of a minimum size of investment to qualify as investor”; *CMS v. Argentina* (ICSID Case No. ARB/01/8, 17 July 2003) at [48].

21. Both the BIT’s **context** and the **object and purpose** support the ordinary meaning of “*every kind of asset invested by the Investor*” covering not only shares in a company, but its assets:
- 21.1. India is wrong to suggest (skeleton, ¶ 26(b) [CB/25]) that Article 7(3)’s express provision for reflective loss claims for expropriation¹³ is somehow inconsistent with the unqualified asset-based definition in Article 1(1) extending to indirectly invested assets. There is no such inconsistency: *E AIB* at [322]–[324]; *Siemens* at [138]–[140]. Indeed, in the context of this treaty, Article 7(3) [CB/145] provides powerful support to RAKIA’s case, because the cross-reference to Article 7(1) means that a “*Measure*” (that is, action “*applied directly to an Investment*”) necessarily applies to the assets of the investment company: See further ¶ 38.2 below.
- 21.2. Article 3(2) provides: “*The Contracting Parties shall encourage and facilitate **the formation and establishment of appropriate legal entities** by Investors in order to establish, develop and execute **Investment projects** in different economic sectors as may be permitted by the laws and regulations of the host Contracting Party.*” [CB/141] That is not only (further) express contemplation of investment through local companies: the reference to “*Investment [with a capital ‘I’] projects*” reinforces the functional nature of the words “*invested by*” in Article 1(1), and the fact that the assets of such an investment company (that is, the “*projects*”) fall within the scope of “*every kind of asset invested by the Investor*”.
- 21.3. The BIT’s object and purpose of promoting and protecting investment, as expressed in its preamble [CB/138], is facilitated by protecting the “*very common situation*” of assets invested through a local or otherwise intermediate company:¹⁴ *E AIB* at [321] and [326]; *Pausbok* at [202]; *Skubenko* at [388].
22. Finally, India argues (skeleton, ¶ 57 [CB/34]) that an award made in 2011 under a different treaty (*White Industries v. India*) means that “*India was very concerned about access to arbitral jurisdiction*”, that “[*b*]oth Parties plainly wished to confine access to arbitral jurisdiction”, and that India’s case is somehow supported by a model BIT promulgated by India in 2016. That is

¹³ “*Where a Contracting Party expropriates the assets of a [local] company ... in which Investors of the other Contracting Party own shares ... it shall ensure that the provisions of clause (1) of this Article are applied to the extent necessary to ensure fair and equitable compensation in respect of their Investment*”. [CB/145]

¹⁴ In line with this, concern at the importance of shareholder protections would have been entirely evident to the parties at the time the BIT was entered into: see the chronology set out in the Annex to Bradfield 1 [SB/100-112].

unalloyed speculation or simply wrong. In any event, it is not admissible as part of the VCLT interpretative exercise, whether under the guise of supplementary means of interpretation under Article 32 or otherwise. In particular, treaty interpretation is an **objective** process, and the VCLT rules do not permit speculative recourse to one treaty party's (asserted or supposed) intention. See:

22.1. The ILC's *Draft Articles* (YBILC 1966, vol. II), commentary to Article 28 (the precursor to Article 32) at [18]: treaty interpretation is about “*the elucidation of the meaning of the text rather than an investigation ab initio of the supposed intentions of the parties*”.

22.2. The Supreme Court in *JTI Polska* at [35] and [36]: supplementary means must “*demonstrate the **common intention or understanding** of the parties to the treaty*”; documents “*reflect[ing] the intentions of only some of the parties*” are unlikely to “*be of any assistance in identifying a **common intention or understanding** of the parties*”.

RAKIA's investment as found by Knowles J: the shares (and the cash and pledge)

23. Under the heading “*Investment' by RAKIA*”, Knowles J correctly summarised the Article 1(1) definition (at ¶¶ 78–79 [CB/120-121]), asked the question “[*w*]hat did RAKIA invest ... that was an ‘asset?’” (at ¶ 84 [CB/121]), and answered that question (at ¶ 85) [CB/121]:

“The basic answer to the question is, in my judgment, it invested US\$42.5 million, the shares and the pledge of shares in the territory of Andhra Pradesh.”

24. Later under the heading “*‘And applied directly to’ an Investment*”, Knowles J confirmed his finding that RAKIA's investment consisted of the shares and (“*over time*”) the cash and pledge. He did so with express reference to the functional term “*invested*”, which is one of the key elements of the Article 1(1) definition. See at ¶ 103 [CB/124]:

*“RAKIA's ‘Investment’ was not simply a shareholding. It was (in the manner explained above, and over time) a number of things: US\$42.5 million, and shares in [ANRAK], and the pledge of shares. **These were invested** in the proposed establishment of an Alumina and Aluminium Industry in the State of Andhra Pradesh.”*

25. Knowles J was correct so to find:¹⁵

25.1. There is no dispute about the **shares** in ANRAK.

¹⁵ Although RAKIA's investment goes further, for the reasons explained below.

25.2. India criticises Knowles J for referring to the **cash** for which RAKIA obtained its shares and by which it thereby capitalised ANRAK. That criticism is unfounded:

- (a) India’s focus is on the chronology: RAKIA’s exchange of the cash for the shares (see skeleton, ¶ 40 [CB/28-29]). However, Knowles J recognised that that exchange happened, and correctly referred to Article 1(1)’s ‘change in form’ clause:¹⁶ see at ¶¶ 86 [CB/121] (“*RAKIA received shares ... in return for ... the money*”), 94 [CB/122], and 103 [CB/124] (RAKIA’s investment “*over time*”).
- (b) Read fairly, Knowles J included the cash in his characterisation of RAKIA’s investment as a precursor of the shares. He was correct to do so—in particular because it is relevant when explaining how GOM 44 “*applied directly to*” the shares that they were the means of implementing an investment project, and had value because of that project.

25.3. India also says that Knowles J erred in including in RAKIA’s protected investment the **pledge** of shares by RAKIA as security for ANRAK’s borrowing by reference to Article 1(1)(i) (judgment at ¶ 87 [CB/122]), because “*the pledge was an asset only in the hands of Axis Bank*”, *i.e.* the pledgee (skeleton, ¶ 41 [CB/29]). However, Article 1(1)(ii) refers to “*securities issued by an Investor*” [CB/139]. The pledge was such a security. It was “*issued by an Investor*” to support ANRAK’s borrowing for the benefit of the project.

26. India’s principal criticism in its Ground One is that Knowles J “*equat[ed] ... the Investment with the wider project*” (skeleton, heading to section D(3) [CB/29]). The basis for that contention is the judgment at ¶ 111 [CB/125], which India characterises (skeleton, ¶¶ 44 and 49–50 [CB/30-32]; Ground One, ¶ 1.1 [CB/15]) as “*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’*”.

27. That is a misreading of the judgment. Knowles J made no such finding.

27.1. At ¶ 85 [CB/121], Knowles J found in clear terms that RAKIA’s investment consisted of the shares, cash and pledge: “*in my judgment, [RAKIA] invested US\$42.5 million, the shares and the pledge of shares in the territory of Andhra Pradesh*”.

¹⁶ “*Any change of the form in which assets are invested ... does not affect their character as Investment.*”

- 27.2. That finding is under the heading “*Investment*’ by RAKLA”. It is preceded by reference to the Article 1(1) definition (at ¶ 78 [CB/120]), and is followed by an explanation of why each asset falls within Article 1(1)’s inclusive list (at ¶¶ 86–87 [CB/121-122]). Paragraphs 88–94 in the same section then contain the Judge’s analysis of why those assets had the character of an investment, culminating in the statement at ¶ 94 [CB/122] that the shares in ANRAK were “*the modality by which RAKLA invested money in the project ... i.e. ‘to establish Alumina and Aluminium Industry in the State of Andhra Pradesh’*”.
- 27.3. Paragraph 111 then appears in a subsequent section of the judgment, titled “*‘And applied directly to’ an Investment?*” [CB/124-125]. At ¶ 103 [CB/124], the Judge observed that (“*[i]t helps ... to keep in mind*”) that the shares, cash and pledge “*were invested in the proposed establishment of an Alumina and Aluminium Industry in the State of Andhra Pradesh*”. The statement India criticises then explains **why** GOM 44 “*applied directly to*” that investment:
- “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 [GoAP] acted directly to end the supply of bauxite and with that the establishment of an Alumina and Aluminium Industry in the State of Andhra Pradesh.”*
- 27.4. Shortly after ¶ 111, at ¶ 116 [CB/125] the Judge referred to “*a major form of investment structure*” as “*establishing and taking shareholdings in companies incorporated in ‘the territory of another contracting party’*”, underscoring the earlier analysis of the investment as the shares (and the cash and pledge).
28. Read fairly and in context, it is clear that Knowles J was explaining that GOM 44 was “*applied directly to*” the investment as identified earlier in the judgment, **because** there was a direct nexus between the action on the one hand, and the collection of assets **operating as an investment** on the other.
- 28.1. It is obvious from the Judge’s close adherence to the asset-based definition in Article 1(1) that his approach was that an investment must be comprised of identified assets: see in particular at ¶ 90 [CB/122] (and then, as just noted, at ¶ 116 [CB/125]).
- 28.2. By ¶ 111 [CB/125], Knowles J had already found what those assets were. The issue he was considering there was different: was GOM 44 “*applied directly to [the]*

Investment”? For that purpose, he had regard to what the investment *did* (or was intended to do)—in the words of the judgment at ¶ 108 [CB/124], what gave it “*the quality of an investment*”.

28.3. The Judge’s conclusion on that point was correct, for the reasons explained in Section C below, but for present purposes what matters is that it is a mischaracterisation of the judgment to suggest that Knowles J erroneously ‘found’ that the protected **investment** was the “*proposed establishment of an Alumina and Aluminium Industry in the State of Andhra Pradesh*”. He was asking and answering (correctly) a different question.

29. India’s Ground One is therefore misconceived and should fail.

RAKIA’s investment also encompassed the project assets, including the BSA

30. Before the Judge, RAKIA characterised its investment as set out in the judgment at ¶ 82 [CB/121]: it extended to “*the project as a whole*”, with a number of assets then enumerated. In its skeleton for the s. 67 application, RAKIA indicated that “*the project as a whole*” included the BSA: see at ¶ 95.2 (“*[t]he BSA was a fundamental and necessary component of the project*”).¹⁷

31. RAKIA’s protected investment does extend to all of the project assets held by ANRAK, including in particular the BSA. That follows from the legal principles set out in ¶¶ 12–21 above. In short:

31.1. The BSA is a “*kind of asset*”, and falls squarely within Article 1(1)(iii) [CB/139]: “*rights or claims to money or to any performance under contract having financial or economic value*”.

31.2. It was “*invested by*” RAKIA as the “*Investor*”, through ANRAK:¹⁸ in terms of the arbitral jurisprudence referenced above and Butcher J’s approach in *Dayyani*, it was an ‘indirectly’ invested asset.

¹⁷ India’s skeleton at ¶ 42(b) [CB/29] claims as common ground below “*that the BSA was not an asset invested by RAKIA in India*”. That is not substantiated, but it seems from India’s consequential skeleton below that it relies on the single line at T2/196/21–22. That was not a concession, but an explanation of why India was wrong to mischaracterise RAKIA as arguing “*that we consider ourselves to be a party to the BSA*”: see T2/196/16–21 [SB/391].

¹⁸ In which RAKIA had an express and substantive governance role, see e.g. article 5 of the Shareholders’ Agreement [SB/198].

32. India’s repeated characterisation of RAKIA’s case as amounting to an argument that its investment “*was not limited to the assets that it had actually invested*” (skeleton, ¶¶ 9, 26 and 46 [CB/20-21, 24-25, 31]) is a mischaracterisation: RAKIA of course accepts that its investment must consist of “*asset[s] invested by*” it, but those words encompass assets invested through a local company.
33. Similarly, India’s suggestion that RAKIA must show a “*legal or beneficial interest in any of the assets of ANRAK as a matter of any applicable law*” (skeleton at ¶ 37(b) [CB/28], and see also ¶¶ 29 and 31–32 [CB/25-26]) is the ‘ownership fallacy’ explained above.¹⁹
34. If further confirmation were needed that the BSA was an asset “*invested by*” RAKIA, the facts of this case are compelling:
- 34.1. The Memorandum of Understanding (‘MoU’) entered into by GoAP and the Government of Ras Al Khaimah (including RAKIA) expressly provided for the incorporation of “*an Indian Registered Limited Company*”, defined as “*the said Aluminium Company*” (clause II); the exclusive supply by the Andhra Pradesh Mineral Development Corporation (or ‘APMDC’) of bauxite from identified deposits “*for the use of the said Aluminium Company*” (clause III); and “*a detailed collaboration agreement between APMDC and the said Aluminium Company within the framework of this MoU*” (clause XI): see Knowles J at ¶¶ 20–21 [CB/106-107].
- 34.2. ANRAK was “*the said Aluminium Company*”. RAKIA’s acquisition of shares in and capitalisation of it were therefore not the mere purchase of shares in the abstract: they were a means of investing in the project contemplated by the MoU, in the manner encouraged by Article 3(2) of the BIT [CB/141].
- 34.3. The BSA was the “*detailed collaboration agreement*” provided for in clause XI of the MoU. It gave effect to the government’s promise of exclusive supply by APMDC of bauxite: Knowles J at ¶¶ 32–41 [CB/109-112].
- 34.4. In terms of Article 1(1) of the BIT, the BSA was a successor in form to a promise made by India to RAKIA in the MoU of an exclusive supply of bauxite to a project company: that company was incorporated, and the contract giving effect to that

¹⁹ A fallacy also affecting the award at ¶ 130 [SB/37-38] (mischaracterising RAKIA’s case as “*because there is a wide definition of assets, it follows that you can own assets which belong to someone else*”) and ¶¶ 131 and 133 [SB/38] (referring to “*a proprietary interest in the assets of the company*” and “*the assets of a company ... treated as belonging to its shareholders*”).

promise was entered into, as contemplated. The BSA was therefore an asset which embodied “*the long standing and foundational promise of, and entitlement to, the supply of bauxite*” (Bradfield 1, ¶ 50 [SB/71]), in turn a critical part of the investment project.

34.5. The BSA was accordingly an asset “*invested by*” RAKIA.

C. “**APPLIED DIRECTLY TO AN INVESTMENT**”—ARTICLE 1(8) OF THE BIT

Treaty interpretation: meaning of “applied directly to an Investment”

35. In terms of the VCLT general rule—ordinary meaning, in context and in light of the treaty’s object and purpose—the words “*applied directly to an Investment*” in Article 1(8) of the BIT do not call for an elaborate interpretative exercise [CB/140]. They mean what they say.

35.1. “*applied directly*” connotes a direct (immediate or proximate, rather than indirect or remote) nexus; and

35.2. “*to an Investment*” refers to the investment as defined in Article 1(1): (i) the assets that are (ii) “*invested by*” the Investor in the host state [CB/139].

36. In its grounds and skeleton, India wrongly seeks to qualify or restrict the ordinary meaning of the words “*applied directly to*”:

36.1. In its Ground Two at ¶ 4.1 [CB/16] (see also its skeleton, ¶¶ 6(c) and 61(b) [CB/19, 35-36]), India says that the ordinary meaning of the words “*applied directly to*” requires “*the direct application of binding executive action specifically to the investor’s Investment*”. If the word “*specifically*” is intended to be synonymous with “*directly*”, it adds nothing to the interpretative exercise. If it is not synonymous, it is an unwarranted addition.

36.2. India suggests in its skeleton at ¶¶ 61 and 61(b) [CB/35-36] (although not in Ground Two): that there must be “*a form of direct legal application to an asset*” or “*a form of direct legal connection between the state action and [the] Investment*”. Article 1(8) requires no such thing—“*applied directly to*” is not limited to any particular kind of application, whether legal, or factual, as long as the nexus between the action and the investment is direct.

37. India is also wrong to criticise the Judge for conceptualising “*direct*” application by reference to action that is “*targeted at the investment*” (skeleton, ¶ 60 [CB/35], referring to the

judgment at ¶¶ 112–113 [CB/125]). Targeted application is not necessary for direct application, but it is sufficient—and on the facts of this case, the relevant action was both targeted and direct (see further below).

38. The ordinary meaning of “*applied directly to an Investment*” is supported by the treaty context.

38.1. Article 1(1) is indispensable context to Article 1(8), because “*Investment*” as defined in the former provision is the object of the words “*applied directly to*” in the latter.

(a) As explained above, “*Investment*” is defined in Article 1(1) both expansively (“*every kind of asset*”) and functionally (“*invested by*” the Investor) [CB/138].

(b) India is therefore wrong to elide the object of “*applied directly to*” with the constituent assets of an investment **alone**, as it does in its skeleton at ¶ 61 (“*[t]he terms used denote a form of direct legal application to an asset*”) [CB/35–36].

(c) Article 1(1) does not say ‘applied directly to an asset’; it says “*applied directly to an Investment*”, “*Investment*” meaning assets **as invested by** the Investor.

38.2. Specifically in terms of investments in the form of shares in a local company, Articles 7(1) and 7(3) are important:

(a) As set out above, Article 7(3) provides in terms for claims for reflective loss by Investors in circumstances where the host state “*expropriates the assets of a [local] company*” in which an Investor owns shares. Critically, that is done by requiring that “*the provisions of clause (1) of this Article are applied to the extent necessary to ensure fair and equitable compensation in respect of their Investment*” [CB/145].

(b) Article 7(1) is then relevantly framed in terms of “*direct or indirect Measures having effect equivalent to ... expropriation*” [CB/144].

(c) That means that a “*Measure*” as defined in Article 1(8) can necessarily exist in relation to an “*Investment*” in the form of shares in a local company, in circumstances where what the “*Measure*” does is expropriate assets of the company in which the Investor holds shares.

39. India’s approach to an investment by way of a shareholding in a local company is that there must be “*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” (skeleton at ¶ 65 [CB/38], emphasis in the original).

40. That has no basis in the treaty text. It relies on the inapposite customary international law position concerning standing to advance diplomatic protection discussed above:
 - 40.1. India accepts that BITs, including this BIT, allow for claims for reflective loss. However, it says that the meaning of the **treaty-based** definition of “*Measure*” in Article 1(8) and the words “*applied directly to*” in particular, should somehow be restricted by customary international law, because “*customary international law recognizes a clear distinction between (i) a 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)*” (skeleton, ¶ 17 [CB/22-23]).
 - 40.2. That is a *non sequitur*. The customary international law position that India invokes concerns standing for diplomatic protection (see above), and does not address the meaning or application of a “*Measure*”, or action “*applied directly*”. Furthermore, the treaty definition of “*Investment*” does not turn on ownership (also see above).
 - 40.3. The customary international law position that India invokes is inappropriate as interpretative context for the BIT, because the treaty is a *lex specialis* and the position concerning standing for diplomatic protection is irrelevant (Butcher J in *Dayyani* at [60] and Sir Christopher Greenwood in *EAIB* at [331]).
41. As it was succinctly put by the annulment committee in *Azurix v. Argentina* at [94], “*there is nothing in the wording of Article I(1)(a) [defining ‘Investment’] that would suggest it is only Azurix’s legal rights as a shareholder ... that are protected*”. So too here: there is nothing in Article 1(8) read together with Article 1(1) that would suggest that action “*applied directly to*” an investment in the form of a shareholding is somehow limited to action against the Investor’s rights *qua* shareholder.
42. Finally, as to object and purpose:
 - 42.1. Knowles J was right to identify at ¶¶ 116–117 of his judgment [CB/125] compelling support for that textual and contextual understanding of the Article 1(8) definition: India’s case (and the tribunal’s approach) “*would in practice mean that a major form of investment structure fell outside the compass of the BIT without apparent reasons for that choice*”. That is correct, and supported by (i) the preamble of the BIT; (ii)

Article 3(2) [CB/138,141]; and (iii) the investor–state jurisprudence referred to in ¶ 21.3 of this skeleton above.²⁰

- 42.2. India’s only real response to the Judge’s correct weighing of the object and purpose is to suggest that lack of practical protection for investments by way of shareholdings in local companies is an “*inherent feature of this Treaty*”, and follows from “*an evident intention on the part of the Contracting Parties to restrict the bringing of investor–state claims*” (skeleton, ¶ 55 [CB/33]). That is circular. It assumes that for which India contends: that India’s extremely restrictive interpretation is somehow ‘inherent’ in the treaty, or a manifestation of an ‘evident intention’ of the parties. As set out above, the terms of the BIT do not support that assumption.

GOM 44 “applied directly to” the shares (and the cash and pledge)

43. Knowles J was right to find that GOM 44 “*applied directly to*” RAKIA’s protected investment in the form of the shares (and the cash and pledge).
44. As explained at ¶¶ 26–28 above, ¶ 111 of the judgment [CB/125] properly understood is an explanation of why GOM 44 was applied directly to those assets *operating as an investment*. Insofar as India’s Ground Two is predicated on the misunderstanding that Knowles J found that GOM 44 “*applied directly to*” something else, it is misconceived.
45. Knowles J’s reasoning and conclusion are correct on both the law and the facts.
46. As to the law, it reflects the ordinary meaning of “*applied directly to*”, and the functional nature of the definition of “*Investment*” in Article 1(1) [CB/138], by which the treaty does not protect assets in and of themselves, but insofar as they function as an Investment (“*every kind of asset **invested by the Investors***”).
47. Knowles J is also clearly right by reference to the essential facts:
- 47.1. The MoU of 14 February 2007 (i) expressly contemplated the incorporation of ANRAK as the vehicle for an investment project in Andhra Pradesh, (ii) contained a promise by GoAP of an exclusive supply of bauxite for that project (the “*foundational promise of, and entitlement to, the supply of bauxite*”, as put in Bradfield 1

²⁰ Including in particular *Pausbok* (cited by India) at [202], in terms similar to Knowles J’s judgment: “*a BIT would be rendered practically without effect if it were right to argue that any action taken by a State against such local companies or their assets would not be subject to Treaty claims by a foreign investor because its investment is merely constituted of shares in that local company.*”

[SB/71/50]), and (iii) expressly contemplated the entry into of a contract between ANRAK and APMDC, the state mineral development corporation (judgment at ¶¶ 19–22 [CB/106-108]).

- 47.2. ANRAK was duly incorporated and RAKIA took shares in it, and GoAP directed APMDC to enter into the BSA (GOM 222, 13 August 2008 [SB/205-210]), and approved the draft contract (GOM 289, 30 October 2008 [SB/211-212]). The BSA was then executed (judgment at ¶¶ 23–41 [CB/108-112]).
- 47.3. Between 2008 and 2013, the project was advanced to the point where “*implementation was completed in all respects*” and commencement of operations depended on “*the supply of ore (Bauxite) by APMDC*”²¹ (see also judgment at ¶¶ 41–49 [CB/112-114]).
- 47.4. In 2014 there was a change in government in Andhra Pradesh. In a legislative debate on 22 December 2015, the new Chief Minister declared that “[*t*]he then government has taken one sided decision ... of giving 224 million tons of Bauxite ore and executed a MOU. [GOM 222] directed [APMDC] to enter into [the BSA]. ... I am cancelling this [government order].” [SB/323-324] Four months after that, GOM 44 was issued [SB/329-332]; and the BSA was then cancelled, as described in the judgment at ¶¶ 52 ff [CB/114-115].
48. In a finding not challenged on appeal, Knowles J found (at ¶ 100 [CB/123]) that “*by GOM 44 the [GoAP] was taking binding, executive, action to alter or end the BSA*”. Given the factual context and chronology set out above, the further conclusion that that action “*applied directly*” to RAKIA’s investment by way of its shares is correct: there was a direct (immediate or proximate) nexus between the action (GOM 44) on the one hand, and the investment project for which ANRAK was incorporated, capitalised in return for the issuance of shares, and thus through which RAKIA invested in India.
49. A different way to approach the same conclusion—and a further reason why Knowles J’s decision was correct—is by reference to the effect of the termination of the BSA on the *value* of the shares in ANRAK:

²¹ State Bank of India to GoAP (1 January 2018) [SB/335-338]. See also ANRAK’s Standalone Balance Sheet (26 August 2013), p. 3 [SB/258]; APMDC to GoAP (2 September 2014) [SB/263-264]; ANRAK to GoI (8 December 2014) [SB/265-267]; APMDC to GoAP (17 July 2015) [SB/268-276].

- 49.1. As explained above, and as accepted by India, it is a characteristic feature of international investment treaties (and this BIT specifically) that an investor with an investment in the form of shares may claim against the host state for reflective loss, *i.e.* the diminution in value of the shares caused by a breach of the BIT.
- 49.2. In the context of a treaty regime one of the characteristic features of which is its embrace of claims for reflective loss by shareholders, adverse action taken against the business of a project company which causes precisely such loss is action “*applied directly to*” shares in that company *qua* investment.
- 49.3. That was well captured by the tribunal in *GAMI v. Mexico* (UNCITRAL, 15 November 2004) at [33], rejecting an argument that the offer of investor–state arbitration in Article 1116 of NAFTA did not extend to claims for reflective loss: “*The Tribunal does not accept that directness for the purposes of NAFTA Article 1116 is a matter of form. The fact that a host state does not explicitly interfere with share ownership is not decisive. The issue is rather whether a breach of NAFTA leads with sufficient directness to loss or damage in respect of a given investment.*”
- 49.4. This conclusion must particularly follow in a context such as the present where the sole purpose and activity of the company in which the relevant shares were held was the project directly impacted by the executive action complained of.
50. Finally, under this heading:
- 50.1. The tribunal’s reasoning on this point (which in any event is due no deference in the s. 67 context: *Dallah v. Pakistan* [2011] 1 AC 763) is virtually non-existent. The beginning and end of the analysis is a single sentence in the award at ¶ 137 [SB/40]: “*the acts in question, although having an indirect effect on RAKLA investment [sic], were directly applied only to APDMC [sic] and ANRAK*”. That is entirely conclusory, and wrong for the reasons given by Knowles J and set out above.
- 50.2. India asserts (Ground Two, ¶ 4.2 [CB/16]; see also its skeleton, ¶¶ 70–71 [CB/39–40]) that Knowles J erred “*to the extent that he held that in GOM 44 [GoAP] acted directly to end the establishment of an Alumina and Aluminium Industry*”. That is not what Knowles J held. India omits critical words from ¶ 111 of the judgment: “*in GOM 44 [GoAP] acted directly to end the supply of bauxite and with that the establishment of ...*” [CB/125]. That is obviously a reference to the BSA and the finding at ¶ 100 of the

judgment [CB/123]. It was therefore part of the Judge’s factual finding as to the direct applicability of the Measure.

GOM 44 “applied directly to” the BSA

51. If the BSA is part of RAKIA’s protected investment within the meaning of Article 1(1) (which it is for the reasons given in Section B above), it is common ground that GOM 44 qualified as a “*Measure*” within the meaning of Article 1(8):

51.1. India does not challenge Knowles J’s finding at ¶ 100 [CB/123] that GOM 44 was a “*binding, executive, action*”.

51.2. India also rightly accepts that that action “*applied directly*” to the BSA: see its skeleton, ¶ 52(b) [CB/32].

D. SCOPE OF THE STANDING OFFER TO ARBITRATE—ARTICLE 10 OF THE BIT

52. For all those reasons, the decision below in this case can and should be upheld because GOM 44 “*applied directly to*” RAKIA’s “*Investment*”, and was therefore a “*Measure*”. However, there is arbitral jurisdiction in this case for a further and freestanding reason: the standing offer to arbitrate in the BIT is not qualified by any requirement that there be a Measure, because Articles 10(2) and (3) are non-jurisdictional federalism provisions [CB/148].

53. Article 10, as with the rest of the BIT, falls to be interpreted applying Articles 31–33 of the VCLT. It is critical that the exercise is framed as ascertaining **the meaning of a standing offer of investor–state arbitration**. That analytical framework is well-established in this area: see this Court’s leading decision in *Ecuador v. Occidental* [2006] QB 432 (CA) at [32]. This was neglected by the tribunal in its award at ¶¶ 82 ff [SB/25], which proceeds on the unstated assumption that the entirety of Article 10 is jurisdictional in nature. That assumption is wrong: the standing offer to arbitrate is **contained in** Article 10, but it is not the **entirety of** Article 10 that is the standing offer.

Text

54. Starting with the general rule of interpretation in Article 31 of the VCLT and the treaty text, Article 10 is structured as follows:

54.1. Article 10(1) [CB/147] declares what is “*governed by*” Article 10. Article 10(1) is not an operative provision: it does not provide for any obligation assumed by the

Contracting States, and it does not make any offer capable of acceptance by Investors. Instead, Article 10(1) is introductory in nature.

54.2. Articles 10(2) and (3) [CB/148] then follow, dealing respectively with India and the UAE.

54.3. Articles 10(4) and (5) [CB/148-149] provide for a tiered dispute resolution mechanism. The second tier of that mechanism is investor–state arbitration, and it is there that the standing offer is made by each Contracting Party to Investors of the other, in terms which may be accepted by the Investor and thereby comprise an arbitration agreement. The English text relevantly reads as follows:

“4. Any dispute arising between a Contracting Party and an investor of the other Contracting Party in respect of an Investment under this Agreement shall ... be settled amicably through negotiations

*5. If **such dispute** cannot be settled amicably within a period of six months ... **the dispute may be submitted to one of the following dispute settlement mechanisms:** (a) [ICSID arbitration]; or (b) an arbitral tribunal established under the [UNCITRAL Rules]”*

54.4. There then follow Articles 10(6) and (7) [CB/149-150] dealing with a notice period and modifications to the UNCITRAL Arbitration rules; and Article 10(8) [CB/150] containing two exclusions (where a relevant contract provides for dispute resolution, and a temporal limitation clause).

55. Of those various parts, the standing offer to arbitrate is made in, and only in, Article 10(5) read together with Article 10(4):

55.1. Article 10(5) is, in terms, the offer of investor–state arbitration.

55.2. The parameters of that offer are defined by the requirement for a “*dispute*”, between a Contracting Party and an “*Investor*”, in respect of an “*Investment*”—nothing else.

55.3. The offer is also expansive, insofar as it applies to “**Any** [*such*] *dispute*”.

56. Articles 10(2) and (3) are not part of the standing offer. Rather, they are (i) structurally separate, and (ii) introduced by the words, in the English text, “*this Article shall cover ...*”.

57. As a matter of their ordinary meaning, the words “*shall cover*” may be read as **inclusive, not restrictive**. In context, they are most obviously read that way. That is fortified by: (i) the structural separateness of Articles 10(2) and (3) from the standing offer in Article 10(5)

read with 10(4); and (ii) the use of different and stronger ‘scope’ terminology in Article 10(1) (“*shall be governed by*”) and Article 10(8) (“*shall not be applied*”).

58. If there existed only the English text of the BIT, it could be said that Articles 10(2) and (3) were ambiguous as to whether they operate inclusively or restrictively. However, the BIT exists in three authentic texts. Read together, there is no ambiguity, because the words in the Hindi text in the same position as “*shall cover*” are unambiguously inclusive, not restrictive; and the word in the Arabic text is of the same character as the English (that is, capable of being read inclusively, and more naturally read in that manner):

58.1. In the Hindi, the relevant words are: शामिल होंगे. That connotes “*includes*”.

58.2. In the Arabic, the relevant word is تغطي. That connotes “*cover*”.

59. Where a treaty exists in more than one authentic language, all texts are the subject of (or provide the ‘input’ for) the general rule of interpretation in Article 31 of the VCLT. Further, pursuant to Article 33(3) of the VCLT, “[*t*]he terms of the treaty are presumed to have the same meaning in each authentic text”. Applying the Article 31 rule to all three authentic texts, it is clear that the meaning of the words “*shall cover*” / शामिल होंगे / تغطي is inclusive, not restrictive. The presumption of unity of meaning in Article 33(3) is therefore not displaced.
60. The recital prior to the signatures in the BIT contains a priority clause: after stating that the treaty is done “*in the Arabic, Hindi and English languages, all texts being equally authentic*”, the recital provides “[*i*]n case of ***divergence in interpretation***, the English text shall prevail” [CB/154]. The priority clause thus begs the question of whether there is a “*divergence in interpretation*”. That in turn is answered by the application of the general rule of interpretation in Article 31 of the VCLT, coupled with the presumption of unity of meaning in Article 33(3).²² For the reasons just given, while there might have been ambiguity were the treaty to exist in the English text only, there is no ambiguity when the

²² See the ILC’s *Draft Articles* (YBILC 1966, vol. II), commentary to Article 29 (the precursor to Article 33) at [7]: “*The unity of the treaty and of each of its terms is of fundamental importance in the interpretation of plurilingual treaties and it is safeguarded by combining with the principle of the equal authority of authentic texts the presumption that the terms are intended to have the same meaning in each text. This presumption requires that every effort should be made to find a common meaning for the texts before preferring one to another.*” See also the WTO Appellate Body in *United States – Softwood Lumber* (WT/DS257/AB/R, 19 January 2004) at [59].

three texts are construed together. There is therefore no divergence, and the priority clause is not engaged.

61. Construed in accordance with the applicable public international law principles of treaty interpretation, Articles 10(2) and 10(3) are accordingly inclusive only. They therefore do not delimit or qualify the standing offer of arbitration made in Article 10(5) read with Article 10(4), which extends (in accordance with its terms) to “[a]ny dispute ... in respect of an Investment”. Rather, Articles 10(2) and 10(3) contain treaty-based rules of attribution concerning the state responsibility of India and the UAE for the executive acts of their political subdivisions as well as of their central governments.
62. Such treaty-based federalism clauses are common. The most well-known is Article 50 of the ICCPR, replicated in multiple human rights treaties. In the investment context, the US Model BIT since 2004 includes a federalism clause, as does the United States–Korea FTA in issue in *Elliott Associates* (see this Court’s judgment at [10]).
63. The tribunal was therefore wrong to rely on something resembling an *effet utile* argument, answering in the negative the rhetorical question “why article 10.2 is there at all” (award, ¶ 87 [SB/25-26]). There is *effet utile* in treaty-based confirmation of the applicability of customary international law rules (in this case, Article 4 of the ILC’s Articles on Responsibility of States for Internationally Wrongful Acts).

Context

64. The most important context for the interpretation of Article 10, and in particular the scope of the standing offer to arbitrate that it contains, is provided by the substantive protections in Articles 3 through 9 of the BIT. Some of these (for example, the second sentence of Article 4(1) [CB/142], and Article 7 [CB/144-145]) require a “Measure”; but most do not (for example, the first sentence of Article 4(1) [CB/141], Article 5(1) [CB/142], Article 5(2) [CB/142-143], Article 6(1) [CB/143], Article 8 [CB/145-146], and Article 9 [CB/146-147]).
65. All else being equal, there is an obvious sense and utility in the scope of substantive protection and the scope of investor–state arbitration in the same treaty coinciding. See this Court in *Elliott Associates*, [53]: “there is nothing surprising or unworkable about the Contracting Parties to NAFTA and the Contracting Parties to the Treaty having limited the right of investors to arbitrate to circumstances in which the substantive protections under the Treaty were engaged”

66. It was something of a *leitmotif* in India’s case below that, as a matter of principle, the scope of a BIT’s substantive protections need not coincide with the scope of investor–state arbitration in particular because of Article 11 and the availability of state-state claims (see its skeleton before Knowles J at ¶¶ 32–33, 46(a), 46(b), 53(a), 75(a) and 75(c)). That is of course correct, but ‘need not’ does not mean ‘should not’. In reality, Article 11 is not helpful, if relevant at all, for the interpretation of Article 10.
- 66.1. The examples relied on by India in its skeleton before this Court (fns 6 and 7) [CB/23] of treaties that do not include investor–state arbitration at all (the UK–Australia FTA), or confine it to narrow categories of claim (the early generation Soviet and Chinese BITs), in fact support RAKIA’s case—the exclusion or delimitation in those treaties is clear; contrast this with the use of **inclusive** language in Articles 10(2) and (3).
- 66.2. India was also wrong to suggest below that the state–state dispute resolution provision is especially wide, or operates together with Articles 10(2) and (3) as a form of ‘package’, carefully allocating jurisdiction. Article 11 [CB/150-152] is an entirely ordinary state–state dispute resolution clause,²³ and it was present from the very beginning of the negotiations in 2006, whereas Articles 10(2) and (3) appeared much later.²⁴

Object and purpose

67. The object and purpose of the BIT is expressed in the preamble²⁵ as “[d]esiring to create conditions favourable for fostering greater Investment” and “[r]ecognizing that the encouragement and reciprocal protection of such Investment ... will be conducive to the stimulation of individual business initiative and will increase prosperity in both Contracting Parties” [CB/138].
68. The availability of investor–state arbitration coextensive with treaty-based standards furthers that object and purpose, especially in respect of “*protection*”. That has been

²³ Article 11 is substantively identical to Article 9 of the UK Model BIT. The only difference is the addition of the words “*or execution*” to “*interpretation or application*”. However, those words were suggested by the UAE in 2006, so it cannot be suggested that they enlarge the scope of Article 11 as a complement to Articles 10(2) and (3) as added much later.

²⁴ See the minutes and accompanying drafts of: 1998 [SB/392-404], 2006 [SB/405-424], 2007 [SB/425-442], July 2013 [SB/443-445], and October 2013 [SB/446].

²⁵ By far the most reliable indica of object and purpose, because of its mutuality: see *Border Timbers v. Zimbabwe* [2024] 1 WLR 3417 at [27].

confirmed by a host of awards: *Maffezini v. Spain* (ICSID Case No. ARB/97/7, 25 January 2000) at [54]–[55]; *Gas Natural v. Argentina* (ICSID Case No. ARB/03/10, 17 June 2005) at [29]; *Suez v. Argentina* (ICSID Case No. ARB/03/19, 3 August 2006) at [59]; *Itisaluna v. Iraq* (ICSID Case No. ARB/17/10, 3 April 2020) at [194].

69. The tribunal in this case was dismissive of object and purpose supporting RAKIA’s construction of Article 10, characterising it as “*an argument not infrequently deployed by Claimants who find that the terms of a BIT are not broad enough to cover their case*”, and “*so at odds with the ordinary meaning of article 10.2 in its context that it cannot be a fair and rational interpretation of the BIT*” (award, ¶ 100 [SB/29-30]). That is wrong: it wrongly assumes that the ordinary meaning of Article 10(2) is necessarily restrictive; and in any event it does what the Supreme Court in *JTI Polska* identified as impermissible in public international law, and gives undue primacy to the text over the context and object and purpose in the VCLT analysis (see ¶ 14 above).

E. CONCLUSION

70. India’s appeal should therefore fail, first because for the reasons given by Knowles J, and for the further reasons set out above, GOM 44 “*applied directly to*” RAKIA’s “*Investment*”, and there was therefore a “*Measure*” as defined in the BIT.
71. In any event, the BIT’s standing offer of arbitration is in Article 10(5) read with Article 10(4). There is no dispute that the terms of those provisions are satisfied.

TIMOTHY OTTY KC

Blackstone Chambers

BEN JURATOWITCH KC

BENEDICT TOMPKINS

Essex Court Chambers

21 November 2025