Neutral Citation Number: [2025] EWHC 1553 (Comm)

Case No: CL-2022-000304

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

In the matter of the Arbitration Act 1996
And in the matter of an arbitration under the UNCITRAL Arbitration Rules

Rolls Building, Royal Courts of Justice
Fetter Lane, London
Date: 20/06/2025

Before:
THE HON. MR JUSTICE ROBIN KNOWLES CBE

- -

Between:

RAS AL KHAIMAH INVESTMENT AUTHORITY

Claimant/ Appellant

- and -

REPUBLIC OF INDIA

Defendant/ Respondent

- -
- -

Toby Landau KC, Lucas Bastin KC and Matthieu Gregoire (instructed by **Jones Day**) for the **Claimant/ Appellant**

Samuel Wordsworth KC, Siddharth Dhar KC and Peter Webster (instructed by **Dentons**) for the **Defendant/ Respondent**

Hearing dates: 15 and 16 October 2024

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JUDGMENT

Robin Knowles J, CBE:

Introduction

1. This case concerns the question whether an UNCITRAL arbitral tribunal had jurisdiction to determine a dispute between the investment authority of the state of Ras Al Khaimah (a state of the United Arab Emirates) and the Republic of India ("India") in connection with bauxite mining and aluminium production in India.

2. The arbitral tribunal comprised Lord Hoffmann (chair), Justice Chandramauli and J William Rowley QC ("the Tribunal"). As is well established, a tribunal is itself competent to rule on the issue of its jurisdiction under section 30 of the Arbitration Act 1996, but subject to challenge to the Court. The Tribunal's conclusion was that it had no jurisdiction. The issue is now before the Court by way of challenge under section 67 of the Arbitration Act 1996.

The BIT

3. The Government of India and the Government of the United Arab Emirates reached a written agreement dated 12 December 2013 ("the BIT"). The title to the BIT stated that it was an agreement "on the promotion and protection of investments".

4. The BIT provided for texts in Arabic, Hindi and English languages with "all texts being equally authentic" and "in case of divergence in interpretation, the English text shall prevail". The recitals provided that the Governments (each a "Contracting Party") had agreed:

> "Desiring to create conditions favo[u]rable for fostering greater Investment by Investors of one Contracting Party in the territory of the other Contracting Party;
>
> Recognizing that the encouragement and reciprocal protection of such Investment, made in accordance with the laws and regulations of the host Contracting Party will be conducive to the stimulation of individual business initiative and will increase prosperity in both Contracting Parties …"

5. By Article 2(1) ("Scope of the Agreement"):

> "This Agreement shall apply to all Investments made by Investors of one Contracting Party in the territory of the other Contracting Party, whether made before or after the coming into force of this Agreement, but shall not apply to any dispute arising out of any Measure applied to an Investment before the entry into force of this Agreement"

6. Article 1 ("Definitions") provided:

> "1. The term "Investment" means every kind of asset invested by the Investors of one Contracting Party in the territory of the other Contracting Party in accordance with the laws, and regulations of the Contracting Party in whose territory the Investment is made and in particular, though not exclusively, includes:
>
> (i) movable and immovable property as well as any other property rights in rem such as mortgages, liens, pledges, or usufruct;

(ii) shares, stocks, bonds, debentures and any other similar forms of participation in a company and other debts and loans and securities issued by an Investor of a Contracting Party and returns retained for the purpose of reinvestment;

(iii) rights or claims to money or to any performance under contract having financial or economic value;

(iv) intellectual property rights, goodwill, technical processes, know-how, copyrights, trademarks, trade names and patents in accordance with the relevant laws of the respective Contracting Parties;

(v) any right conferred by law or by virtue of any licenses or permits granted pursuant to law, excluding any right conferred in respect of hydrocarbons.

Any change of the form in which assets are invested or reinvested does not affect their character as Investment."

7. Article 1 continued:

"2. "Investor" means any national, company or government of a Contracting Party.

3. "National" means a natural person holding the nationality of a Contracting Party in accordance with its applicable law.

…

8. "Measure" means any form of binding action taken by a Contracting Party under any law, rule or regulation and applied directly to an Investment."

8. By Article 4 ("Protection of Investments"):

"1. Investments by Investors of either Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party in a manner consistent with the provisions of domestic laws of the host Contracting Party, this Agreement and applicable rules of international law. Neither Contracting Party shall in any way impair by arbitrary or discriminatory Measures, the management, maintenance, use, enjoyment, or disposal of Investments."

9. By Article 5 ("Treatment of Investments"):

"Each Contracting Party shall, at all times, ensure Investments made in its territory by Investors of the other Contracting Party, fair and equitable treatment. Such treatment shall not be less favo[u]rable than that which it accords to Investments of its own investors or investors of any third Party, whichever is the most favo[u]rable."

10. By Article 7 ("Expropriation"):

"1 a) Investments made by Investors of one Contracting Party in the territory of the other Contracting Party shall not be nationali[s]ed, expropriated, dispossessed or subjected to direct or indirect Measures having effect equivalent to nationali[s]ation, expropriation or dispossession (hereinafter collectively referred

to as "expropriation") by the other Contracting Party except for a public purpose related to the internal needs of that Contracting Party and against expeditious, adequate and effective compensation and on condition that such Measures are taken on a non-discriminatory basis and in accordance with the procedures established under law.

…

3. Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under its applicable law in force in any party of its own territory, and in which Investors of the other Contracting Party own shares, stocks, debentures or other rights of interest it shall ensure that the provisions of clause (1) of the Article are applied to the extent necessary to ensure fair and equitable compensation in respect of their Investments to such Investors of the other Contracting Party who are owners of such rights or interest.

4. The term "expropriation" shall also apply to interventions or regulatory Measures by a Contracting Party such as the freezing or blocking of the Investment, compulsory sale of all or part of the Investment, or other comparable Measures, that have a *de facto* confiscatory or expropriatory effect in that their effect results in totally or near totally depriving the Investor from the ownership, control or substantial benefits over his Investment or which may result in total or near total loss or damage to the economic value of his Investment."

11. By Article 10 ("Settlement of Disputes between Contracting Party and the Investor"):

"1. Disputes arising between a Contracting Party and an Investor of the other Contracting Party in respect of an Investment under this Agreement shall be governed by this Article.

2. In the context of Republic of India, this Article shall cover Measures underlying a dispute taken by the Central Government and/or the state governments while exercising their executive powers in accordance with the Constitution of India.

…

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, as far as possible, be settled amicably through negotiations between the parties to the dispute. …

5. If such dispute cannot be settled amicably within a period of six months from the date of receipt of Notice of Dispute, the dispute may be submitted to one of the following dispute settlement mechanisms: …

b. an arbitral tribunal established under the Arbitration Rules of the [UNCITRAL], in force at the time of commencement of the dispute; …".

12. By Article 14.2:

"Nothing in this Agreement precludes the host Contracting Party from taking necessary reasonable Measures in accordance with its laws applied generally on a

> non-discriminatory basis, in circumstances of extreme emergency for the specific purposes of prevention of diseases or pests".

13. I keep in mind that on India's case the result of these and its other provisions is that the drafting of the BIT is individual to the point of "exceptional". I also keep in mind, as asked by both parties, the whole of the terms of the BIT. This includes, as asked by India, the width of a State-to-State dispute resolution provision at Article 11 although I do not set this out.

The MOU

14. In 1961 the Government of Andhra Pradesh incorporated Andhra Pradesh Mineral Development Corporation Limited ("APMDC Ltd"). In 2005 the Government of Ras Al Khaimah established RAKIA by Emiri Decree.

15. A Memorandum of Understanding ("the MOU") dated 14 February 2007 (six years before the BIT) was entered into by the Government of Andhra Pradesh and the Government of Ras Al Khaimah. The Governments recorded that they did so following "a high level meeting" on 9 February 2007 at which "it was decided to establish Alumina and Aluminium Industry in the State of Andhra Pradesh".

16. By a first recital the MOU recorded:

> "WHEREAS, the State of Andhra Pradesh is having rich Bauxite Deposits in Visakhapatnam and East Godovari Districts, consisting of about 550 Million Tonnes of Metallurgical Grade Bauxite. Keeping its importance in view, the [Government of Andhra Pradesh] have reserved the entire deposit bearing areas available in E.G. District and Visakhapatnam District through GOMs No. 999 … for exclusive exploitation by the public sector undertaking."

17. The first recital continued:

> "Further, all these areas are falling under reserve forest as well as notified tribal areas. As per the AP Land Transfer Regulation, 1959, transfer of these areas to non-tribals is prohibited. Further, the Hon'ble Supreme Court of India in Samatha Vs State of A.P. case, gave the ruling that the State owned Corporation can mine these areas and in case State owned Corporations are involved in mining, it does not amount to transfer of the areas to non-tribals. Considering these facts, [the Government of Andhra Pradesh] is looking for a highly competent and financially sound entrepreneur who can establish value-added industry to produce end-products, based on these valuables, mined by APMDC Ltd."

18. Among further recitals were these:

> "WHEREAS, the [Government of Ras Al Khaimah], United Arab Emirates, which has got strong industrial exposure having a number of cement manufacturing companies in Ras Al Khaimah with an annual production capacity of 8 million tonnes, with extensive experience in mining, GORAK exports this High Grade Limestone to various countries including India.

> Also the [Government of Ras Al Khaimah] has got a large exposure in generating of power and has a world class Ceramic Tiles manufacturing facility.
>
> The [Government of Ras Al Khaimah] has three ports in Ras Al Khaimah with rich experience in handling Bulk Cargos and also has interest in onshore and offshore Oil Exploration.
>
> With its vast industrial experience, the [Government of Ras Al Khaimah], UAE, has come forward to establish One Million Tonnes Alumina Plant with 2 50,000 Tonnes Aluminium Smelter with a provision to double its capacity in the State of Andhra Pradesh by using the Bauxite resources available in the State. They intend to bring in the best energy efficient and best Aluminium technology available in the world."

19. Clause I of the MOU recorded that the parties had "a vision to augment growth and development in the State of Andhra Pradesh", and that the MOU set out "the terms, obligations and commitments to be performed jointly and/or severally."

20. By clauses II to X of the MOU:

> "II. [The Government of Ras Al Khaimah] and its Investment Authority [i.e. RAKIA] along with their Associates or its successors undertake to incorporate an Indian Registered Limited Company (hereinafter referred to as the said Alumin[i]um Company) which will set up an Alumina and Aluminium Refinery and Smelter to produce One Million Tonnes Alumina and 2,50,000 [sic] Tonnes of Aluminium per annum initially, with a provision for suitable expansion, in the state of Andhra Pradesh at the locations other than the Scheduled Areas mutually agreed to by the two parties and with a capital outlay of about $2 Billion USD.
>
> III. [The Government of Andhra Pradesh] shall direct APMDC [Ltd] to supply Bauxite from out of the areas available in the Jerrala group of deposits, Chintapalli Mandal spread over 1649 hectares with probable reserves of 224 Million Tonnes of bauxite ore for the use of the said Aluminium Company at the price as fixed by a Committee formed by [the Government of Andhra Pradesh], based on cost of production uninterruptedly as long as the industry is in operation. APMDC [Ltd]/[the Government of Andhra Pradesh] shall not sell or export Bauxite from Jerrala deposit to any other party during the period of operation of the said Aluminium Company.
>
> IV. APMDC [Ltd] shall pursue the applications already filed by them with [the Government of Andhra Pradesh]/ [the Government of India] for forest and environmental clearances required and get the mining lease cleared for the Jerrala bauxite deposit. The entire expenditure incurred by the APMDC [Ltd] for obtaining various clearances including payment of net present value to Forest Department shall be borne by the said Aluminium Company.
>
> V. The said Aluminium Company or its subsidiary shall identify suitable land other than the land in Scheduled Areas for establishment of the alumina-aluminium plant. The same will be acquired and handed over to the said Aluminium Company by [the Government of Andhra Pradesh/Collector], to the extent required by the company. The said Aluminium Company shall bear the cost. [The Government of

Andhra Pradesh] will act as facilitator to create infrastructure like development of Roads between the factory and Bauxite Mines at Jerrala Village of Chintapalli Mandal and other infrastructure amenities like water supply, power and other requirements for establishment of the industry, the cost of which will be borne by the said Aluminium Company.

VI. The said Aluminium Company shall not depend on power supply and shall go in for captive power generation facility for uninterrupted power supply to the plant. However, from construction stage till the time of commissioning of plant, [the Government of Andhra Pradesh] shall provide adequate power supply during construction of the said Aluminium Company and the backup grid support facility during regular operations as per the rules & tariffs approved by the Andhra Pradesh Electricity Regulatory Commission (APERC).

VII. The said Aluminium Company shall offer equity to APMDC [Ltd] in the said Aluminium Company at the percentage as may be decided by the Committee appointed by the [Government of Andhra Pradesh] under Para III.

VIII. APMDC [Ltd] shall procure the required machinery for mining either on its own or on hire basis whichever is found economical. The hire charges shall be fixed by a committee as appointed by [the Government of Andhra Pradesh] under para III by taking prevailing rates.

IX. APMDC [Ltd]/ The Aluminium Company shall train the local tribals identified by the Department of Tribal Welfare in mining/allied subjects for making use of them in the proposed project and ultimately absorb them in the mining operations/industry as the case may be as far as possible. Schooling and health facilities will also be provided to the local tribal for their advancement. A minimum of 0.5% of revenue from the value added project shall be spent on the health, training, social infrastructure and welfare of tribals by the said Aluminium Company.

X. [the Government of Andhra Pradesh] shall provide exemptions to the project from entry tax octroi/ other tax incentives and exemptions as being extended by [the Government of Andhra Pradesh] for mega fast track projects."

21. The MOU further provided by clause XI:

"There shall be a detailed collaboration agreement between APMDC [Ltd] and the said Aluminium Company within the framework of this MOU within one month from the granting of Mining Leases. This MOU is subject to additions and/or variations and/or deletions with the mutual consent in writing of both the parties hereto and shall come into force from the date of its signing by the parties hereto and shall remain valid for three years or till the commencement of commercial production (whichever is earlier) or till either of the parties mutually agree to sever the arrangement, or this MOU is superceded by a detailed internal agreement as envisaged in para above [sic]."

22. Clause XII was in these terms:

> "XII. APMDC [Ltd] shall allocate 20% of the net profit it earns from Bauxite mining to the tribals which does not include the expenditure for reforestation and maintenance of ecology, and for the purpose as provided in the Samatha case and the mining operations shall be strictly as per the principles laid down in the said Samatha judgment."

ANRAK Aluminium Ltd, Penna Cement Ltd and The Share Holders Agreement

23. Shortly after the MOU, on 23 March 2007 ANRAK Aluminium Limited was incorporated under the Indian Companies Act 1956.

24. On 6 April 2007 RAKIA ("Government of Ras Al Khaimah, UAE through its investment arm … RAKIA … and its associates/ affiliates and its nominees …") and a company by the name Penna Cement Industries Limited ("with its associates") entered into an agreement titled (in capitals) "Share Holders Agreement". Penna Cement Industries Ltd was described as a Company registered under the Indian Companies Act, 1956.

25. The parties to the Share Holders Agreement took shares in ANRAK Aluminium Ltd. They recited in the agreement that they did so "to establish the … Alumina and Aluminium Industry" in Andhra Pradesh and had "accordingly" formed ANRAK Aluminium Ltd.

26. The Share Holders Agreement included these recitals:

> "WHEREAS, First Party – Government of Ras Al Khaimah, UAE and Government of Andhra Pradesh, India concluded [the MOU], whereby First Party has agreed and undertook to incorporate an Indian registered limited Company, which will set up an Alumina Plant and Aluminium Smelter in the State of Andhra Pradesh by using the bauxite reserves available at Jarella Mines …
>
> AND WHEREAS, on the basis of the [MOU] and long standing relationship with [Penna Cement], the First Party – Government of Ras Al Khaimah, UAE approached [Penna Cement] for necessary support and co-operation in establishing the Alumina/Aluminium plant in the State of Andhra Pradesh.
>
> AND WHEREAS [Penna Cement] has confirmed that the Alumina & Aluminium Industry in Andhra Pradesh is technically feasible, financially viable and it was decided by both [RAKIA] and [Penna Cement] to enter into a Shareholders Agreement to establish the said Alumina and Aluminium Industry.
>
> Accordingly the company was formed in the State of Andhra Pradesh under Indian Companies Act, 1956 in the name and style of [ANRAK Aluminium Ltd]"

27. Article 1.1 and 1.2 of the Shareholders Agreement provided:

> "1.1 The total cost of the project including working capital margin requirements have been estimated at Rs 4,300 crores … Debt equity ratio shall be 70:30.
>
> 1.2 The required equity capital of [ANRAK Aluminium Ltd] … shall be brought in to the extent of 30% by [RAKIA] and the balance 70% by the second party to the Share holders Agreement, "[Penna Cement]"

28. Article 3 was titled "Project" and provided:

> "3.1 The project execution shall be by [Penna Cement] and [Penna Cement] agrees to obtain all statutory approvals/permissions for the implementation of the project and implement the project successfully.
>
> 3.2 The changes made by [Penna Cement] in determining the Project capacities by adopting best economic viability shall be subject to [RAKIA's] approval."

29. Article 4 was titled "Business" and provided:

> "4.1 [ANRAK Aluminium Ltd] shall be engaged in the following business activities:
>
> a. The manufacture, production, marketing, distribution, import, export Alumina, Aluminium & associated/ related products and power.
>
> b. Lease/or acquire, construct and operate bauxite mine facility.
>
> c. Any industrial, manufacturing and commercial activity relating directly or indirectly to the objects of [ANRAK Aluminium Ltd], without limitations, any necessary actions for the use of advanced methods and techniques, protection of acquired rights and establishment of affiliated companies for engineering and industrial activities in connection with the objects of [ANRAK Aluminium Ltd].
>
> 4.2 The principal place of business of the company shall be in the state of Andhra Pradesh, India."

30. The Tribunal summarised that between 14 February 2007 (the date of the MOU) and 30 October 2008 (the date of an agreement known as the BSA, next described below):

> "RAKIA invested some US$30.8 million by way of subscription for 30% of the issued share capital of ANRAK [Aluminium Ltd]. The other 70% was taken by an Andhra Pradesh company named Penna …"

31. Mining leases were granted to APMDC Ltd on 28 December 2007.

The BSA

32. The Government of Andhra Pradesh issued an Order numbered 222 and dated 13 August 2008 "GOM 222"). This recorded that the Government of AP had constituted a six member High Powered Committee:

> "for fixation of sale price of Bauxite and the percentage of equity that [APMDC Ltd] shall demand in the proposed Value Added Industry".

33. GOM 222 recorded that the Committee had concluded that APMDC Ltd should enter into a detailed Bauxite Supply agreement, and further:

> "(11) Aluminium Companies shall submit irrevocable Performance Bank Guarantee for an amount of Rs 5.00 cores in favour of [APMDC Ltd] drawn on any Nationalized Bank within a period of 30 days from Signing of Bauxite Supply

> Agreements between APMDC [Ltd] and the said Aluminium Companies. The Bank Guarantee shall be valid for the total period of the contract.
>
> (12) All the terms and conditions mentioned in … [the MOU] entered into with the Government of Ras-Al-Khaimah shall also form part of the Bauxite Supply Agreement and [APMDC Ltd] shall ensure fulfilment of those conditions by the Companies."

34. GOM 222 concluded:

> "7.The Government have examined the matter in detail and after careful consideration, hereby accept and approve the above recommendations of the High Powered Committee, in toto and direct [APMDC Ltd] to enter into Bauxite supply agreements and take necessary further action accordingly by taking the approvals of Government wherever required from time to time, if necessary, and intimate the action taken by them at every stage to Government, scrupulously. The Bauxite Supply Agreement shall be entered into with a stipulation that it shall not be implemented till permission of the Government of India is obtained by Government of Andhra Pradesh/ [APMDC Ltd] under Section 2(ii) of Forest Conservation Act, 1980, and also Environment Clearances for the Bauxite Mining Project as per the directions of Hon'ble High Court of Andhra Pradesh …"

35. An agreement entitled "Bauxite Supply Agreement" dated 30 October 2008 was entered into between APMDC Ltd and ANRAK Aluminium Ltd. By clause 2.2 it was to "continue to remain in force for a period of the life time of the plant or until exhaustion of the mining reserves of the bauxite in the Mines …" By Clause 21 the agreement "can be altered/terminated with the mutual consent of both parties and with the Government consent.".

36. By Clause 35:

> "This Agreement shall be governed by the law of India for the time being in force and subject to Clause 27, the City Civil Courts in Hyderabad shall have the excusive jurisdiction in the matter. …"

37. Recitals recorded that ANRAK Aluminium Ltd was "established in Andhra Pradesh by [the Government of Ras Al Khaimah] through … RAKIA …". They continued:

> "[ANRAK Aluminium Ltd] proposes to establish a 1.5 million tonne per annum (MTPA), alumina refinery plant in Makavaripalem Mandal in Visakhaptnam District in Andhra Pradesh and Aluminium Smelter of 2,50,000 tonne per annum capacity in Andhra Pradesh in the first phase with provision to expand at a location other than scheduled area mutually agreed by two parties with a capital outlay of about 2 Billion US Dollars. To this extent they have entered into MOU with Government of [Andhra Pradesh] on 14th February, 2007.
>
> … [APMDC Ltd] is a Government of Andhra Pradesh Undertaking which has obtained a Mining Lease for extraction of Bauxite deposits from Jerrela (known as Chintapalli Group) South of Korukonda in Visakhapatnam District of Andhra Pradesh in [GOMs No 358, 359, 360 dated 28 December 2007]. The Government of Andhra Pradesh and Government of Ras Al Khaimah entered into a

Memorandum of Understanding (the "MOU") on 14th February 2007 in terms of which the Government of Andhra Pradesh agreed to mine and supply Bauxite by APMDC [Ltd] from and out of the Mines more specifically defined hereunder [Jerrela Blocks I, II, III, VIII totalling 1,162.00 Hectares]…"

38. By Clause 7, under the headings "Obligation to Sale and Purchase" and "Sale and Purchase of Bauxite":

"(a) [APMDC Ltd] agrees and undertakes to sell and deliver to [ANRAK Aluminium Ltd] exclusively in a continuous and uninterrupted manner, and [ANRAK Aluminium Ltd] agrees and undertakes to purchase, accept and pay for, the Bauxite in the quantities and having the qualities as required hereby, upon the terms and conditions set out in this Agreement.

(b) [ANRAK Aluminium Ltd] shall purchase Run of Mine (ROM) ore of Bauxite as produced by [APMDC Ltd] for effective utilization in their refinery and smelter located in Andhra Pradesh only and shall not utilize/sell the same for any other purposes or to a third party."

39. By Clauses 27 and 28

"27. REPEAL

… This Agreement together with any documents referred to in it supersedes any and all oral and written agreements drafts, undertakings, representations, warranties and understandings heretofore made relating to the subject matter hereof and constitutes the entire agreement and understanding of the Parties relating to the subject matter hereof.

28. OTHER SOCIAL OBLIGATIONS OF [ANRAK Aluminium Ltd]

APMDC [Ltd]/The Aluminium Company shall train the local tribals identified by the Department of Tribal Welfare in mining/allied subjects for making use of them in the proposed project and ultimately absorb them in the mining operations/industry as the case may be as far as possible. Schooling and health facilities will also be provided to the local tribal for their advancement. A minimum of 0.5% of revenue from the value added project shall be spent on the health, training, social infrastructure and welfare of tribals by the said Aluminium Company. The Aluminium company shall deposit the amount annually to APMDC [Ltd] which will spend the same as per Government guidelines on tribal development."

40. By Clause 6:

"Equity to [APMDC Ltd] and Representation in the Board of the Company

(a)The equity holding of [APMDC Ltd] in the value added industry to be set up by Aluminium companies will be up to 1.5% of the total equity, subject to a maximum of Rs. 50.00 crores, which shall be by way of adjustment annually out of the sale consideration amount for bauxite payable by the purchaser to APMDC [Ltd] over a period of 10 years. The shares shall be allotted in proportion to the payment made.

(b) [APMDC Ltd] shall nominate one Director from APMDC [Ltd] on the Board of Directors of the Aluminium Company."

41. By Clause 18:

"Infrastructure facilities for the Refinery and Smelter

[ANRAK Aluminium Ltd] shall identify suitable land other than the land in the scheduled areas for establishment of Alumina refinery and Aluminium smelter at their cost.

[ANRAK Aluminium Ltd] shall also create infrastructure amenities like development of roads between the refinery and smelter and bauxite mines of Jerrela Village of Chinthapalli Mandal and water supply, power and other requirements at their own cost. [Government of Andhra Pradesh] shall act as facilitator for the creation of infrastructure by the Aluminium Company.

[ANRAK Aluminium Ltd] shall not depend on power supply and shall go in for captive power generation facility for an uninterrupted power supply to the plant."

42. The Government of Andhra Pradesh issued an Order numbered 289 and dated 30 October 2008 ("GOM 289"). This provided:

"… Government hereby approve the said Draft Agreement for Supply of Bauxite Ore … with a condition that this agreement shall not be implemented till the permission of the Government of India is obtained by [APMDC Ltd] under section 2(ii) of Forest Conservation Act, 1980 and also Environment Clearances for the Bauxite Mining project. The Vice Chairman & Managing Director [APMDC Ltd] is permitted to enter into the above agreement with [ANRAK Aluminium Ltd]."

43. On 12 December 2008 the Ministry of Environment & Forests of the Government of India provided specified environmental clearances subject to conditions. The Tribunal observed that:

"… in contrast to this fairly rapid progress, the applications for forest Clearance proceeded very slowly."

2009-2016

44. The Tribunal summarised that in 2009:

"… RAKIA brought its investment up to US$42.5 million but did not thereafter match equity investments by Penna. As a result, its share of equity was reduced to about 12%."

The references to equity were to equity shares in ANRAK Aluminium Ltd.

45. The Tribunal commented:

"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 at least to take the lead in investing US$2 billion and bringing the

> 'best energy efficient and best Aluminium technology available in the world' to Andhra Pradesh. In the event, however, it was an Indian company, [Penna Cement] which … emerged from the anonymity of being an 'associate' in the MoU and took a 70% interest in the equity of ANRAK [Aluminium Ltd]. RAKIA's last investment was a payment of about USD$10m in August 2009, after which it appears to have adopted a 'wait and see' position and allowed its equity interest to be diluted by further issues of shares to Penna."

46. By an Agreement for Pledge of Shares dated 25 May 2010, RAKIA confirmed it pledged shares in ANRAK Aluminium Ltd in favour of Axis Bank Limited as security trustee acting for a number of lenders to ANRAK Aluminium Ltd.

47. The Tribunal further summarised:

> "Between 2010 and 2013 ANRAK [Aluminium Ltd] built an alumina refinery and captive power plant."

In a little more detail, it added:

> "On 17 July 2010 a committee of scientists from the [Ministry of the Environment and Forests] inspected the area for which APMDC [Ltd] had applied for forest clearance and the site on which ANRAK [Aluminium Ltd] was to build the refinery and smelter. The committee was surprised to see that the building of the refinery had already begun. On 8 November 2010 an official from the Ministry wrote to ANRAK:
>
> > *'The committee has reported that the construction activity for the project has already commenced and sufficient progress has been made. It is also noted that the Stage II Forest Clearance under the Forest (Conservation) Act 1980 for the Jarilla Mines has not been granted. Hence in the absence of forest clearance, there is no assured supply of bauxite for the proposed aluminium refinery.*
> >
> > *In view of the above you are advised to stop further construction work for Alumina refinery for Smelter and Captive Power Plant till final decision is taken to grant Forest Clearance to the captive Jarilla mines.'*
>
> ANRAK [Aluminium Ltd] nevertheless carried on building the refinery …
>
> The Ministry examined the question of whether such mining in a tribal area would be lawful … and on 3 October 2011 appointed a committee under the chairmanship of Mr JC Kala, former Director General of Forests, to advise on whether clearance should be granted."

48. The committee produced a report. The Tribunal's summary of the report included the following:

> "… the committee said that it had made efforts to obtain the views of all stake holders, 'specially the local tribals' but had not been altogether successful. … The Committee said that it had weighed the pros and cons. It noted that the 'State's record of providing development in the area has not been satisfactory. 'But 'the

vicious cycle of poverty leading to ecological degradation and in turn more poverty can be broken only through development in the area.' Accordingly it recommended that approval should be granted but that first *'Gramsabha* or the *Panchayat* at appropriate level should be consulted.'

The Ministry appears to have pondered this advice for another two years."

49. The refinery was completed in 2013.

50. The Tribunal recorded:

"In December 2014 Mr James Buchanan, who had recently been appointed Chief Executive Officer of Ras al Khaimah Development Corporation, went to Hyderabad to see Mr Prathap Reddy of Penna:

> *'During my meeting with Mr Prathap Reddy, he briefed me about the Project and his commitment to the Project. He remained confident of the government granting the necessary approvals required for APMDC [Ltd] to commence bauxite mining operations, as the Project was being supported by both the Central Government and the Government of Andhra Pradesh. He also informed me that his group of companies, who were also shareholders in ANRAK [Aluminium Ltd], were in the process of injecting almost USD 35 million between 2014 through 2015 in the Project.'*

Mr Buchanan said he derived a 'cautious level of optimism' from these statements, although the level was not high enough to justify any further investment in the project until bauxite mining had actually begun."

51. The Tribunal summarised:

"On 17 August 2015 the [Government of India] granted Forest Clearance, the last important national clearance needed to enable APMDC [sic] to start mining bauxite. On 5 November 2015 the [Government of Andhra Pradesh] issued GOM 97 which gave effect to the Forest Clearance in Andhra Pradesh. However, after a good deal of public protest, the [Government of Andhra Pradesh] reversed itself and on 22 December 2015 the Chief Minister announced he would 'cancel the BSA'

…

On 22 December 2015 there was a debate on bauxite mining in the Legislative Assembly … At the end of the debate the Chief Minister announced a U-turn: he proposed to cancel the BSA by revoking GOMs 222 and 289, the orders by which [the Government of Andhra Pradesh] had authorised APMDC [Ltd] to enter into it. …"

2016

52. The Government of Andhra Pradesh issued an Order numbered 44 and dated 6 April 2016 ("GOM 44"). This stated that "the Government [of Andhra Pradesh] hereby cancel" GOM 222 and GOM 289 "in which the approval to the draft [BSA] was give". GOM 44 added:

> "The Vice Chairman and Managing Director, M/s APMDC Ltd., and the Director of Mines & Geology, AP, Hyderabad shall take necessary action accordingly in the matter, immediately, under intimation to the Government."

53. Article 100A of APMDC Ltd's Articles provides:

> "Notwithstanding anything contained in any of these Articles, the [Government of Andhra Pradesh] may, from time to time, issue such directives as they consider necessary in regard to the conduct of the business of the Corporation of Directors thereof and in like manner may vary and annul any such directive. The Directors shall give immediate effect to directives so issued."

54. ANRAK Aluminium Ltd issued a writ in the High Court at Hyderabad on 11 April 2016. The Tribunal summarised the claim as for "a declaration that GOM 44 was unlawful and void and ordering APMDC [Ltd] to start mining and supply it [ANRAK Aluminium Ltd] with bauxite." The Tribunal added:

> "On 27 April 2016 the High Court made an interim order declaring that the purported cancellation of authorisation to enter into the BSA could not [a]ffect its validity because it had been duly authorised at the time it was made. These proceedings were not pursued."

55. On 28 April 2016 the Government of Andhra Pradesh wrote to APMDC Ltd drawing attention to GOM 44 and saying:

> "I therefore request you to take necessary action accordingly duly following the procedure and the conditions laid down in the Agreement entered into by your office with [ANRAK Aluminium Ltd] immediately, under intimation to the Government".

56. On 15 June 2016 the High Court at Hyderabad (Challa Kodanda Ram J) held in an interlocutory judgment that, prima facie, GOMs 222 and 289 had already given "necessary approvals [by the Government of Andhra Pradesh] as required for entering into a contract" and that "pursuant to the said GOs that steps which are required to be taken by [ANRAK Aluminium Ltd] as well as [APMDC Ltd] have already been taken". The Court expressed the view that "there is nothing in this [GOM 44] further to be done." And that "prima facie the cancellation of the said GOs cannot have any bearing in the contracts entered into by [APMDC Ltd] and [ANRAK Aluminium Ltd]."

57. By letter dated 20 June 2016 APMDC Ltd wrote to ANRAK Aluminium Ltd calling on ANRAK Aluminium Ltd to show cause as to why APMDC Ltd should not terminate the BSA. ANRAK Aluminium Ltd gave a substantive reply by letter dated 9 July 2016.

58. By letter dated 21 November 2016 APMDC Ltd again wrote to ANRAK Aluminium Ltd. APMDC Ltd referred to a number of documents including the MOU and GOM 44. It listed what it said were "the key deviations which are not in the best interest of the originally intended Government-to-Government alliance". It concluded:

> "In view of the deviations reiterated in the beginning of the letter and the subsequent elaboration on the lack of satisfactory reply from [ANRAK Aluminium Ltd] as explained above, we hereby bring to your notice that there persists sufficient

> deviations which is impacting the compliance of the course of action undertaken over the period of time regarding [the BSA]. Therefore, we hereby through this letter cancel [the BSA] between APMDC [Ltd] and [ANRAK Aluminium Ltd]."

Mr Toby Landau KC, leading for RAKIA, with Mr Lucas Bastin KC and Mr Matthieu Gregoire, contends that this can only be explained as carrying out an order by the Government.

59. The letters just described have been referred to as the "Show Cause and Termination Letters". RAKIA issued a Notice of Arbitration against the Republic of India on 8 December 2016.

60. The Tribunal recorded:

> "On 5 January 2017 ANRAK [Aluminium Ltd] issued a writ in the High Court at Hyderabad and applied for a declaration that the cancellation of the BSA was a repudiatory breach (and unconstitutional) and an interlocutory mandatory order requiring APMDC [Ltd] to supply it with bauxite. This action has not been pursued. …"

61. The Tribunal observed:

> "There is no evidence that GOM 97 was revoked but no bauxite mining has taken place. As a result ANRAK [Aluminium Ltd]'s refinery has been unemployed."

India points to evidence that the refinery (not the smelter, which was not built) is operating using alternative sources of bauxite.

62. The Tribunal's award also addresses matters of community opinion, politics, and protest across the twenty years from 1997 to 2017. I shall not repeat that in this judgment, but I have read all that the Tribunal has said in these respects.

The conclusion of the Tribunal

63. The Tribunal summarised the dispute in this way:

> "RAKIA, an investor in the aluminium enterprise, alleges that the failure to supply ANRAK [Aluminium Ltd] with bauxite in general, and GOM 44, together with the cancellation of the BSA in particular, were governmental acts, attributable as a matter of international law to India, which constituted breaches of a number of the provisions of the BIT. It claims damages in the sum of US$273m. India denies that there were any such breaches and says that in any event the Tribunal lacks jurisdiction because the provisions of the BIT for arbitration at the instance of the investor do not apply to this case."

64. Although the matter was discussed, the Tribunal decided not to hear jurisdiction first and separately from merits. The result was that the Tribunal received what it described as "… considerable evidence on the question of whether acts attributable to India had been in breach of the BIT, whether such acts as caused the loss of which [RAKIA] complains and what the extent of that loss was". As the Tribunal put it, in view of its conclusions on jurisdiction it did not discuss these topics. The Tribunal's conclusion was (alone) that the dispute did not fall within its substantive jurisdiction.

65. In a paragraph headed "conclusion on jurisdiction" in its Final Award dated 11 May 2022 the Tribunal stated:

> "We now apply our conclusions about the meaning of the BIT to the question of whether it confers upon us jurisdiction to hear the claim. [RAKIA] says this is conferred by Article 10. We have decided that upon its true construction Article 10 applies only when the dispute arises out of Measures taken by governments of India or Andhra Pradesh and that those measures must have been applied directly to the Claimant's investment. We have assumed that APMDC [Ltd]'s repudiation of the BSA can be treated as an act of [Government of Andhra Pradesh], that it caused loss to [ANRAK Aluminium Ltd] and thereby diminished the value of RAKIA's shares in [ANRAK Aluminium Ltd]. But the acts in question, although having an indirect *effect* on RAKIA investment, were directly *applied* only to APMDC [Ltd] and [ANRAK Aluminium Ltd]. If follows that we do not have jurisdiction and the claim must be dismissed."

66. In carrying out his professional task as an advocate to the highest standards, Mr Landau KC did not spare criticism of the Award.

67. As part of Mr Landau KC's criticism of the Award, he suggested the Tribunal's reasoning was difficult to follow. In my view the essential reasoning of the Tribunal was as follows:

(a) Article 10.2 of the BIT is an exhaustive definition of the disputes to which Article 10 applies where the dispute is between an investor of Ras al Khaimah and India (Award paras 82-101).

(b) The BIT still serves the purpose declared by its preamble of creating "conditions favo[u]rable for fostering greater Investment by Investors of one Contracting party in the territory of the other Contracting Party" (Award 99-100).

(c) Article 10.2 concerns "Measures", and these are defined as "any form of binding action taken by a Contracting Party under any law, rule or regulation and applied directly to an "Investment".

(d) Although "Investment" was widely defined in the BIT the asset had to be the asset of the Investor (Award para 130).

(e) Assets of a company in which an Investor held shares were not an asset of the Investor; rather, the shares were the asset of the Investor (Award paras 130-136).

(f) The acts in question of the Government of Andhra Pradesh were "directly applied" only to APMDC Ltd and ANRAK Aluminium Ltd (Award para 137).

68. I add that the Tribunal concluded that the MOU expired on 30 October 2008 (Award paras 115-128). The Tribunal assumed in favour of RAKIA that the termination of the BSA was an act attributable to the Government of Andhra Pradesh (Award paras 110 and 137).

Interpreting the BIT: generally

69. Article 31 of the Vienna Convention on the Law of Treaties ("the Vienna Convention") provides:

> "(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> (2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> (3) There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> (4) A special meaning shall be given to a term if it is established that the parties so intended."

70. Article 32 of the Vienna Convention provides:

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable."

71. The Court of Appeal said of the Court's task in MSC Mediterranean Shipping Co SA v Stolt Tank Containers BV [2023] EWCA Civ 1007 at [61]:

> "Thus the court's task, as set out in Article 31 of the Vienna Convention, is to ascertain the ordinary meaning of the terms used in their context and in the light of the Convention's object and purpose, with recourse to supplementary means of interpretation either to confirm the meaning thus ascertained or, in the strictly limited cases identified in Article 32(a) and (b), to determine the meaning."

72. In Moohan v Lord Advocate [2014] UKSC 67 at [64] the Supreme Court said (and see JTI Polska Sp Z.o.o. v Jakubowski [2023] UKSC 19 at [26]-[27]):

> "It would be wrong to read article 31 as reflecting something like the so-called 'golden rule' of statutory interpretation where one starts with the ordinary meaning of the words and then moves to other considerations only if the ordinary meaning would give rise to absurdity. That is not international law. The International Law Commission made clear in its commentary to the draft treaty, at p 219, that, in accordance with the established international law which these provisions of [the Vienna Convention] codified, such a sequential mode of interpretation was not contemplated:
>
> > 'The commission, by heading the article 'General rule of interpretation' in the singular and by underlining the connection between paras 1 and 2 and again between para 3 and the two previous paragraphs, intended to indicate that the application of the means of interpretation in the article would be a single combined operation.'"

73. In The Czech Republic v Diag Human SE [2024] EWHC 2102 (Comm), one of a number of judgments in this area by Foxton J to which I acknowledge my debt generally and to which I make further reference below, Foxton J drew on Gardiner, Treaty Interpretation 2nd edition (2015) at 4.2.3 to bring out the point that for the purposes of Article 31(2) of the Vienna Convention, context can also include "any structure or scheme underlying a provision or the treaty as a whole".

74. Turning to investment treaties in particular, in Republic of Korea v Elliott Associates LP [2024] EWHC 2037 (Comm) Foxton J held at [22]-[23], an "even-handed" approach should be adopted:

> "22. It has also been suggested that the jurisdictional provisions in investment treaties are to be interpreted neither liberally (i.e. pro-investor) nor restrictively (i.e. pro-State): e.g. *Swissbourgh v Lesotho* [2018] SGCA 81 at [61]-[63]. By way of an apparent counter to that proposition, Mr Wordsworth KC referred me to *ICS Inspection and Control Services Limited v Argentina* PCA Case No 2010-9 Award on Jurisdiction 10 February 2012 (Dupuy, Bernardez, Lalonde), [280]-[281] where the tribunal noted that:
>
> > "Moreover, a State's consent to arbitration shall not be presumed in the face of ambiguity. Consent to the jurisdiction of a judicial or quasi-judicial body under international law is either proven or not according to the general rules of international law governing the interpretation of treaties. The burden of proof for the issue of consent falls squarely on a given claimant who invokes it against a given respondent. Where a claimant fails to prove consent with sufficient certainty, jurisdiction will be declined.
> >
> > This principle follows from the lack of a default forum for the presentation of claims under international law. Whereas the inherent jurisdiction or hermetic division of competence over claims before general courts is a common feature of municipal judicial systems, the default position under public international law is the absence of a forum before which to present claims. The absence of a forum before which to present valid substantive claims is thus a normal state of affairs in the international sphere. A finding of no jurisdiction should not therefore be treated as a defect in a treaty scheme

> that runs counter to its object and purpose in providing for substantive investment protection."
>
> 23. However, I am satisfied that the statement in *Swissbourgh* represents the approach I should adopt, being consistent with [the Vienna Convention], and even-handed. I note that an argument by a state that a dispute resolution provisions to which it has consented in a treaty should be construed narrowly was rejected in *Methanex Corporation v United States of America*, Partial Award (Preliminary Award on Jurisdiction and Admissibility) 7 August 2002, [105], where the tribunal favoured an interpretation of the words used "in good faith in accordance with their ordinary meaning (in accordance with Article 31(1) of the Vienna Convention), without any one-sided doctrinal advantage built in to their text to disadvantage procedurally an investor seeking arbitral relief." A similar observation was made in *Mondev International Ltd v USA* ICSID Case No ARB(AF)/99/2, Award of 11 October 2002 (Stephen, Crawford, Schwebel), [43]."

"Investment" and jurisdiction

75. As Foxton J said in Czech Republic v Diag (above) at [40]:

> "The characterisation of the issue of whether there was an investment as jurisdictional has long been accepted by investment treaty arbitral tribunals (for the purposes of ascertaining their own jurisdiction), and this issue has also been classified as jurisdictional in English first instance court decisions (for the purposes of determining whether ss.67 or 103(2) of the 1996 Act are engaged): *Gold Reserve Inc v. Bolivarian Republic of Venezuela* [2016] EWHC 153; *PAO Tatneft v. Ukraine* [2018] EWHC 1797 and *The Republic of Korea v. Dayyani and Others* [2019] EWHC 3580 (Comm). It has also been accepted as a matter going to an arbitral tribunal's jurisdiction by the Singapore Court of Appeal in *Swissbourgh Diamond Mines* ,,,"

76. "The consistent practice of the courts in England has been that they will examine or re-examine for themselves the jurisdiction of arbitrators.": Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan at [96] per Lord Collins JSC, and see also at [26] and [30] per Lord Mance JSC. "[T]he Court will examine the award with care and interest. If and to the extent that the reasoning is persuasive, then there is no reason why the Court should not be persuaded by it": The Republic of Korea v Dayyani & Ors [2019] EWHC 3580 (Comm) [2020] 1 Lloyd's Rep 212 at [26] per Butcher J.

"Investment" by RAKIA

77. The language of bilateral investment treaties may differ from one to the next. It is important to keep closely in mind that the BIT in the present case has the definitions of "Investment" and "Measure" that it does, and combines them in the way it does in Article 10.

78. The definition of "Investment" in the BIT is concerned with assets "invested … in the territory of" the "other Contracting Party".

79. As RAKIA describes it, the definition of "Investment" in Article 1(1) of the BIT is structured by way of a "chapeau" couched in broad terms as "every kind of asset invested by the Investors", followed by a non-exhaustive list of examples. I agree with RAKIA that the broad scope of the "chapeau" is not reduced by the fact that a non-exhaustive list of examples then follows in Article 1(1).

80. As the Tribunal's decision shows, the question that lies ahead in the present case is whether "Measures" were "applied directly" to the Investment. For that reason, it will be important to establish not simply whether there was an "Investment" but the full extent of the assets "invested".

81. As the Tribunal pointed out, in its Statement of Claim in the arbitration RAKIA itself alleged that its investment was the shares in ANRAK Aluminium Ltd. But RAKIA's argument developed after that stage, including in its Reply in the arbitration.

82. As developed RAKIA has argued:

> "RAKIA's investment was in the project as a whole, rather than a specific aspect of it. It included: rights under the MoU; cash contributions of over USD 42.5 million; shares in ANRAK [Aluminium Ltd]; the pledge of these shares to obtain loans (allowing ANRAK [Aluminium Ltd] to raise hundreds of millions of dollars in further financing); and its interest in the refinery and plant overall."

It has referred also to RAKIA's "implement[ing] the project acting as a sponsor" and "finding and working with a local partner [Penna Cement]". In its written argument for this hearing RAKIA argues that a "constellation of linked elements" constituted the "Investment".

83. In the present case, two states (Andhra Pradesh and Ras Al Khaimah) decided by their Governments "…to establish Alumina and Aluminium Industry in the State of Andhra Pradesh". To that end, an Indian company (ANRAK Aluminium Ltd) would be set up by the investment authority (RAKIA) of one state (Ras Al-Khaimah) and identify suitable land for the establishment of the plant required. The other state (Andhra Pradesh) would direct its development company (APMDC Ltd), to supply bauxite from deposits that could not be mined privately.

84. What did RAKIA invest and invest "in the territory of the other Contracting Party" that was an "asset"?

85. RAKIA did not invest rights under the MOU. It did not have an interest in the refinery and plant that could be described as an asset. Its work as a sponsor and with Penna Cement was not an asset. 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.

86. RAKIA received shares in ANRAK Aluminium Ltd in return for all or some of the money. Shares are an "asset" (under Article 1.1(ii)). It may not be easy to see that it "invested" those shares by receiving them. However, the point does not matter because the money was invested and also because Article 1.1 adds: "Any change of the form in which assets are invested or reinvested does not affect their character as Investment". The provision recognises change and there is no "double counting".

87. As to the pledge of shares, a pledge is an "asset" under Article 1.1(i). It is not difficult to conclude that RAKIA invested the shares when it pledged them to enable ANRAK Aluminium Ltd to borrow.

88. There are of course cases where the question is whether in the particular circumstances of the case an asset is in fact an investment, but this is not one of those. I do not consider any of the cash, shares or pledge can be treated other than as an investment. The Tribunal was right to say that RAKIA's shares in ANRAK Aluminium Ltd were an "investment in India".

89. As noted, RAKIA describes its "Investment" as "in the project as a whole, rather than a specific aspect of it" and refers to "the operation of the overall project, as well as" its component parts. RAKIA argues that its interpretation, of the Investment being in the project as a whole, is the interpretation that gives the terms of the BIT their ordinary meaning in their context and in light of the BIT's object and purpose.

90. In my judgment, these descriptions provide a characterisation that helps confirm that the assets invested by RAKIA were investments. They do not add to what the assets invested were.

91. RAKIA seeks to draw on the approach identified by Foxton J in Czech Republic v Diag (above) at [85] where he said:

> "But generally, I am persuaded by the view that the issue of whether there is an investment should be looked at holistically rather than by considering different components of an integrated activity in isolation, at least where the claim relates to that holistic investment."

See also [132].

92. At least generally speaking (and Foxton J himself uses the word "generally"), I very much agree with the approach, but on my understanding the importance of the reference to a holistic approach is to "the issue of whether there is an investment". Where, as here, a definition of "Investment" is involved that is confined to "assets" the holistic approach does not treat as an Investment something that is not an asset.

93. Foxton J gave the example of a case where "… the tribunal held that the offtake contract in issue in that case was a contract for sale and delivery, and not an investment even if a holistic approach was adopted to the issue of whether there had been an investment." Not every purchase of shares in a company incorporated in India to undertake business in Andhra Pradesh will have the quality of investment with which a bilateral investment treaty is concerned.

94. However that quality in the present case is readily seen: RAKIA's incorporation of ANRAK Aluminium Ltd and shareholding in ANRAK Aluminium Ltd was the modality by which RAKIA invested money in the project that the MOU had described and begun, i.e. "to establish Alumina and Aluminium Industry in the State of Andhra Pradesh".

A "binding action" taken by the Government of Andhra Pradesh "while exercising their executive powers"

95. Article 10.2 of the BIT refers to "Measures underlying a dispute taken by the Central Government and/or the state governments while exercising their executive powers in accordance with the Constitution of India". Article 1(8) of the BIT provides that "Measure" means "any form of binding action taken by a Contracting Party under any law, rule or regulation and applied directly to an Investment".

96. GOM 44 (or GOM 44 and the Show Cause and Termination Letters) was a "binding action" on RAKIA's case.

97. The Tribunal expressed the view that "so far from being 'binding action', GOM 44 did not bind anyone to do anything" and was therefore not a "Measure" as defined by the BIT (Award para 104). When the Tribunal expressed that view, I consider that it was expressing the limited conclusion that "GOM 44 did not itself cancel the BSA" (Award para 107). But that in my judgment stops short of the complete picture. GOM 44 set in motion and was followed by the letter of 28 April 2016 from the Government of Andhra Pradesh to APMDC Ltd and then the Show Cause and Termination Letters.

98. The Tribunal recorded that RAKIA went on to argue (at Award para 107):

> "… [RAKIA] alleges that even if GOM 44 did not itself cancel the BSA, it was a direction by the government to APMDC [Ltd], [sic] a wholly owned state corporation, to terminate the contract. The termination was therefore a governmental action. Alternatively it argued that APMDC [Ltd], [sic] as a corporation controlled by the government, was itself a state organ and its acts were *ipso facto* governmental actions. …"

99. The Tribunal said:

> "There is considerable dispute as to whether the purported termination of the BSA was pursuant to GOM 44, which did not direct APMDC [Ltd] [sic] to terminate the contract but purported to nullify its authority to have made it in the first place, and as to whether as a matter of international law, APMDC [Ltd] [sic] – a commercial company with separate personality – can be regarded as an organ of the state. But the Tribunal does not find it necessary to decide these questions and is prepared to assume in the Claimant's favour that, one way or another, the termination of the BSA was an act attributable to the [Government of Andhra Pradesh]. The question is then whether it was a Measure as defined; i.e. binding action applied directly to an Investment. …"

100. The Tribunal does not say why in its view the Government of Andhra Pradesh should have "purported to nullify [APMDC Ltd's] authority to have made [the BSA] in the first place", if that was not to alter or end the BSA. For my part, I consider it clear enough that by GOM 44 the Government of Andhra Pradesh was taking binding, executive, action to alter or end the BSA.

"Under any law, rule or regulation"

101. This element in isolation does not seem to feature large for either party, and I can understand why. GOM 44 involved the Government exercising its executive powers under law (whether or not the lawfulness of that exercise was open to challenge).

"And applied directly to" an Investment

102. In the present case, and assuming "that APMDC [Ltd]'s repudiation of the BSA can be treated as an act of" the Government of Andhra Pradesh, the Tribunal concluded that "the acts in question … were directly applied only to APMDC [Ltd] and ANRAK [Aluminium] Ltd." (The reference was to the two contracting parties to the BSA.)

103. It helps in the present case to keep in mind that 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 Aluminium Ltd, and the pledge of shares. These were invested in the proposed establishment of an Alumina and Aluminium Industry in the State of Andhra Pradesh.

104. In the Tribunal's view, 'direct application' to ANRAK Aluminium Ltd was not direct application to shares in ANRAK Aluminium Ltd. As seen, in its view the shares were the "Investment". On its analysis, in relation to the shareholding "the acts in question" had "an indirect *effect*", and that was not enough. India's argument led by Mr Samuel Wordsworth KC, with Mr Siddharth Dhar KC and Mr Peter Webster, supported the Tribunal's analysis,

105. With true respect to the Tribunal, I cannot accept that its analysis is the analysis that applies and concludes the matter in the context of the BIT in this case.

106. The analysis used by the Tribunal reflects the familiar and important line of thought that, generally speaking, loss caused to a company is not loss caused to its shareholders when the question is which of the company, on the one hand, or its shareholders, on the other hand, may claim against a person who has caused loss to the company. The analysis of the Tribunal recognises separate corporate personality (India cites the decision of the ICJ in Barcelona Traction; ICJ Rep. 1970, and draws attention to paragraph (c) of Article 31(3) of the Vienna Convention (above)). It respects the common law principle that does not allow claims for reflective loss.

107. But in the context of the BIT and its Article 10, the lens is different, in my judgment. There is no claim of a company in which an Investor has shares. The only relevant claim for consideration is that of the Investor.

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

109. In this context the difference between 'direct' and 'indirect', and between 'application' and 'effect', is, in my judgment, not to be found between what is done to a company and the consequences for its shareholders. Rather, the difference is to be found between what is done that is applied directly to the Investment and what is done that has indirect or no application. This is not to treat the assets of a company as those of a shareholder (and here, a minority shareholder).

110. India highlights the presence of two elements to the requirement that action is "applied directly": that the binding action be "applied to" the Investment, and that the application be direct. In the present case both elements are in my judgment met.

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

112. The action taken was not an action directed elsewhere but having adverse collateral effects here. RAKIA's argument puts things in this way, and correctly in my view: Measures are applied directly to an investment where they are targeted at the investment. The position may be different with measures of wider, general, application that may or do have an adverse effect on the investment in hand but on assets invested elsewhere too.

113. The result is a balance. It is one thing to include an offer to arbitrate that is addressed to executive action that does not apply more widely; it is another to do so where it would inhibit wider executive action.

114. India recognises that "it is true that one of the areas of concern as to investment treaties and investment treaty cases has been the potential impact of the state's right to regulate" but says that "such general concerns tell one nothing about the object and purpose of *this* Treaty". However, here the BIT brings in the word "direct" and it is legitimate to ask why, when seeking to understand it and to provide a faithful interpretation of the BIT.

115. I accept that the difference may not always be straightforward to see, as India urges. However, that difficulty comes with the choice to use the word "directly" in the BIT, important though that choice may have been to the parties. India suggests that there are difficulties in reconciling Articles 7.4 and 14.2 of the BIT but I consider the working of those provisions is not affected by an appreciation that to be a Measure (as defined) an action will be targeted (that is, directed). In any event Article 14.2 serves as a provision for the avoidance of doubt.

116. Standing back, the Tribunal's analysis would in practice mean that a major form of investment structure fell outside the compass of the BIT without apparent reason for that choice. Investors would be advised to avoid investing that took the form of establishing and taking shareholdings in companies incorporated in "the territory of the other Contracting Party".

117. Of course, it is possible for parties to a BIT to intend that effect, but there is no explanation why they should or did with the BIT in this case. By its preamble the BIT referred to creating "conditions favo[u]rable for fostering greater Investment by Investors of one Contracting Party in the territory of the other Contracting Party". India points to some limited examples of binding action that could be taken, applying directly to shares, but these do not save its interpretation, and the Tribunal's interpretation, from the problem just mentioned.

118. I turn to some ancillary points.

119. First, both parties sought to draw assistance for their argument from Article 7 of the BIT. I do not think one can draw reliably from Article 7 in the present context. "Measures" having been defined as "binding action … applied directly" in Article 1.8, Article 7.1 refers to "direct or indirect Measures". But it is perhaps to note that in contrast to the Tribunal's conclusion, Article 7.3 contemplates the payment of compensation where investors of one Contracting Party own shares in a company incorporated in the territory of the other Contracting Party and the assets of the company are expropriated by that other Contracting Party.

120. Second, there are grounds for thinking, discussed by the Tribunal at paras 94-95 in the Award, that the drafting of the BIT may have been at a point when it was accepted that some treaty provision was needed for the time being pending the development of further treaty provision that would be suitable for wider application or in the longer term. This does not advance matters in my view.

121. Third, I was invited by RAKIA to take into account what might be drawn from other engagement at the time. This involved India and the United Arab Emirates over Etihad and Jet Airways, against the background of the consequences of a ruling of the Supreme Court of India in 2012 in respect of Etisalat. I have looked at the material available as asked but need not consider the invitation further in light of the conclusions I have already been able to draw without accepting it.

122. Fourth, there is material that I have not seen because the parties differ on what disclosure India should make. RAKIA asks that inferences be drawn against India as a result, but again I do not need to take that course. In any event, the breadth of consideration invited by RAKIA might not have been possible: see JTI Polska sp. Z o.o and others v Jakubowski (above) at [32]-[36] per Lord Hamblen JSC.

Conclusion

123. In my judgment the Tribunal has jurisdiction. I express no view on the merits of the dispute. I will consider with the benefit of any further argument from the parties, the Orders that should follow this conclusion.