Neutral Citation Number: [2026] EWCA Civ 1358

Case No: CA-2025-002567

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
COMMERCIAL COURT
Mr Justice Robin Knowles CBE
CL-2022-000304

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/10/2026

Before :

LORD JUSTICE MALES
LORD JUSTICE PHILLIPS
and
LORD JUSTICE MILES

- -

Between :

REPUBLIC OF INDIA	**Appellant/ Defendant**
- and -	
RAS AL KHAIMAH INVESTMENT AUTHORITY	**Respondent /Claimant**

- -
- -

Sam Wordsworth KC, Siddharth Dhar KC and **Peter Webster** (instructed by **Dentons UK and Middle East LLP**) for the **Appellant**
Tim Otty KC, Ben Juratowitch KC and **Benedict Tompkins** (instructed by **Freshfields LLP**) for the **Respondent**

Hearing dates: 11, 12 and 14 May 2026
Further written submissions 15, 18 and 19 May 2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on 22 October 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Phillips:

1. This appeal concerned the scope of the investor-state arbitration provisions in a bilateral investment treaty between the respective Governments of the appellant, the Republic of India ("India"), and of the United Arab Emirates ("UAE") signed on 12 December 2013 ("the BIT").

2. By Article 10.2 of the BIT the arbitration provisions were stated, in the context of investments in India, to "cover Measures underlying a dispute taken by the Central Government and/or the state governments while exercising their executive powers…". "Measure" was defined in Article 1.8 as "any form of binding action taken by a Contracting Party under any law, rule or regulation and applied directly to an Investment".

3. In Article 1.1 of the BIT "Investment" was defined as "every kind of asset invested by the Investors of one Contracting Party in the territory of the other Contracting Party…", including "shares, stocks, bonds, debentures and any other similar forms of participation in a company…". The definition added that "[a]ny change of the form in which assets are invested or reinvested does not affect their character as Investment".

4. On 8 December 2016 the respondent ("RAKIA"), the investment arm of the Government of Ras Al Khaimah[1], issued a notice of arbitration under UNCITRAL rules claiming that India had breached the terms of the BIT in relation to an investment of RAKIA in the setting up and operation of an alumina and aluminium industry in the state of Andhra Pradesh. RAKIA's capital investment of US$42.5million was at that time held in the form of a 12% shareholding in an Indian company named ANRAK Aluminium Limited ("ANRAK"). ANRAK had built and was to operate an alumina refinery, supplied with bauxite to be mined in Andhra Pradesh by a state-owned company, Andhra Pradesh Mineral Development Corporation ("APMDC"). RAKIA claimed that executive actions and orders of the Government of Andhra Pradesh ("the GoAP"), which resulted in the cancellation of the bauxite supply contract between APMDC and ANRAK ("the BSA") and the consequent unemployment of ANRAK's refinery, breached the terms of the BIT as to the protection and fair and equitable treatment of Investments and the prohibition of expropriation of Investments.

5. By a final award in the arbitration dated 11 May 2022 ("the Award"), a London-seated arbitral tribunal comprising Lord Hoffmann (Chair), Justice Chandramauli and J. William Rowley QC ("the Tribunal") determined that RAKIA's claim did not fall within the scope of Article 10 and that therefore the Tribunal had no substantive jurisdiction to determine it[2]. The Tribunal assumed, for the purposes of the Award, that the claim related to binding governmental executive acts and that those acts caused loss to ANRAK and therefore diminished the value of RAKIA's minority shareholding in ANRAK, but held that the acts in question had only an indirect effect on that investment, being *directly applied* only to ANRAK and APMDC.

[1] A member Emirate of the UAE.

[2] Pursuant to section 30 of the Arbitration Act 1996, a London-seated tribunal has competence to rule on its own substantive jurisdiction, subject to appeal to or review by the court under the provision of Part 1 of that Act.

6. RAKIA challenged the Tribunal's decision on substantive jurisdiction under section 67 of the Arbitration Act 1996. In a reserved judgment dated 20 June 2025 Robin Knowles J ("the Judge") determined that the GoAP had taken binding executive actions which had applied directly to RAKIA's Investment in India as they were "targeted at" that Investment. Those actions were therefore Measures within Article 10.2 of the BIT. The Judge accordingly determined that the Tribunal did have substantive jurisdiction in relation to RAKIA's claim, set aside the Award and remitted the dispute to the Tribunal to determine it on its merits.

7. India appealed that decision, with the permission of the Judge, on two grounds. Ground 1 was that the Judge erred in regarding RAKIA's Investment as being in the alumina and aluminium industry in Andhra Pradesh rather than simply being RAKIA's 12% shareholding in ANRAK. Ground 2 was that the Judge was wrong to find that the governmental actions in question applied directly to RAKIA's Investment, and accordingly that he erred in holding that such actions were Measures within Article 10.2.

8. In addition to opposing those grounds of appeal, RAKIA sought to uphold the Judge's decision on three alternative grounds identified in its Respondent's Notice. The first was that RAKIA's Investment should be regarded as including the BSA, it being common ground that the relevant executive actions were applied directly to that contract. The second was that an executive action should be regarded as applied directly to an Investment if there was a "direct nexus" between the two. The third was that Article 10 contained a freestanding offer to arbitrate disputes regardless of whether there was a "Measure" for the purposes of Article 10.2.

9. The third ground was an attempt to resurrect an argument that had been determined against RAKIA by the Tribunal and then expressly abandoned by RAKIA shortly before the hearing before the Judge. We declined to permit RAKIA to re-introduce that argument at the hearing before us, my reasons for joining in that decision being set out briefly below.

The essential facts

10. The Judge set out the facts in detail in paragraphs 14 to 61 of his judgment. For the purposes of this appeal, the following summary will suffice, largely drawn from that provided by the Tribunal in paragraphs 1 to 7 of the Award.

11. On 14 February 2007 the GoAP and the Government of Ras al Khaimah entered into a Memorandum of Understanding ('the MoU'). The latter undertook that it would, through RAKIA, incorporate ANRAK, which would construct and operate an alumina refinery, aluminium smelter and power plant in Andhra Pradesh at a cost of US$2 billion. The GoAP undertook that it would direct APMDC to supply ANRAK with bauxite from 'areas available' at Jerrala in the Eastern Ghats.

12. The MoU provided that APMDC would pursue applications to the Government of India and the GoAP for forest and environmental clearances and 'get the mining lease cleared' for the Jerrala bauxite deposits. It was agreed that there would be a 'detailed collaboration agreement' between APMDC and ANRAK and that the MoU would expire when it was superseded by such a 'detailed internal agreement' or after a lapse of three years.

13. On 13 August 2008 and 30 October 2008 respectively, by executive orders GOM 222 and 289, the GoAP authorised APMDC to enter into the BSA to supply ANRAK with bauxite. The BSA, expressed to be conditional upon the necessary clearances and consents being obtained, was executed on 30 October 2008.

14. Between the signing of the MoU and the execution of the BSA, RAKIA invested some US$30.8 million by way of subscription for 30% of the issued share capital of ANRAK. The other 70% was taken by an Andhra Pradesh company named Penna Cement Industries Ltd ('Penna'). In 2009 RAKIA brought its investment up to US$42.5 million.

15. In May 2010 RAKIA pledged its shares in ANRAK (then representing 33% of the equity) in favour of lenders providing finance of US$650m to ANRAK. Thereafter, however, RAKIA did not match equity investments by Penna. As a result, its share of equity was eventually reduced to about 12%.

16. Between 2010 and 2013 ANRAK built an alumina refinery and captive power plant.

17. As set out above, the BIT was signed on 12 December 2013. Article 2 provided that it was to 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 the BIT. It therefore applied to RAKIA's Investment described above.

18. On 17 August 2015 the Government of India granted Forest Clearance, the last important national clearance needed to enable APMDC to start mining bauxite. On 5 November 2015 the GoAP issued GOM 97 which gave effect to the Forest Clearance in Andhra Pradesh.

19. However, after a good deal of public protest, the GoAP reversed itself and on 22 December 2015 the Chief Minister announced that he would "cancel the BSA". On 6 April 2016 the GoAP issued GOM 44 which purported to nullify GOMs 222 and 289, the orders which had originally authorised APMDC to enter into the BSA. There is no evidence that GOM 97 was revoked but no bauxite mining has taken place. As a result, ANRAK's refinery has been unemployed (although India contended that it has operated using alternative sources of bauxite since 2017). On 21 November 2016 APMDC gave notice to ANRAK that it was cancelling the BSA, allegedly for breaches on the part of ANRAK.

The terms of the BIT

20. I have referred to certain key provisions of the BIT above, but it is necessary to provide a fuller account of its terms, largely adopting that provided by the Judge.

21. The title to the BIT stated that it was an agreement "on the promotion and protection of investments". It provided for texts in Arabic, Hindi and English, with "all texts being equally authentic" and stating that "[i]n case of divergence in interpretation, the English text shall prevail".

22. The recitals stated the reasons the Contracting Parties had made the agreement:

> "Desiring to create conditions favorable 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 …"

23. Article 2(1) ("Scope of the Agreement") provided:

> "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"

24. 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."

25. 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."

26. Article 4 ("Protection of Investments") provided:

"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."

27. Article 5 ("Treatment of Investments") provided:

"2. 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 favorable than that which it accords to Investments of its own investors or investors of any third Party, whichever is the most favorable."

28. Article 7 ("Expropriation") provided:

"1 a) Investments made by Investors of one Contracting Party in the territory of the other Contracting Party shall not be nationalized, expropriated, dispossessed or subjected to direct or indirect Measures having effect equivalent to nationalization, 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 part 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 Investment 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."

29. Article 8 ("Transfer of Payments Related to Investments") provided:

> "1. Each Contracting Party shall permit Investors of the other Contracting Party the transfer of payments in connection with an Investment into and out of its territory, including the transfer of:
>
> a) the initial capital and any additional capital for the maintenance, management and development of the Investment;
>
> b) returns;
>
> c) payments under a contract, including amortization of principal and accrued interest payments made pursuant to a loan agreement;
>
> d) royalties and fees referred to in Article 1(4);
>
> e) proceeds from sale or liquidation of the whole or any part of the Investment, including shares;
>
> …"

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

> "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 the commencement of the dispute;
>
> …

> 8. This Article shall not be applied in the following situations:
>
> ….
>
> b) if more than five (5) years have elapsed from the date on which the Investor first acquired, or ought to have with reasonable diligence first acquired, knowledge of the Measure underlying the dispute in question and the knowledge that the Investment had incurred substantial loss or damage as a result of such Measure."

31. Article 11 ("Settlement of Disputes between Contracting Parties") provided for arbitration of disputes between India and the UAE as to the interpretation or application or execution of the BIT.

32. Article 14.2 provided:

> "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"

The principles applicable to the interpretation of the BIT

33. It was not in dispute that the BIT was to be interpreted in accordance with customary international law principles of treaty interpretation as codified in the Vienna Convention on the Law of Treaties 1969 ("the Vienna Convention"), set out by the Judge as follows:

> "69. Article 31 of [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."

34. The Judge referred at [71]-[74] to a number of English authorities on the approach to interpretation required by those Articles. It was not suggested that those authorities or the Judge's summary were in error in any respect, but since his judgment the correct approach has been authoritatively explained by the Supreme Court in *Infrastructure Services Luxembourg SARL v The Kingdom of Spain* [2026] UKSC 9, [2026] 2 WLR 581 as follows:

> "75. Article 31 thus requires the terms of a treaty to be interpreted in good faith in accordance with their ordinary meaning, in their context, and in the light of the treaty's object and purpose. A holistic approach is required. Context and object and purpose may be found in the treaty's text, in other words its surrounding provisions, and in the treaty as a whole, including its preamble. The clear focus of article 31 is, accordingly, on seeking to ascertain the ordinary meaning of the relevant terms of the treaty having regard to context, object and purpose of the treaty as a "single combined operation": see *JTI Polska sp. z o.o. v Jakubowski* [2024] AC 621 (para 26, per Lord Hamblen); and *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* [2017] ICJ Rep 3, para 64.
>
> 76. Article 32 allows for recourse to supplementary material for limited purposes only, emphasising that the court's task is to interpret the treaty rather than the supplementary material. Where the ordinary meaning of treaty terms can be ascertained by applying the primary rule in article 31 of the Vienna Convention on the Law of Treaties, recourse to supplementary means of interpretation under article 32 is permitted only "in order to confirm" that ordinary meaning. Such confirmation can be drawn from the travaux préparatoires. However, the supplementary means of interpretation in article 32 cannot be used to change or contradict the meaning resulting from the application of article 31.
>
> 77. Where, however, the application of the rule in article 31 produces a meaning that is ambiguous or obscure or leads to a manifestly absurd or unreasonable result, the rule in article 32 permits supplementary means to be used to determine the meaning of treaty terms. But such

> cases "should be rare, and only where two conditions are fulfilled, first, that the material involved is public and accessible, and secondly, that the travaux préparatoires clearly and indisputably point to a definite legislative intention" (*Fothergill v Monarch Airlines* [1981] AC 251, 278B-C per Lord Wilberforce; and also *Effort Shipping Co Ltd v Linden Management S.A. and others* [1998] AC 605, 623E per Lord Steyn).

35. Turning to investment treaties in particular at [74], the Judge referred to *Republic of Korea v Elliott Associates LP* [2024] EWHC 2037 (Comm), in which Foxton J at [22]-[23] rejected the suggestion that jurisdictional provisions in investment treaties were to be interpreted narrowly, following the view of the Singapore Court of Appeal in *Swissbourgh v Lesotho* [2018] SGCA 81 at [61]-[63] that they are to be interpreted neither liberally (i.e. pro-investor) nor restrictively (i.e. pro-state). Although Foxton J's decision was reversed by this Court in *Republic of Korea v Elliott Associates LP* [2025] EWCA Civ 905, and certain aspects of his approach to interpreting jurisdiction provisions in treaties disapproved, his adoption of an "even-handed" approach to such provisions in investment treaties was cited without criticism.

36. Whilst RAKIA accepted that an "even-handed approach" was appropriate in the first instance, it relied (at the very end of the hearing of the appeal) upon a refinement said to be found in the judgment of this Court in *Ecuador v Occidental Exploration & Production (No.2)* [2007] EWCA Civ 656, [2007] 2 Lloyd's Rep 352. At [28] Sir Anthony Clarke MR, giving the judgment of the Court, stated:

> "We accept Mr Greenwood's submission that the object and purpose of a BIT (including this BIT) is to provide effective protection for investors of one state (here OEPC) in the territory of another state (here Ecuador) and that an important feature of that protection is the availability of recourse to international arbitration as a safeguard for the investor. In these circumstances it is permissible to resolve uncertainties in its interpretation in favour of the investor: see eg the views of the arbitrators in paragraph 116 of their award in *SGS v Philippines* (2004) 8 ICSID Reports 515."

37. RAKIA argued that that approach, to be followed only in the case of uncertainty when applying the even-handed approach, was binding on us.

38. India responded (in written submissions filed after the hearing) that paragraph 28 in *Occidental* must be treated with considerable caution. It contended that it was unclear what was meant by it being "permissible" to resolve uncertainties in favour of the investor. To the extent that that meant that they should be resolved in the investor's favour, India submitted, that would amount to an impermissible presumption (not supported in international law), and would be contrary to the even-handed approach. India pointed to the fact that the passage referred to only one Tribunal decision in support, that its import had been questioned in two subsequent first instance decisions (*Czech Republic v European Media Ventures SA* [2007] EWHC 2851 (Comm) [2008] 1 All ER (Comm) 531 per Simon J at [23] and *GPF v Poland* [2018] EWHC 409 (Comm) per Bryan J at [56]-[59]) and not followed by at least one tribunal. Further, *Mustill & Boyd: Commercial and Investor State Arbitration* 3rd ed. at 19.18 states that "there is no general presumption that ambiguities are to be resolved in favour of

investors" and in footnote 4 states that *Czech Republic v EMV "*suggest[s] persuasively that if this is what was suggested in [*Occidental*], then it would be going too far."

39. In my judgment paragraph 28 of *Occidental* is readily understood. Article 31 of the Vienna Convention requires that the words of a treaty be interpreted "in the light of its object and purpose". In referring to it being permissible to resolve uncertainties in interpretation in favour of the investor in the circumstances of the "object and purpose" of a BIT being to provide effective protection for investors, Sir Anthony Clarke MR was doing no more or less than recognising and applying the approach in Article 31. I do not consider that the paragraph suggests a presumption, but merely that it would be permissible, at the end of a holistic approach to interpretation, that the identified object and purpose would be the factor that tipped an otherwise uncertain outcome in favour of the investor.

The judgment below

40. In considering what constituted RAKIA's "Investment" for the purposes of the BIT, the Judge recognised at [78] that the definition of that term was concerned with "assets invested in the territory of the other Contracting Party". However at [80] he stated that, given that the question was whether "Measures" were "applied directly" to the Investment, it was important to establish not simply whether there was an "Investment" but the full extent of the assets invested.

41. At [85] the Judge rejected RAKIA's contention that it had invested "rights under the MOU" and pointed out that it did not have an interest in ANRAK's refinery and plant that could be described as an asset. Neither was its work as a sponsor and with Penna an asset. He concluded that:

> "The basic answer to the question is, in my judgment, [RAKIA] invested US42.5 million, the shares and the pledge of shares in the territory of Andhra Pradesh."

42. The Judge further explained his conclusion as follows:

> "86. RAKIA received shares in [ANRAK] 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] 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] were an "investment in India".

43. The Judge then returned at [89] to RAKIA's contention that its "Investment" was "in the project as a whole, rather than a specific aspect of it" and in "the operation of the overall project, as well as" its component parts. He accepted at [92] that the question of whether there was an investment should be looked at holistically, following Foxton J in *The Czech Republic v Diag Human SE* [2024] EWHC 2102 (Comm) at [85], but pointed out that this was directed to determining whether, for example, a purchase of shares had the quality of an investment. He concluded that:

> "Where, as here, a definition of "Investment" is involved that is confined to "assets" the holistic approach does not treat as an Investment something that is not an asset."

44. The Judge further explained the distinction he was drawing as follows:

> "93...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."

45. The Judge then considered the nature of the GoAP's actions and at [100] went further than the Tribunal in finding it "clear enough that by GOM 44 [the GoAP] was taking binding, executive, action to alter or end the BSA".

46. Turning to the question of whether GoAP's executive acts "applied directly to" RAKIA's Investment, the Judge identified at [104] that the Tribunal viewed RAKIA's shares in ANRAK as the "Investment", and considered that the acts in question had only an indirect effect on those shares. At [106] the Judge noted that the Tribunal's analysis reflected separate corporate personality (referring to *Barcelona Traction*; ICJ Rep. 1970) and the common law principle that does not allow claims for reflective loss.

47. But the Judge did not consider that that analysis applied in the context of the BIT, where the only claim is that of the Investor [105], [107]. At [108] he reiterated that:

> "…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").

48. In that context, the Judge stated at [109] that:

> "…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)."

49. Accepting the requirement that the relevant governmental action be "applied directly" and "applied to" the Investment [110], the Judge found both of those elements to be met in the present case. His reasoning was as follows:

> "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."

50. At [114] the Judge recognised that the BIT had used the word "direct" and that it was legitimate to ask why, when seeking to understand it and to provide a faithful interpretation of the BIT. At [115] he further accepted that the "difference may not always be straightforward to see", but justified his conclusion with the following considerations:

> "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."

51. At [119] the Judge drew support for his conclusion from the fact that Article 7.3 of the BIT "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".

RAKIA's Investment

Ground 1 of the appeal

52. India's case was that RAKIA's Investment at the time of the relevant executive actions was solely its 12% shareholding in ANRAK, being the asset it held within the definition of Investment at Article 1.1 of the BIT. India was critical of what it regarded as the Judge's incorrect statement that RAKIA also invested the US$42.5 million in cash and the pledge of its shares, contending:

    i) that "simultaneously" to include the cash and shares was double-counting (the shares having replaced the cash as RAKIA's Investment within "the change of form" provision in Article 1.1); and

    ii) that the pledge was not an asset of RAKIA at all, and so could not be part of its Investment.

53. Ultimately India conceded that those criticisms were of no real significance to its overall case, its real complaint being that, according to India, the Judge had incorrectly equated RAKIA's Investment with the overall project, a precursor to finding that executive actions had directly applied to the Investment so analysed.

54. In my judgment there is no merit in any of India's criticisms of the Judge's analysis of what constituted RAKIA's Investment. As regards the element of cash, it is clear that the Judge recognised that RAKIA initially invested cash, for which it received shares, a "change of form" within Article 1.1. The Judge expressly stated at [86] that "[t]he provision recognises change and there is no "double counting"". That is further made clear at [103], where the Judge referred to the Investment as "(in the manner explained above, and over time) a number of things: US$42.5 million, and shares in ANRAK…". The Judge did not suggest anywhere in his judgment that the Investment was *simultaneously* both cash and shares; he regarded the cash as the initial Investment, superseded immediately by the shares allotted to RAKIA in exchange for that cash.

55. As regards the pledge, permitting an asset (RAKIA's shareholding) to be used to secure third-party lending was undoubtedly a further substantial investment in ANRAK, as the Judge held at [87]. Just as making a loan to a company gives rise to an asset in the form of the obligation to repay that loan, pledging an asset by way of security gives rise to an asset in the form of rights of subrogation or indemnity against the principal debtor. Precisely what those rights were in the current case is a matter of Indian law as to which there was no evidence, but absent such evidence it must be assumed that RAKIA acquired rights against ANRAK equivalent to those which would have arisen under English law.

56. As regards the contention that the Judge regarded RAKIA's Investment as including the overall project, the immediate answer is that, in the section of the judgment headed ""Investment" by RAKIA", the Judge expressly held that the Investment had to be "an asset" invested by RAKIA in the territory of India [84] and concluded on more than one occasion that the relevant assets were "US$42.5 million, the shares and the pledge of shares…" (see [85] and [88]). The Judge also expressly rejected the contention that the Investment extended to the overall project (see [85]). That is made abundantly clear by his statement at [90] that the descriptions of RAKIA's Investment as an investment in the project as a whole "provide[s] a characterisation that helps confirm that the assets invested by RAKIA were investments. They do not add to what the assets invested were".

57. India's challenge to the Judge's finding in relation to what was RAKIA's Investment was founded on what he said in a later section of his judgment, in which he addressed the question of whether the executive actions were "applied directly to" the Investment. India pointed to the Judge's apparent criticism of the Tribunal's view that "the shares were the Investment" and that the executive acts had only an indirect effect on that shareholding [104]. India further relied on the Judge's central finding at [111] that "There was application to the Investment in that the action was applied to the proposed establishment of an Alumina and Aluminium Industry in the State of Andhra Pradesh".

58. In so stating, however, the Judge was not changing his mind as to what constituted RAKIA's Investment. He repeated at [103], as his starting point, that the Investment was, over time, the cash, the shares and the pledge. His later comments were based on his view that, in considering whether executive acts were directly applied to an Investment, it was necessary to look not simply at the assets that constituted the Investment, but at those assets as an investment ([108]) i.e. what the assets were invested in. This was made even clearer by his statement at [109] that "[t]his is not to treat the assets of a company as those of a shareholder (and here, a minority shareholder)".

59. The challenge to the Judge's finding as to what constituted RAKIA's Investment was therefore misconceived. The real question was whether he was right to regard executive actions affecting ANRAK's business as applying directly to RAKIA's Investment, which he correctly identified as its minority shareholding (and rights arising from the pledge of those shares). That question is posed by ground 2 of the appeal, addressed below.

Respondent's Notice ground 1

60. RAKIA's primary position was that the Judge was right to hold that the GoAP's executive actions applied directly to its minority shareholding in ANRAK, but argued, in the alternative, that he should have held that RAKIA's Investment extended beyond that shareholding to include, in particular, the BSA. As prefaced above, there was no dispute that the actions were applied directly to that contract.

61. RAKIA pointed to what it described as a "large body" of investor-state awards which confirmed that "indirect" investments are covered by an asset-based definition like Article 1.1 of the BIT. It referred to the leading case of *Siemens v Argentina* (ICSID Case No. ARB/02/8, 3 August 2004), where the Tribunal stated that the relevant BIT

"does not require that there be no interposed companies between the investment and the ultimate owner of the company".

62. RAKIA further relied on *Republic of Korea v Dayyani* [2019] EWHC 3580 (Comm), [2020] Bus LR 884, concerning the scope of the arbitration provisions in the Korea-Iran BIT. Korea challenged the substantive jurisdiction of an arbitral tribunal to determine a dispute relating to a failed purchase of Daewoo Electronics, a Korean company, by Iranian national businessmen (the Dayyanis), the purchase being effected by a Singaporean company (D&A) incorporated by them for the sole purpose of the acquisition and owned and controlled by them. Korea contended that the Iranian nationals were not "investors" in Korea and their shareholding in the Singaporean company did not constitute an "investment" for the purposes of the BIT. Butcher J rejected that argument in the following terms:

> "72. Any analysis of this issue must commence with the terms of the BIT. The terms of the BIT, whether Article 1 or Article 12 [the arbitration provision], 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". Nor do I consider that any such limitation, which could have been expressed if agreed between the contracting states, can be read into the treaty wording. That would appear to me to be a rewriting of the treaty.
>
> 73. That claims may be brought by indirect investors under bilateral investment treaties with provisions analogous to those of the BIT is supported by a number of investment arbitration awards….. In certain of these cases the claim is by the indirect shareholder of a company incorporated in the host state, and the shares in that company are themselves regarded as the protected investment, but even such cases support the conclusion that there is no requirement inherent in the concept of "investment" or "investor" in a bilateral investment treaty that the "investor" should be the direct legal owner of the "investment".
>
> …
>
> 76. What this analysis points towards is that the relevant question is whether the BIT itself confers a wide enough protection such that a shareholder may be protected in relation to damage to the assets of the company in which the shares are held. I consider that it does. The shareholder(s), at least if it/they exercise control over the company as there was no issue that the Dayyanis did in the case of D&A, can, in accordance with the ordinary meaning and understanding of the word, be termed "investors" in the assets of the company in such circumstances, and the assets of the company can fairly be described as "investments" "invested by" those shareholders. The terms of the BIT are in this respect very wide."

63. RAKIA argued that the analysis in *Dayyani* was applicable in the present case. There was nothing in the BIT, it contended, that required that assets be directly held by the Investor, so that assets held by a local Indian company (ANRAK), in which RAKIA

held shares by way of investment, did constitute an Investment by RAKIA for the purposes of Article 1.1 and Article 10 of the BIT.

64. In most of the cases RAKIA referred to, the issue of indirect ownership of assets arose because a national of one contracting party to a BIT had invested through a subsidiary incorporated in a different jurisdiction to its home territory, often one it had established in the other contracting party's territory. A claim under the BIT could not be made in the name of the subsidiary because it did not meet the nationality requirement to be an "Investor". In those circumstances tribunals (and Butcher J in *Dayyani*) have had little difficulty in interpreting the relevant BIT as encompassing investments made and assets held through intervening subsidiaries owned and/or controlled by the investor, declining to regard the separate corporate personalities involved as frustrating the object and purpose of the relevant treaty.

65. The position in the present case is very different. RAKIA was at all times a minority shareholder in ANRAK, that shareholding having declined to 12% by the time of the relevant executive actions. In no sense can RAKIA be described as the owner or controller of ANRAK or the owner (indirectly) of any of its assets, and the BIT cannot be interpreted so as to include ANRAK's assets as those invested by RAKIA. Further, RAKIA did not point to any award where assets of a company have been treated as those of a minority shareholder of that company, let alone where the interest was as small as 12%.

66. I conclude that the Judge was right to reject RAKIA's contention that its Investment included ANRAK's assets.

"Applied directly" to an Investment

Ground 2 of the appeal and Respondent's Notice ground 2

67. India's case was that an executive action would apply directly to an Investment held in the form of shares in a company only if that action had direct legal application to the shares (such as by expropriating them) or regulated how the shares could be used or exploited (such as by way of a restriction on the right to transfer or redeem them, or a limitation on the right to receive dividends). That, India argued, was (applying the primary test in Article 31.1 of the Vienna Convention) the ordinary meaning of wording which defined the Investment in terms of "assets" and defined a Measure in terms of an action "applying directly" to those assets. The wording employed in Article 1.8 was "applied to" rather than "affected by" and was narrowed further by the word "directly". It followed that, if executive action applied to the business of the company or its assets, but not specifically to the shares themselves, that action could not be said to be directly applicable to the shareholding even though it adversely affected its value, perhaps destroying that value entirely. India contended that such effect was clearly through the *indirect* application of the action to the shares, as the Tribunal held.

68. India accordingly disputed the Judge's contrary view that the word "direct" connoted executive action that was "targeted at" the Investment in question as opposed to wider executive action (such as the exercise of the GoAP's regulatory functions) which might affect the relevant asset among other assets invested elsewhere. India contended that there was no justification for that distinction in the wording used; widely applicable executive action (such as expropriation of shares of a class of companies) would be

described correctly as "applying directly" to one specific shareholding within the affected class. Further, Article 7.4 referred expressly to "regulatory Measures"; and Article 14.2 clarified that the Contracting Parties were permitted to take "necessary reasonable Measures... applied generally" in an emergency to prevent disease or pests. Neither of those provisions was consistent with a reading of the definition of "Measure" that excluded actions that had general application or wider regulatory effect.

69. India did not shrink from the fact that, as the Judge pointed out, the above analysis would have the effect of limiting the offer of arbitration in the BIT to a very narrow category of disputes in relation to what was likely to be the most common form of Investment, namely, shares held in a company. India supported its case that such an outcome was correct and intended by the Contracting Parties by reference to a number of submissions:

i) first, that there is, in general, no presumption that arbitration provisions in a treaty will follow the substantive protections provided. India relied on paragraph 385 of the decision of a UNCITRAL tribunal chaired by Sir Christopher Greenwood in *European American Investment Bank AG (Austria) v The Slovak Republic* PCA Case No. 2010-17 to the following effect:

> "…the Tribunal cannot accept…that treaty provisions laying down standards of substantive treatment for an investor must be deemed ineffective if they are not enforceable through arbitration. It may well be the case that such provisions are more effective if they are enforceable in that way, but the States Parties to the present BIT clearly decided that…they would adopt several substantive standards…which would not be enforceable through arbitration. There are numerous other BITs in which the same choice has been made..."

ii) second, that the offer to arbitrate in Article 10 of the BIT was of a "very unusually restricted scope", not to be found in any other treaty. In particular, and as was common ground, the offer to arbitrate was limited to disputes arising from executive actions and excluded those to do with legislative or judicial actions, even though the protections in the BIT were not so limited; any disputes in that latter respect between the Investor and India could be litigated through the Indian courts or taken up by the UAE as a dispute between Contracting Parties, for which arbitration is provided in Article 11 of the BIT;

iii) third, the circumstances of the conclusion of the BIT supported and confirmed a narrow interpretation. India relied upon the fact that, following an adverse investor-State arbitral award in *White Industries v India* in 2011 (concerning an alleged failure of effective justice in the Indian courts), India put its BIT programme on hold whilst reviewing its portfolio of existing BITs, entering into a BIT with the UAE for the first time in 2013 against that background. India asserted that this provides a "good explanation" for the Contracting Parties agreeing the arbitration offer in the narrow terms for which India contended. India contended that recourse could be had to such supplemental material pursuant to Article 32 of the Vienna Convention.

70. India's arguments did not, however, meet the central feature of the Judge's analysis. The Judge reasoned that, even though RAKIA's Investment was held in the form of its shareholding in ANRAK (and the pledge of those shares), on a proper interpretation of the provisions of the BIT that shareholding must be viewed not merely as an asset, but as an investment. The question, he held, was whether the executive action was applied directly to the investment represented by the asset, not simply whether it was applied directly to the asset simpliciter.

71. In my judgment that approach was correct. The BIT recognised in Article 8.1 that any investment would be made through the transfer into the territory of a Contracting Party of "the initial capital" and "any additional capital". That capital would be an asset of the Investor (usually but not necessarily money) which would be transferred to an entity by way of investment in the territory of a Contracting Party. It is to be noted that Article 3.2 provides that 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...". The BIT further recognised that that capital injection would (in almost every case) cease to be the asset of the Investor on or shortly after receipt and would be replaced by rights in or against the entity which received the cash, most commonly stocks or shares (if the right was an equity interest) or notes, bonds or debentures (if the right was as secured creditor) to reflect the capital injected. Article 1.1 then provides, crucially in my view, that such "change of the form in which assets are invested... does not affect their character as Investment."

72. It follows that, for the purposes of the BIT, a minority shareholding allocated to an Investor in exchange for capital investment in a company is not regarded as just an interest in the company (with rights prescribed and delineated by the constitution of the company and applicable laws), which may be held anywhere in the world. Instead, it retains the "character" of assets invested in the territory of a Contracting Party, unaffected by the change from monies paid by way of the initial investment to an equivalent shareholding. It also follows that the question of whether an action is applied directly to an Investment held through a shareholding must be determined on the basis that the asset in question is invested in the relevant territory in the project the company was set up to establish, develop and execute.

73. That reading of the BIT makes sense of and gives meaning to the protections given to Investments in its substantive provisions (themselves giving effect to the objects and purposes to be found in the recitals to the BIT), most of which would be emasculated by a reading which limited them to executive actions applied only to the structure through which the Investment was held. A simple example, debated during the hearing, illustrates the point. If an Investor had transferred US$42.5 million to partly capitalise a new company formed to establish a project in the territory of a Contracting Party in exchange for an allotment of shares, but the whole of that sum was immediately thereafter expropriated by executive action, that action would, on any ordinary good faith understanding, be regarded as applied directly to the Investor's investment, expropriating it and depriving the Investor of most if not all of the value of what it had invested. Yet India's proposed interpretation would be that the action was applied directly to the assets of the company, with only an indirect effect on the Investment, viewed simply as the shares.

74. As for the points made by India in support of its restrictive interpretation, it may well be that the protections provided by the BIT (and the offer to arbitrate in particular) are

unusually restricted and the wording unique, but that does not provide assistance in interpreting the extent of those restrictions, only in justifying India's proposed conclusion in that regard. The arguments simply assume that conclusion. I see no merit in India's reliance on the *White Industries* award and its response to that decision. All that India could point to were certain agreed minutes of discussions between the Governments, which record that in July 2013 India raised new but unidentified concerns with an existing draft of the BIT (dating back to 2007) "in view of the evolving international legal jurisprudence in this field", but that the UAE sought to limit discussions and revisions to issues previously identified in 2007. It was resolved to continue discussions in the light of the "highest priority" being accorded to them by the respective Governments. That does not, as per *Infrastructure* at [77] "clearly and indisputably point to a definite legislative intention", so as to be a matter to which recourse may be had pursuant to Article 32 of the Vienna Convention. As should be obvious, identifying one motivation or consideration of one party to a negotiation says nothing about why terms were eventually included in the agreement made, let alone their interpretation. There will be countervailing motivations and considerations for both parties, commercial, economic and political, all of which will play a part in negotiations and factor into the compromises each may make in agreeing the final terms.

75. I therefore agree with the Judge that the actions of the GoAP in the present case applied directly to RAKIA's Investment. That Investment was in a company formed to establish an alumina and aluminium industry in Andhra Pradesh, exploiting local deposits of bauxite. The executive actions in question directly applied to it, ending the availability of the primary supply of bauxite and leading to the termination of the contract by which it was to be supplied.

76. I do not agree, however, with the Judge's explanation for the use of the term "direct", although I consider that that was a subsidiary aspect of his reasoning and not necessary for his decision. There is force in India's argument that a distinction between "wider executive action" and "targeted" action does not work; an industry-wide regulation would "apply directly" to a company, being "targeted" at all such companies. I also accept the submission that such a distinction would be difficult to reconcile with other provisions in the BIT. In my judgment the distinction has in mind the exclusion of indirect or consequential application of executive actions directed elsewhere. For example, the executive action which applied directly to the BSA and therefore the Investment might also have applied indirectly to separate businesses set up to service the mining operation or the refinery or transport between the two (and any Investors in those businesses), causing damage to them also. In common with the Judge, I accept that the distinction may not be clear cut in every case. Neither is it necessary for present purposes to consider whether the test I have suggested above is the same as RAKIA's proposal that what is required is a "direct nexus" between the executive action and the Investment.

77. I should mention that in its skeleton argument for the appeal India criticised the Judge for proceeding on the basis that the effect of GOM 44 was to end not only the BSA but also to end the establishment of the alumina and aluminium industry in Andhra Pradesh. India asserted that that was not the intention of the GoAP and that was not the effect of the action: the refinery was permitted to operate from 2017, using alternative supplies of bauxite. India did not advance that argument further in oral submissions (but did not

formally abandon it). In my judgment India was right not to emphasise the point, as it was not capable of affecting the arguments or the outcome discussed above. All that RAKIA needed to establish at the jurisdictional stage was that the executive actions in question applied directly to its Investment, causing damage to the value of its shares, not that it forever ended the industry in which that investment was made.

The third ground of the Respondent's Notice

78. In view of the conclusion I have reached on the appeal, I would not in any event have considered it necessary to address RAKIA's argument, which would render all of the above analysis redundant if correct, that the offer to arbitrate in Article 10 is a "freestanding" offer to arbitrate any dispute and is not conditional on there being a "Measure" within Article 1.8 of the BIT. However, given that we declined to hear the argument, it is necessary to explain my reasons for joining in that decision, albeit briefly.

79. It was common ground that the Court had jurisdiction to entertain the new argument. Although India required the leave of the Judge to appeal his decision by virtue of section 67(4) of the Arbitration Act 1996, RAKIA was entitled to seek to uphold the Judge's decision on different grounds without his leave by serving a Respondent's Notice. There is also no doubt that the Court had the power to permit a new argument to be advanced on appeal, whether by an appellant or a respondent.

80. The principles to be applied by the Court when considering whether to allow a new point to be taken on appeal were set out in *Singh v Dass* [2019] EWCA 360 at [16]-[18]. In *Hudson v Hathway* [2022] EWCA Civ 1648, [2023] KB 345 at [35] Lewison LJ summarised the approach as follows:

> "Whilst an appellate court will always be cautious before allowing a new point to be taken, the decision whether it is just to permit the new point will depend upon an analysis of all the relevant factors. These will include, in particular, the nature of the proceedings which have taken place in the lower court, the nature of the new point and any prejudice that would be caused to the opposing party if the new point is allowed to be taken."

81. At [36] Lewison LJ noted that it was not entirely clear whether precisely the same principles apply where it is the respondent who wishes to rely on a new point. In my judgment the general approach must be the same, although the fact that it is a respondent who seeks to raise a new point may be a relevant factor in certain circumstances.

82. In my judgment it was not just to permit RAKIA to resurrect ground 3 of the Respondent's Notice. Whilst the argument was principally one of interpretation, it was the subject of detailed analysis by the Tribunal and rejected on convincing grounds. RAKIA, no doubt with the benefit of sophisticated legal advice, made the decision not to pursue that argument before the Judge. In the absence of any explanation for that decision, and assuming the point was not considered unarguable, it is fair to assume that the argument was not pursued for tactical reasons.

83. The deciding factor, however, is that that decision meant that the argument was not ventilated before the Judge, who was therefore unable to determine the point, decide

what order to make in that regard (including possible declaratory relief) and whether to grant leave to appeal such an order. The Arbitration Act 1996, by limiting the nature and extent of permissible challenges and appeals to arbitration awards and making the decisions of judges on such challenges and appeals final unless they give leave to appeal, thereby gives effect to the principles of party autonomy and speedy finality. Whilst I would not suggest that this Court should never permit a new argument to be raised which has not been brought before the judge in the context of an arbitration challenge or appeal, the caution to be exercised must be all the greater to ensure that the primacy of the decision making role of the first instance judge is not circumvented or undermined. In my view to have permitted the new argument to be resurrected after abandoning it before the Judge would have had such an effect in this case.

Conclusion

84. I would dismiss the appeal.

Lord Justice Miles:

85. I agree that the appeal should be dismissed for the reasons given by Lord Justice Phillips. For the reasons given by Lord Justice Males I too would prefer to reserve my view as to whether the pledge of the ANRAK shares was an Investment.

Lord Justice Males:

86. I agree that the appeal should be dismissed for the reasons given by Lord Justice Phillips. However, I prefer to reserve my opinion whether the pledge of RAKIA's shares in ANRAK was itself an Investment to which the cancellation of the bauxite supply agreement applied directly.

87. As is commonly the case when there is a bilateral investment treaty, the overseas investor (RAKIA) provided cash in exchange for shares in a company incorporated in the host state (India). In those circumstances it is natural to describe both the cash and the shares as an investment. The investor has invested the cash, and in that sense RAKIA's investment was US$42.5 million. In exchange for the cash, it obtained a shareholding in ANRAK, and that shareholding, an asset held by RAKIA, was an investment which replaced the cash. Perhaps it could also be said in a colloquial sense that RAKIA invested in a project to establish an alumina and aluminium industry in the Indian state of Andhra Pradesh, but the project was not an asset of RAKIA, and therefore was not an 'Investment' even within the wide definition contained in the BIT, and the judge did not make the mistake of thinking that it was.

88. I can see that there is a case for saying that the pledge of the ANRAK shares was also an investment by RAKIA. Presumably it pledged its shares to the bank which provided loan funding to ANRAK with a view ultimately to enhancing the value of those shares. In exchange for the pledge, RAKIA would no doubt have obtained legal rights in the form of rights of subrogation or indemnity against ANRAK, which can be regarded as an asset. However, we heard very little argument about this and for the purpose of this appeal it is unnecessary to go this far. It is in any event difficult to see (and it was not suggested) that RAKIA's case based on the pledge of its shares adds anything of substance to its more straightforward case which treats those shares as the relevant Investment.

89. The real question is whether the Government's cancellation of the agreement pursuant to which bauxite was to be supplied to ANRAK's refinery, which undoubtedly was a 'Measure' within the meaning of Article 1(8), was 'applied directly' to the shares in ANRAK held by RAKIA. On that question I agree with the judgment of Lord Justice Phillips.