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AG 243410 11 September 2018

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RE: PCA CASE N° 2014-26 – LOUIS DREYFUS ARMATEURS SAS (FRANCE) V. THE REPUBLIC OF INDIA

Dear Mesdames,
Dear Sirs,

On behalf of the Arbitral Tribunal, please find enclosed an electronic copy of the Arbitral Tribunal's Award dated today.

Separately, one original hard copy will be dispatched by courier to each Party, and each member of the Tribunal.

Please do not hesitate to contact me should you have any queries concerning this letter.

Yours sincerely,

Christel Y. Tham
Legal Counsel

Encl.: The Tribunal's Award dated 11 September 2018

Cc: Ms. Jean E. Kalicki
(*by e-mail*: jean.kalicki@kalicki-arbitration.com)

Prof. Julian D.M. Lew QC
(*by e-mail*: jlew@20essexst.com)

J. Christopher Thomas QC
(*by e-mail*: jcthomas@thomas.ca)

PCA Case No. 2014-26

IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH THE UNCITRAL ARBITRATION RULES 1976 AND THE AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF INDIA AND THE GOVERNMENT OF THE REPUBLIC OF FRANCE ON THE RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS DATED 2 SEPTEMBER 1997

BETWEEN

LOUIS DREYFUS ARMATEURS SAS (FRANCE)

Claimant

and

THE REPUBLIC OF INDIA

Respondent

AWARD

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11 September 2018

The Arbitral Tribunal:
Ms. Jean E. Kalicki (Presiding Arbitrator)
Prof. Julian D.M. Lew QC
Mr. J. Christopher Thomas QC

Registry:
The Permanent Court of Arbitration

TABLE OF CONTENTS

GLOSSARY OF DEFINED TERMS / LIST OF ABBREVIATIONS

ABG Consortium	Consortium Consisting of ABG Infralogistics and its subsidiary ABG Kolkata Container Terminals Private Limited
ABG Infra	ABG Infralogistics
ABG Kolkata	ABG Kolkata Container Terminals Private Limited
ABG Ports	ABG Ports Limited
Additional Document Verification	Document verification conducted by the Respondent after the Hearing regarding events that took place at HDC between the Notice of Suspension and the Notice of Termination
Agreed Chronology of Events	The Parties' Agreed Chronology of Events, dated 8 November 2017
ALBA	ALBA Asia Private Limited, formerly ABG-LDA Bulk Handling Private Limited
Amended Statement of Claim	LDA's Amended Statement of Claim, dated 17 February 2016
Berths	Berths Nos. 2 and 8 at the Haldia Dock Complex
Bifurcation Request	Request for Bifurcation, dated 7 July 2015
Bifurcation Response	LDA's Response to Request for Bifurcation, dated 28 July 2015
Blacklisting Order	KoPT order banning business dealing with HBT for five years, dated 16 June 2014
CISF	Central Industrial Security Force
CITU	Centre of Indian Trade Unions
Claimant	Louis Dreyfus Armateurs SAS (also referred to as LDA)
CPI	Communist Party of India (Marxist)
Consent Order	Consent Order issued by the Calcutta High Court, dated 12 September 2012
Contract	Agreement between the Board of Trustees for the Port of Kolkata and ABG Haldia Bulk Terminals Private Limited in Respect of Supply, Operation and Maintenance of Different Cargo Handling Equipment at Berths No. 2 and 8 of Haldia Dock Complex, Kolkata Port Trust, dated 16 October 2009
Contracting Parties	Contracting Parties to the France-India BIT
Counter-Memorial	India's Counter-Memorial on Merits and Remaining Jurisdictional/Admissibility Issues Memorial on Counterclaims, dated 3 November 2016
Counter-Memorial on Jurisdiction	India's Statement of Defense, Counter-Memorial on Jurisdiction and Admissibility, dated 7 July 2015
Customs Authority	Office of the Commissioner of Customs
Decision on Jurisdiction	The Tribunal's Decision on Jurisdiction, dated 22 December 2015

EPCG	Export Promotion Capital Goods
FIPB	Foreign Investment Promotion Board of India
FIR	First Information Report (a form of incident report to the police)
First Objection	India's first Objection as described and numbered in its Bifurcation Request (that the Tribunal lacks jurisdiction *Ratione Voluntatis* because LDA failed to comply with jurisdictional preconditions to arbitration)
Five Star	Five Star Shipping Agency
France-India BIT	Agreement between the Government of the Republic of India and the Government of the Republic of France on the Reciprocal Promotion and Protection of Investments, dated 2 September 1997 (also referred to as the Treaty)
Further Amended Statement of Claim	LDA's Further Amended Statement of Claim, dated 20 July 2016
HBT	Haldia Bulk Terminals Private Limited, formerly ABG Haldia Bulk Terminals Private Limited
HDBC	Haldia Dock Bachao Committee
HDC	Haldia Dock Complex
Hearing	The hearing held between 27 November and 1 December 2017, resuming for two additional days on 3 December and 4 December 2017 (later reconvened on 29 January 2018 following the Additional Document Verification)
India	The Republic of India (also referred to as Respondent)
ILC Articles	International Law Commission's Draft Articles on Responsibility of States for Wrongful Acts
India's Cost Submission	India's Submission on Costs, dated 18 May 2018
India's Post-Hearing Brief	India's Post-Hearing Brief, dated 3 April 2018
INTTUC	Indian Trinamool Trade Union Congress
KoPT	Board of Trustees for the Port of Kolkata (also referred to as the Kolkata Port Trust)
LDA	Louis Dreyfus Armateurs SAS (also referred to as Claimant)
LDA's Cost Submission	LDA's Submission on Costs, dated 10 May 2018
LDA's Post-Hearing Brief	LDA's Post Hearing Brief, dated 30 March 2018, as corrected on 6 April 2018
LoI	Letter of Intent dated 29 April 2009 signed by the ABG Consortium and KoPT
MLP	Minimum Level of Performance, as defined by the Tender and the Contract
MMT	Million metric tons
MoS	Ministry of Shipping
MT	Metric tons

Notice of Arbitration	LDA's Notice of Arbitration, dated 31 March 2014
Notice of Suspension	Notice of Suspension of Operations, dated 23 August 2012
Notice of Termination	Notice of Termination, dated 31 October 2012
Notification of Claim	Notification of Claim, dated 11 November 2013
Objections	India's Objections to Jurisdiction, Nos. 1-11, set out in India's Bifurcation Request
Parties	Claimant and Respondent
PCA	Permanent Court of Arbitration
PO1	Procedural Order No. 1, dated 13 April 2015
PO2	Procedural Order No. 2, dated 13 August 2015
PO3	Procedural Order No. 3, dated 11 September 2015
PO4	Procedural Order No. 4, dated 23 February 2016
PO5	Procedural Order No. 5, dated 11 May 2016
PO6	Procedural Order No. 6, dated 22 June 2016
PO7	Procedural Order No. 7, dated 9 January 2017
PO8	Procedural Order No. 8, dated 6 September 2017
PO9	Procedural Order No. 9, dated 4 November 2017
PO11	Procedural Order No. 11, dated 11 January 2018
Port	Port of Kolkata (Calcutta), India
Project	The operations anticipated pursuant to the Contract
Rejoinder	India's Rejoinder on The Merits and Remaining Jurisdictional/Admissibility Issues and Reply on Counterclaim, dated 8 August 2017
Reply	LDA's Reply to India's Counter-Memorial, dated 17 April 2017
Ripley	Ripley & Co. Ltd. and its affiliated entities
Second Bifurcation Request	India's Request for Bifurcation of Further Objections to Jurisdiction and Admissibility, dated 28 March 2016
Second Bifurcation Response	LDA's Response to Respondent's Request for Request for Bifurcation of Further Objections to Jurisdiction and Admissibility, dated 11 April 2016
Second Counter-Memorial on Jurisdiction	India's Counter-Memorial on Further Objections to Jurisdiction, dated 28 March 2016
Second Objection	India's second Objection as described and numbered in its Bifurcation Request (that the Tribunal lacks jurisdiction because the Investments were made through a company of which LDA owns less than 51 percent)
Statement of Claim	LDA's Statement of Claim, dated 3 March 2015
Statement of Defense	India's Statement of Defense, dated 7 July 2015

TMC	All India Trinamool Congress Party
Tender	Tender for Supply, Operation and Maintenance of Different Cargo Handling Equipment at Berth # 2 & 8 of Haldia Dock Complex, Kolkata Port Trust, No. Ad/Equipping/2007-08
Treaty	Agreement between the Government of the Republic of India and the Government of the Republic of France on the Reciprocal Promotion and Protection of Investments, dated 2 September 1997 (also referred to as France-India BIT)
UNCITRAL Rules	Arbitration Rules of the United Nations Commission on International Trade Law 1976
VCLT	Vienna Convention on the Law of Treaties, dated 23 May 1969
Vested Interests	As defined by LDA, to include *inter alia* Ripley and various leaders of INTTUC and the TMC

I. INTRODUCTION

1. This is a proceeding alleging violations of the Agreement between the Government of the Republic of India and the Government of the Republic of France on the Reciprocal Promotion and Protection of Investments dated 2 September 1997 (the "**Treaty**" or "**France-India BIT**"). Claimant, Louis Dreyfus Armateurs SAS ("**LDA**" or "**Claimant**"), alleges numerous violations of the Treaty. Respondent, the Government of the Republic of India ("**India**" or "**Respondent**," and together with LDA, the "**Parties**"), disputes both LDA's jurisdiction to pursue these particular claims, and also LDA's allegations on the merits; it also pleads certain conditional counterclaims.

2. As discussed herein, the Parties agree that the project at the heart of their dispute, a plan for the mechanization of cargo handling operations at two berths of the Haldia Dock Complex ("**HDC**") at the Port of Kolkata ("**Port**"), was unprecedented in India. Prior to this project, cargo at these berths (like that at many other ports in India) had been unloaded from ships through stevedoring operations involving large contingents of manual laborers. The modernization plan from which this dispute arises envisioned the integration into Berths No. 2 and 8 (the "**Berths**") of large mobile harbor cranes, together with other modern equipment and cargo handling practices, to significantly increase both the efficiency of operations and the overall volume of cargo that effectively could be handled.

3. The Parties also agree that this project ultimately failed. The core of their dispute on the merits is *why* it failed, and whether any acts attributable to India that allegedly contributed to its failure fell below the thresholds of State conduct required under the Treaty.

4. As a threshold issue, however, the Parties also dispute whether this Tribunal may examine LDA's claims on the merits. India raises numerous jurisdictional objections, one of which was the subject of the Tribunal's Decision on Jurisdiction dated 22 December 2015 (the "**Decision on Jurisdiction**"), involving an unusual Treaty provision that distinguishes between investments that are protected under its rubric and others that are not. As discussed hereafter, the Tribunal determined earlier in these proceedings that this core jurisdictional issue could not be resolved in the abstract, because as ultimately pleaded by LDA, it was intertwined with factual issues regarding the actions allegedly attributable to India and the particular entities and investments to which those actions were allegedly directed. The Tribunal accordingly provided LDA a full opportunity to try to substantiate, on the merits, its allegation that the challenged State conduct had been taken with respect to an investment that was protected under the Treaty, and not simply with respect to an investment that was excluded from Treaty protection. Ultimately, however, the

Tribunal determines that LDA has failed to meet its burden of demonstrating a Treaty violation by India with respect to an investment that is protected under the France-India BIT.

II. THE PARTIES AND THEIR REPRESENTATIVES

5. LDA is a company duly incorporated and existing under the laws of France. Its principal place of business is at Immeuble "Les écluses," 28, Quai Gallieni, 92158 Suresnes Codex, France and it is registered under No. 652-012-311 in the Companies and Trade Registry of Nanterre, France. LDA is represented in these proceedings by: Dr. Tariq Baloch, whose address is 3 Verulam Buildings, Gray's Inn, London, WC1R 5NT, United Kingdom; Mr. Farhad Sorabjee, Mr. Varghese Thomas, Ms. Arti Raghavan, Ms. Shanaya Irani, and Ms. Neeraja Balakrishnan of J. Sagar Associates, Vakil's House, 18 Sprott Road, Ballard Estate, Mumbai 400 001, India; until 24 December 2015 only, Professor Vaughan Lowe QC of Essex Court Chambers, 24 Lincoln's Inn Fields, London WC2A 3EG, United Kingdom; and from 17 October 2016, Dr. Georgios Petrochilos of Three Crowns LLP, 104 avenue des Champs-Elysées 75008, Paris, France.

6. India is a sovereign state. It is represented by Mr. Mark A. Clodfelter, Dr. Constantinos Salonidis, Ms. Oonagh Sands, Mr. Ofilio J. Mayorga, Mr. Joseph Klingler, and Ms. Diana Tsutieva of Foley Hoag LLP, 1717 K Street NW, Washington, DC 20006-5342, United States. India is further represented by Messrs. Thomas Bevilacqua and Antoine Lerosier of Foley Hoag AARPI, 153 rue du Faubourg Saint-Honoré, 75008 Paris, France.

III. RELEVANT LEGAL PROVISIONS

A. THE TREATY

7. The provisions of the France-India BIT that are relevant are set out below.

8. Article 1(1) of the France-India BIT states:

> The term "investment" means every kind of asset, such as goods, intellectual property rights and other rights and interest of whatever nature, invested in the area of the Contracting Party in accordance with the laws of that Contracting Party, and in particular though not exclusively includes:
>
> a) Moveable and immovable property as well as any other rights in rem such as mortgages, liens, usufructs and pledges, and similar rights;
>
> b) Shares and other kinds of interest including minority or indirect forms, in companies constituted in the territory of one Contracting Party;

c) Debentures or rights to money, or to any legitimate performance having a financial value;

d) Business concessions conferred by law or under contract, including concessions to search for, extract or exploit natural resources, which are located in the maritime area of the Contracting parties [sic].

9. Article 2(1) of the France-India BIT provides:

> [The BIT] shall apply to any investment made by investors of either Contracting Party in the area of the other Contracting Party, including an indirect investment made through another company, wherever located, which is owned to an extent of at least 51 percent by such investors, whether made before or after the coming into force of this Agreement.

10. Article 4(1) and (2) of the France-India BIT states:

> The investments made by investors of one Contracting Party shall enjoy full and complete protection and safety in the area of the other Contracting Party.
>
> Each Contracting Party shall extend fair and equitable treatment in accordance with internationally established principles to investments made by investors of the other Contracting Party in its area and shall permit the full exercise of this right in principle and in practice…

11. Articles 5(1) and 5(2) of the France-India BIT state:

> Each Contracting Party shall accord to investments of investors of the other Contracting Party, including their operation, management, maintenance, use, enjoyment or disposal by such investors, treatment which shall not be less favourable than that accorded to investments of its investors, or than the most favourable treatment accorded to investors of any third country, whichever is more favourable.
>
> In addition each Contracting Party shall accord to investors of the other Contracting Party, including in respect of returns on their investments, treatment which shall not be less favourable than that accorded to investors of any third State.

12. Article 6(1) of the France-India BIT states:

> Neither Contracting Party shall take any measure of expropriation or nationalisation or any other measures having the effect of dispossession, direct or indirect, of investors of the other Contracting Party of their investments in its area, except in the public interest and provided that these measures are not discriminatory or contrary to a specific obligation entered into by Contracting Party [sic] not to take a measure of dispossession.

13. Article 9 of the France-India BIT states:

> Any dispute concerning the investment occurring between one Contracting Party and an investor of the other Contracting Party shall, if possible. [sic] be settled amicably between the two parties concerned.
>
> Any such dispute which has not been amicably settled within a period of six months from written notification of a claim may be sumitted [sic] to international conciliation

under the Conciliation Rules of the United Nations Commission on International Trade Law, if the parties so agree.

Notwithstanding paragraph 2. [sic] the dispute may be referred to arbitration at any time as follows: […] (b) if the investor so decides, the dispute shall be referred to an ad hoc arbitral tribunal in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law, as adopted by the General Assembly on December 15, 1976 […]

B. THE VCLT

14. Article 31 of the Vienna Convention on the Law of Treaties, dated 23 May 1969 ("**VCLT**"), sets forth the Convention's general rule of treaty interpretation:

> (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 connexion with the conclusion of the treaty;
>
> b. any instrument which was made by one or more parties in connexion 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.

15. Article 32 of the VCLT states:

> 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.

IV. PROCEDURAL HISTORY

A. COMMENCEMENT OF THE ARBITRATION

16. On 31 March 2014, LDA submitted a Notice of Arbitration ("**Notice of Arbitration**"), invoking the Treaty and the Arbitration Rules of the United Nations Commission on International Trade Law 1976 (the "**UNCITRAL Rules**").

B. CONSTITUTION OF THE TRIBUNAL

17. On 17 April 2014, LDA appointed Professor Julian D.M. Lew, QC as first arbitrator. On 8 July 2014, LDA requested that pursuant to Article 7(2) of the UNCITRAL Rules, the Secretary-General of the Permanent Court of Arbitration ("**PCA**") appoint the second arbitrator. On 10 July 2014, the PCA wrote to India inviting its comments on LDA's request by 28 July 2014, and by letter dated 31 July 2014, the PCA granted India an extension until 11 August 2014. India replied by letter dated 8 August 2014, in which it appointed Mr. J. Christopher Thomas, QC as second arbitrator.

18. On 8 September 2014, in accordance with Article 9(3)(b) of the France-India BIT, the co-arbitrators appointed Ms. Jean E. Kalicki as Presiding Arbitrator.

19. On 3 November 2014, the Parties and members of the Tribunal signed the Terms of Appointment.

C. INITIAL PROCEDURAL STEPS

20. On 9 March 2015, LDA submitted its Statement of Claim ("**Statement of Claim**"), together with accompanying exhibits and legal authorities, ten witness statements[1] and one expert report.[2]

21. The Tribunal held a preliminary procedural meeting with the Parties on 25 March 2015 in The Hague. During that meeting, India indicated that it intended to request bifurcation of the proceedings so that jurisdictional objections might be considered as a preliminary question.

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[1] Witness statements of Messrs. Gurpreet Malhi, Hans Starrenburg, Gildas Maire, Olivier Morel-Jean, Babu Rajeev, Saket Agarwal, Jean-Michel Pap, Yogesh Agarwalla, Pradip Ghosh, and Manpreet Jolly. Citations to witness statements and expert reports hereafter are in the format "Last Name #," with # (expressed in Roman numerals) connoting a first, second or third statement or report.

[2] Expert Report of Mr. James Gilbey.

22. On 13 April 2015, the Tribunal issued Procedural Order No. 1 ("**PO1**"), which set forth two alternative procedural timetables, one envisaging the potential future bifurcation of the proceedings, and the other envisaging no such bifurcation.

23. On 7 July 2015, in accordance with PO1, India filed its Statement of Defense, Counter-Memorial on Jurisdiction and Admissibility ("**Counter-Memorial on Jurisdiction**"), and Request for Bifurcation ("**Bifurcation Request**"), along with exhibits and legal authorities. India's Bifurcation Request referenced eleven separate objections to jurisdiction ("**Objections**")[3] set out in its Counter-Memorial on Jurisdiction, and requested bifurcation of the proceedings to allow each issue to be addressed as a preliminary question prior to any examination of the merits.

24. On 28 July 2015, LDA filed its response to India's Request for Bifurcation ("**Bifurcation Response**"), along with exhibits and legal authorities.

D. BIFURCATION OF PROCEEDINGS AND DECISION ON JURISDICTION

25. On 13 August 2015, the Tribunal issued Procedural Order No. 2 ("**PO2**"), in which it granted India's request for bifurcation in respect of the first and second of India's Objections ("**First Objection**" and "**Second Objection**"), and denied India's request for bifurcation in respect of the remaining Objections.

26. On 11 September 2015, the Tribunal issued Procedural Order No. 3 ("**PO3**"), in which it fixed the procedural timetable in accordance with the Parties' agreement.

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[3] As described and numbered in India's Bifurcation Request, these were that (1) "The Tribunal Lacks Jurisdiction *Ratione Voluntatis* Because Claimant Failed To Comply With The Jurisdictional Requirements In Article 9 Of The BIT"; (2) "The Tribunal Lacks Jurisdiction Over All Of Claimant's Claims, Because The Investments Were Made Through A Company Of Which Claimant Does Not Own At Least 51 Percent And Claimant Therefore Cannot Benefit From The Treaty's Protections Under Articles 1(1) And 2(1)"; (3) "The Tribunal Lacks Jurisdiction Over All of Claimant's Claims Because Claimant's Alleged Investment Was Not Made In Accordance With Indian Law"; (4) "Claimant's Allegedly Indirectly-Held Rights Under The Contract Do Not Qualify As A Protected Investment Under The BIT"; (5) "*Prima Facie* Jurisdiction Is Lacking Over Claims Relating To Claimant's Indirect Shareholding In HBT, Which Claimant Claims To Be Its Investment, Because It Alleges No Treatment By India Of That Shareholding Interest"; (6) "Jurisdiction Is Lacking Over The Entirety Of Claimant's Claims, Because They Are Based On Contract Rights That Belong To An Affiliated Entity And Because Claimant Suffered No Distinct, Individual Loss" (7) "The Tribunal Has No Jurisdiction Over Conduct That Is Not Attributable To The State Under International Law"; (8) "Parallel Proceedings"; (9) "The Tribunal Lacks Jurisdiction Over Claimant's Claims Based Upon Facts And Disputes Settled By Virtue Of The Consent Order Of The Calcutta High Court"; (10) "The Tribunal Lacks Jurisdiction Over Claimant's Claims To The Extent That They Are Based Upon Actions Or Omissions That Occurred Before Claimant Made Its Alleged Investment In HBT"; and (11) "The Tribunal Lacks *Prima Facie* Jurisdiction Over Claimant's Claims To The Extent That They Are Based Upon Actions Or Omissions That Occurred Before India Acquired Knowledge Of Claimant's Shareholding In HBT." Bifurcation Request, pp. 6-17.

27. Pursuant to the agreed timetable, on 18 September 2015, LDA submitted its Reply on Jurisdiction related to the First and Second Objections ("**Reply on Jurisdiction**"). On 23 October 2015, India submitted its Rejoinder on Jurisdiction related to the First and Second Objections ("**Rejoinder on Jurisdiction**").

28. On 5 November 2015, a bifurcated jurisdictional hearing was held at the International Dispute Resolution Centre in London. LDA was represented at the hearing by Professor Vaughan Lowe QC, Dr. Tariq Baloch, Mr. Farhad Sorabjee, and Ms. Arti Raghavan. India was represented by Messrs. Clodfelter, Bevilacqua, Klinger, and Lerosier, Dr. Salonidis, and Ms. Sands, assisted by Mmes. Kalinowski and Schmidt.

29. On 22 December 2015, the Tribunal issued its Decision on Jurisdiction. The Tribunal dismissed India's First Objection, which had contended that LDA failed to comply with certain alleged preconditions to arbitration in Article 9 of the Treaty, including an obligation to attempt amicable settlement in good faith and to wait at least six months before commencing arbitration. With respect to LDA's Second Objection, the Tribunal found that LDA "may not proceed under Article 2(1) of the Treaty with a claim with respect to its indirect investment" in Haldia Bulk Terminals Private Limited (formerly ABG Haldia Bulk Terminals Private Limited) ("**HBT**"), which was structured through an entity in which LDA owned less than 51 percent, but that it "may proceed under Article 2(1) of the Treaty with a claim with respect to its direct investments in India,"[4] provided that a direct investment claim was not "simply a restatement of the indirect investment claim that is excluded from BIT protection under Article 2(1)."[5] Accordingly, the Tribunal invited LDA to indicate, within 30 days of the issuance of its Decision on Jurisdiction, whether it intended to rest on its pleadings as already submitted with respect to such "direct investment" claims, or whether LDA would seek an opportunity to amend or supplement its claims in this regard.

E. LDA'S CLAIM REFORMULATION AND INDIA'S SECOND BIFURCATION REQUEST

30. By letter dated 30 December 2015, India expressed its concern that amendments to LDA's Statement of Claim would make it impossible for India to respond to such amendments within the timeframe for the submission of its Counter-Memorial, as originally envisioned in the procedural timetable. India requested the Tribunal to suspend the schedule outlined in PO3, until "such time as [the] Claimant has set forth its

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[4] Decision on Jurisdiction, ¶ 157.

[5] Decision on Jurisdiction, ¶ 151.

arguments to support claims under the new [jurisdictional] theory."[6] On 31 December 2015, the Tribunal invited LDA's comments on India's letter.

31. On 2 January 2016, LDA wrote, *via* e-mail, to note that the Tribunal's Decision on Jurisdiction provided a 30-day period for LDA to indicate whether it intended to seek leave to amend or supplement its Statement of Claim. On 15 January 2016, LDA requested such leave, *i.e.*, to make "limited amendments to, and supplement its submissions in [its] Statement of Claim, supported by a brief supplementary report of its expert accountant," and proposed to do so by 15 February 2016.[7] On the same date, the Tribunal invited India's comments on LDA's proposed deadline and further invited the Parties to "confer, and, where possible, agree on the necessary adjustments to the procedural timetable" by 29 January 2016.[8] India indicated that it had no objection to LDA's extension request on 20 January 2016.

32. On 27 January 2016, LDA informed the Tribunal that the Parties had been unable to reach an agreement on the procedural timetable, in particular, on the need (or lack thereof) for incorporating a potential second bifurcation stage. In the absence of agreement, LDA attached its own proposed timetable.

33. On 1 February 2016, in response to a request for comment from the Tribunal dated 27 January 2016, India submitted its own proposed modifications to the procedural timetable and reiterated its position that any modifications to the procedural timetable should incorporate an opportunity for India to file a second application for bifurcated consideration of potential jurisdictional objections at a preliminary stage of the proceedings.

34. On 15 February 2016, LDA requested, and the Tribunal granted, an extension until 17 February 2016 for the submission of its Amended Statement of Claim. On 17 February 2016, LDA submitted its Amended Statement of Claim, together with a supplemental expert report.[9] LDA submitted a corrected version of its Amended Statement of Claim on the following day.

35. Also on 17 February 2016, India renewed its request to the Tribunal that the procedural timetable incorporate a stage for bifurcated consideration of potential further jurisdictional objections. LDA opposed India's request in a letter dated 18 February 2016.

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6 Letter from Respondent dated 30 December 2015, p. 2.

7 Letter from Claimant dated 15 January 2016, ¶ 3.

8 Letter from the PCA to the Parties dated 15 January 2016.

9 Supplemental Expert Report of Mr. James Gilbey.

36. On 23 February 2016, the Tribunal issued Procedural Order No. 4 ("**PO4**"), permitting India to make a second application for bifurcation of proceedings and ordering that certain modifications be made to the procedural timetable.

37. On 28 March 2016, India submitted its Amended Statement of Defense, Counter-Memorial on Further Objections to Jurisdiction and Admissibility ("**Second Counter-Memorial on Jurisdiction**"), and Request for Bifurcation of its Further Objections to Jurisdiction and Admissibility ("**Second Bifurcation Request**"), with additional exhibits and legal authorities. In its Second Bifurcation Request, India argued *inter alia* that LDA's reformulation of its claims in the Amended Statement of Claim was insufficient to overcome the obstacles to jurisdiction India previously had raised, including the Article 2(1) issue on which the Tribunal had commented in its Decision on Jurisdiction.

38. LDA submitted its response to India's Second Bifurcation Request on 11 April 2016 ("**Second Bifurcation Response**"), requesting that the Tribunal deny the request. Both Parties submitted additional comments on 14 and 15 April 2016, respectively.

39. On 11 May 2016, the Tribunal issued Procedural Order No. 5 ("**PO5**"), in which it denied India's Second Bifurcation Request, concluding *inter alia* that it was "not convinced" that the renewed objection based on Article 2(1) of the Treaty "can be decided simply as a matter of law, without grappling with the evidence regarding the challenged conduct and the considerations that drove that conduct," including among other things "the Respondent's knowledge and intentions" with respect to LDA and the company in which it held a direct investment (ALBA Asia Private Limited, formerly ABG-LDA Bulk Handling Private Limited) ("**ALBA**"), "separate from HBT." The Tribunal considered that "[t]hese issues of fact appear to be closely intertwined with the merits, likely requiring detailed review of documentary and witness evidence as well as an evidentiary hearing."[10] The Tribunal preserved India's further Objections for consideration in conjunction with the merits; confirmed the procedural timetable as set forth in Timetable B in Appendix A to PO4; and deferred any ruling on an application for costs occasioned by the Second Bifurcation Request.

40. By letter dated 17 May 2016, LDA requested, *inter alia*, a "minor revision" to the procedural timetable, as then amended.[11]

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[10] PO5, ¶¶ 48-49.

[11] Letter from Claimant dated 17 May 2016, ¶ 3.

41. On 20 May 2016, India requested the Tribunal to "immediately suspend" the schedule as set out in the procedural timetable "until such time as Claimant … set[s] forth its arguments and evidence" in support of jurisdiction.[12] In India's view, LDA had failed to do this in its Amended Statement of Claim, and had only set out its full position in its submissions on India's Second Bifurcation Request. LDA and India submitted additional letters in response to each other's comments on 26 and 27 May 2016, respectively, with LDA submitting another letter in response on 30 May 2016.

42. On 22 June 2016, the Tribunal issued its Procedural Order No. 6 ("**PO6**"), in which it: (i) denied India's application to suspend the briefing schedule pending additional submissions from LDA; (ii) denied India's application, in the alternative, to reconsider the Tribunal's decision in PO5 with respect to India's Second Bifurcation Request; (iii) cautioned that the Tribunal would only take into account in further proceedings the arguments and evidence presented in formal pleadings, not in ancillary procedural filings, and requested LDA to confirm whether it intended to rest on its Amended Statement of Claim for purposes of further proceedings, or wished to incorporate certain additional allegations it had raised in its Second Bifurcation Response into a Further Amended Statement of Claim, with the understanding that any such filing must be completed within four weeks; and (iv) adjusted the procedural timetable to run from the date of LDA's confirmation or, in the alternative, of its further filing. The Tribunal later clarified the manner in which the procedural timetable would run in a communication to the Parties dated 28 June 2016.

43. On 20 July 2016, LDA submitted its Further Amended Statement of Claim ("**Further Amended Statement of Claim**"). The Tribunal issued an updated procedural timetable to the Parties on the same date.

F. SUBSEQUENT PRE-HEARING PROCEDURAL STEPS

44. On 19 September 2016, the Parties wrote separately by e-mail to confirm that they had reached an agreement as to certain further modifications to the procedural timetable. On 10 October 2016, India proposed *via* e-mail a further revision to the procedural timetable, which LDA accepted in an e-mail of the same date. The Registry confirmed receipt and, on behalf of the Tribunal, informed the Parties that the proposed changes had been accepted.

45. On 22 October 2016, India requested a ten-day extension of its deadline to submit its Counter-Memorial on Merits and Remaining Jurisdictional/Admissibility Issues and Memorial on Counterclaims. In an e-

[12] Letter from Respondent dated 20 May 2016, p. 5.

mail of the same date, LDA accepted the request. The Registry confirmed receipt and, on behalf of the Tribunal, informed the Parties that the requested extension had been granted.

46. On 4 November 2016, India submitted its Counter-Memorial on Merits and Remaining Jurisdictional/Admissibility Issues and Memorial on Counterclaims ("**Counter-Memorial**") dated 3 November 2016. The Counter-Memorial was accompanied by ten witness statements[13] and one expert report,[14] along with exhibits and legal authorities. On 9 November 2016, India submitted a one-page errata sheet correcting certain citations in its Counter-Memorial, along with a corrected electronic version of the Counter-Memorial itself.

47. On 21 November 2016, the Parties wrote separately to submit their respective Requests for Document Production. From 1 December 2016 to 12 December 2016, the Parties exchanged simultaneous responses and objections to each other's requests and replies to each other's objections. On 30 December 2016, LDA informed the Registry that the Parties had agreed on an extension of the deadline for the production of documents responsive to uncontested requests from 1 January 2017 to 9 January 2017.

48. On 9 January 2017, the Tribunal issued Procedural Order No. 7 ("**PO7**") ordering both Parties to produce certain contested requested documents within the time limit set in the revised procedural timetable.

49. On 20 January 2017, India wrote to the Tribunal informing it of the Parties' agreement to extend the timeline for supplemental production of documents to 10 February 2017. On 30 January 2017, LDA confirmed its agreement, requesting India to provide its supplemental documents on a rolling basis. On 21 January 2017, LDA completed producing its supplemental documents pursuant to PO7. On 17 February 2017, the Registry wrote to the Parties on behalf of the Tribunal, requesting India to complete its production by 24 February 2017. On 24 February 2017, India informed the Tribunal that it had completed the production of all documents in its possession, custody, or control that resulted from its thorough and diligent searches.

50. On 16 March 2017, LDA submitted a request for the extension of the time available for filing its Reply to India's Counter-Memorial. On 17 March 2017, LDA informed the Registry of the Parties' agreement to extend the deadline of each of LDA and India's next pleadings to 17 April and 27 July 2017, respectively.

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[13] Witness statements of Messrs. A.K. Dutta, S. Lepcha, M. Jain, A.K. Mahapatra, M.L. Meena, N. Muruganandam, D. Nayak, S. Jain, S.K. Saha Roy, and R.K. Shukla.

[14] Expert Report of Timothy H. Hart.

India confirmed their agreement on the same date. On 20 March 2017, LDA submitted a revised timetable as agreed by the Parties.

51. On 17 April 2017, LDA submitted its Reply to India's Counter-Memorial ("**Reply**"), accompanied by eight supplemental witness statements[15] and a further supplemental expert report,[16] along with exhibits and legal authorities.

52. On 25 July 2017, India informed the Tribunal that the Parties had agreed to extend the deadline for submission of each of LDA and India's next pleadings, due on 27 July and 27 August 2017, to 6 August and 6 September 2017, respectively. On 7 August 2017, these deadlines were further extended by the Parties' agreement to 8 August and 10 September 2017, respectively.

53. On 8 August 2017, India submitted a Rejoinder on The Merits and Remaining Jurisdictional/Admissibility Issues and Reply on Counterclaim ("**Rejoinder**"), accompanied by nine supplemental witness statements[17] and a supplemental expert report,[18] along with exhibits and legal authorities.

54. On 28 August 2017, LDA made an application to the Tribunal seeking directions in respect of: (i) documents that LDA claimed were "improperly withheld by [India];" and (ii) documents provided as exhibits to Respondent's Rejoinder which LDA argued were incomplete in material respects, illegible, or not translated. On 1 September 2017, India wrote to the Tribunal, requesting it to reject LDA's application. LDA and India provided further comments on 3 September and 4 September 2017, respectively.

55. On 5 September 2017, India resubmitted certain exhibits to its Rejoinder.

56. On 6 September 2017, the Tribunal issued Procedural Order No. 8 ("**PO8**"), ordering India to use its best efforts to locate more legible copies of certain exhibits, and to inform LDA within two weeks of the outcome of the search it had undertaken to perform in respective of certain requested documents.

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[15] Second witness statements of Messrs. Gurpreet Malhi, Hans Starrenburg, Gildas Maire, Olivier Morel-Jean, Babu Rajeev, Saket Agarwal, Jean-Michel Pap, and Pradip Ghosh (hereafter each referenced by name and "II").

[16] Further Supplemental Expert Report of James Gilbey.

[17] Second witness statements of Messrs. A.K. Dutta, M. Jain, A.K. Mahapatra, M.L. Meena, N. Muruganandam, D. Nayak, S. Jain, S.K. Saha Roy, and R.K. Shukla (hereafter each referenced by name and "II").

[18] Second expert report of Timothy H. Hart.

57. On 10 September 2017, LDA submitted its Rejoinder to the Counterclaim ("**Rejoinder to Counterclaim**").

58. On 21 September 2017, India provided LDA with the documents referred to in PO8 that it was able to locate after a diligent search and a more legible copy of Exhibit R-252.

59. On 11 October 2017, the Registry, on behalf of the Presiding Arbitrator, provided the Parties with a draft Agenda for the pre-hearing conference, containing proposals on certain organizational and procedural aspects for the hearing to be held between 27 November and 1 December 2017, resuming for two additional days on 3 December and 4 December 2017 (the "**Hearing**"). The Parties were invited to consult directly to reach agreement to the greatest extent possible on the matters set out therein, and to deliver their comments, either jointly or separately, by no later than two days before the scheduled date of the call. Between 23 October and 31 October 2017, the Parties provided their views on the items listed in the draft Agenda. On 31 October 2017, the pre-hearing conference was held.

60. On 27 October 2017, India notified the Tribunal that it sought to examine at the Hearing the following witnesses produced by LDA: (i) Mr. Babu Rajeev; (ii) Mr. Gildas Maire; (iii) Mr. Gurpreet Malhi; (iv) Mr. Hans Starrenburg; (v) Mr. Jean-Michel Pap; (vi) Mr. Manpreet Jolly; (vii) Mr. Olivier Morel-Jean; (viii) Mr. Pradip Ghosh; (ix) Mr. Saket Agarwal; (x) Mr. Yogesh Agarwalla; and (xi) Mr. James Gilbey.

61. On 30 October 2017, LDA notified the Tribunal that it sought to examine at the Hearing the following witnesses produced by India: (i) Mr. M. Jain; (ii) Mr. S. Jain; (iii) Mr. A.K. Dutta; (iv) Mr. D. Nayak; (v) Mr. S.K. Saha Roy; (vi) Mr. A.K. Mahapatra; (vii) Mr. R.K. Shukla; (viii) Mr. M.L. Meena; (ix) Mr. N. Muruganandam; and (x) Mr. T.H. Hart.

62. On 1 November 2017, the Parties submitted to the Tribunal an agreed list of *dramatis personae*.

63. On 4 November 2017, the Tribunal issued Procedural Order No. 9 ("**PO9**") regarding the organizational and procedural aspects of the Hearing.

64. On 7 November 2017, the Parties submitted to the Tribunal an updated agreed list of *dramatis personae*, with the individuals listed in alphabetical order, as requested by the Tribunal.

65. On 8 November 2017, pursuant to PO9, the Parties submitted to the Tribunal an agreed chronology of events ("**Agreed Chronology of Events**").

66. On 9 November 2017, the Tribunal notified the Parties that it maintained its prior ruling regarding examination of witnesses in person rather than by video-conference, "absent any previously unknown or exigent circumstances, for example involving health, that would justify reconsideration of the Tribunal's prior decision."

67. On 15 November 2017, pursuant to PO9, the Parties submitted a single consolidated USB key containing the Parties' submissions, expert reports, witness statements, and exhibits and authorities.

68. On 20 November 2017, LDA sought the Tribunal's assistance in securing the presence at the Hearing of its witness, Mr. Jolly. On 21 November 2017, India requested the Tribunal to consider allowing Mr. S. Jain to be examined by video-conference because Mr. S. Jain might be unable to secure the necessary approvals to attend the Hearing in person.

69. On 22 November 2017, the Tribunal issued Procedural Order No. 10 ("**PO10**"), in which it *inter alia* directed LDA to convey to Mr. Jolly his duty as a witness to make himself available for questions at the Hearing. The Tribunal accepted the potential video-conference alternative for the examination of Mr. Jolly and Mr. S. Jain given the circumstances, but reiterated its strong preference that witnesses appear in person if possible rather than by video-conference.

G. THE HEARING

70. The Hearing took place at the International Dispute Resolution Centre, London on 27 November to 1 December, and 3-4 December 2017. The following individuals attended:

Arbitral Tribunal
Ms. Jean E. Kalicki (Presiding Arbitrator)
Professor Julian D.M. Lew QC
Mr. J. Christopher Thomas QC

Claimant
Dr. Tariq Baloch
Mr. Cameron Miles
(3 Verulam Buildings)

Mr. Georgios Petrochilos
Ms. Eleonore Gleitz
(Three Crowns LLP)

Mr. Farhad Sorabjee
Ms. Arti Raghavan
Ms. Deepika Bhargava
Ms. Shanaya Irani
Ms. Natalia Ivanova

(J. Sagar Associates)

Mr. Philippe Louis-Dreyfus
Mr. Antoine Person
(LDA's representatives)

Mr. Gildas Maire
Mr. Hans Starrenburg
Mr. Gurpreet Malhi
Mr. Jean Michel-Pap
Mr. Saket Agarwal
Mr. Babu Rajeev
Mr. Olivier Morel-Jean
Mr. Pradip Ghosh
Mr. Yogesh Agarwala
Mr. Manpreet Jolly
Mr. James Gilbey
(LDA's witnesses and expert)

Respondent
Mr. Mark A. Clodfelter
Ms. Janis H. Brennan
Mr. Constantinos Salonidis
Mr. Ofilio J. Mayorga
Ms. Shrutih Tewarie
Mr. Joseph Klingler
Mr. Sudhanshu Roy
Mr. Oscar Norsworthy
Ms. Kathern Schmidt
Ms. Angelica M. Villagran
Ms. Nancy M. Lopez Torres
(Foley Hoag LLP, Washington)

Mr. Thomas Bevilacqua
(Foley Hoag LLP, Paris)

Mr. Sambit Triphaty
Mr. A.R. Sengupta
Mr. N. Muruganandam
Mr. Anant K. Saran
(India's representatives)

Mr. Amol K. Dutta
Mr. Abhay K. Mahapatra
Mr. Swapan K. Saha Roy
Mr. Madan L. Meena
Mr. Narayanaswami Muruganandam
Mr. Damodar Nayak

Mr. Ravi K. Shukla[19]
Mr. Sukesh K. Jain[20]
Mr. Manish Jain
Mr. Timothy H. Hart
(India's witnesses and expert)

PCA
Ms. Jennifer Nettleton-Brom

Other
Ms. Emily Choo, National University of Singapore
Centre for International Law Practice Fellow

Court reporters
Ms. Laurie Carlisle
Ms. Diana Burden

Interpreters
Mr. Shakil Mustafizure Rahman
Mr. Abdul Jain

71. At the Hearing, all of the witnesses that were notified by the Parties were examined either in person or by video-conference, except for Mr. Jolly who, according to LDA, was no longer in its control and had declined to participate further. At the Hearing, India indicated its intention to file a written application to have the witness statement of Mr. Jolly disregarded.

72. Further, during the course of his examination, Mr. S. Jain proffered new documents related to the law and order situation at HDC on specific dates, which LDA objected it had not previously had the opportunity to review and which (in its view) prompted questions about the thoroughness of India's prior production of relevant and material documents. The Tribunal requested India to verify after the Hearing whether there were any additional documents of the same nature that had not yet been produced, regarding incidents at HDC between the Notice of Suspension and the Notice of Termination ("**Additional Document Verification**"). The Tribunal requested that arrangements be made for a supplemental examination of Mr. S. Jain upon completion of the Additional Document Verification.

[19] Testimony provided by video-conference.

[20] Testimony provided by video-conference.

H. POST-HEARING PROCEEDINGS

73. On 12 December 2017, LDA explained the grounds on which it would resist any application by India to exclude the witness statement of Mr. Jolly from the record, and requested leave to submit a witness statement of Mr. Bhushan Patil should India proceed with its application.

74. On 22 December 2017, India requested the Tribunal to consider Mr. Jolly's witness statement only to the extent that it contradicted LDA's case on the merits, a request to which LDA responded on 5 January 2018.

75. On 31 December 2017, India proposed a protocol for conduct of the Additional Document Verification, on which LDA provided comments on 5 January 2018. India provided further comments regarding this issue on 10 January 2018.

76. On 11 January 2018, the Parties submitted their corrections to the Hearing transcripts.

77. On 11 January 2018, the Tribunal issued Procedural Order No. 11 ("**PO11**"), in which it *inter alia* determined that Mr. Jolly's witness statement would remain in evidence but the Tribunal would apportion only such weight to its various assertions as it considered appropriate in the circumstances, and declined LDA's proffer of an additional witness statement from Mr. Patil.

78. On 18 January 2018, India supplied electronic and hard copies of the documents resulting from the Additional Document Verification.

79. The supplemental examination of Mr. S. Jain took place on 29 January 2018 at the International Dispute Resolution Centre, London. The following individuals were present:

Arbitral Tribunal
Ms. Jean E. Kalicki
Professor Julian D.M. Lew QC
Mr. J. Christopher Thomas QC

Claimant
Dr. Tariq Baloch
(3 Verulam Buildings)

Mr. Georgios Petrochilos
Ms. Eleonore Gleitz
(Three Crowns LLP)

Mr. Farhad Sorabjee
Ms. Arti Raghavan
(J. Sagar Associates)

Respondent
Mr. Mark A. Clodfelter
Mr. Constantinos Salonidis
Mr. Ofilio J. Mayorga
Mr. Sudhanshu Roy
Ms. Angelica Villagran

(Foley Hoag LLP, Washington)

Mr. Anant K. Saran
(India's representatives)

Mr. Sukesh K. Jain
(India's witness)

PCA
Ms. Jennifer Nettleton-Brom

Other
Ms. Emily Choo, National University of Singapore
Centre for International Law Practice Fellow

Court reporters
Ms. Laurie Carlisle
Ms. Diana Burden

80. On 13 February 2018, the PCA circulated corrected transcripts of the Hearing to the Parties.

81. On 30 March 2018, LDA submitted its post-hearing brief ("**LDA's Post-Hearing Brief**") to the PCA.

82. On 3 April 2018, India submitted its post-hearing brief ("**India's Post-Hearing Brief**") to the PCA.

83. On 3 April 2018, the PCA circulated both LDA's and India's Post-Hearing Briefs to the Tribunal and to the Parties.

84. On 5 April 2018, India objected to LDA's submission of certain new factual allegations in its cover letter dated 30 March 2018 and new legal authorities in its Post-Hearing Brief. On 6 April 2018, LDA responded to India's objections noting that "it is misconceived to seek to confine the Tribunal's knowledge of the law to sources cited by the parties" and that "a number of [the new legal authorities] were referred to in the course of oral argument in November 2017."

85. On 6 April 2018, LDA submitted a corrected Post-Hearing Brief, noting that the corrected version addressed "certain minor formal errors/omissions." On 16 April 2018, India commented on LDA's corrections. On 17 April 2018, LDA responded to India's comments.

86. On 1 May 2018, the PCA circulated to the Parties the Tribunal's decision that (i) any new factual allegations in LDA's cover letter are outside the scope of these proceedings; (ii) the matter regarding the new legal authorities to which LDA made reference in its Post-Hearing Brief will be taken under advisement, and in the event the Tribunal considers that any such authorities would have a material effect on its analysis, it will offer an opportunity of response with respect to such authorities; and (iii) no prejudice has been created by LDA's corrections and/or additions, and that therefore, the Tribunal accepts the updated version as submitted.

87. Following certain extensions granted by the Tribunal, LDA and India filed their respective cost submissions, dated 10 May 2018 and 18 May 2018 respectively, with the PCA ("**LDA's Cost Submission**" and "**India's Cost Submission**"). On 19 May 2018, the PCA transmitted both documents simultaneously to the Tribunal.

V. OVERVIEW OF THE DISPUTE AND REQUESTS FOR RELIEF

A. SUMMARY OF LDA'S POSITION

88. As reformulated in LDA's Further Amended Statement of Claim, LDA seeks declaratory and compensatory relief based on India's alleged violation of its rights as an investor in ALBA, by virtue of the "destruction of … assets" belonging to a company in which ALBA held shares (HBT).[21] In particular, HBT's value was said to have been linked to its rights under a contract dated 16 October 2009 for the "supply, operation and maintenance of different cargo handling equipment at Berth No. 2 & 8 of Haldia Dock Complex," between HBT and the Board of Trustees for the Port of Kolkata ("**KoPT**"). This contract is hereafter referred to as the "**Contract**,"[22] and the operations it anticipated are referred to as the "**Project**." LDA alleges that "the destruction of the Project resulted in heavy losses to ALBA and therefore, to the Claimant."[23]

89. As discussed further herein, ALBA is a joint venture company incorporated under the laws of India, owned by LDA and ABG Ports Limited, also a company incorporated under the laws of India ("**ABG Ports**").[24] As of the events in question, LDA held 49% of ALBA's shares, and ABG Ports held the

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[21] Further Amended Statement of Claim, ¶ 30.

[22] Agreement between KoPT and HBT for Supply, Operation, and Maintenance of Different Cargo Handling Equipment at Berth No. 2 & 8 of Haldia Dock Complex, dated 16 October 2009 ("**Contract**," **C-2**).

[23] Further Amended Statement of Claim, ¶ 30.

[24] Further Amended Statement of Claim, ¶ 126. ABG Ports was later renamed Starports Logistics Limited.

remaining 51 percent.[25] ALBA in turn held a 63% equity stake in HBT, with the balance of 37% held directly or indirectly by ABG Infralogistics ("**ABG Infra**"), the parent of ABG Ports. LDA alleges that as a result of certain arrangements, including preferential shares, ALBA was entitled to a 98.78% share of HBT's profit.[26]

90. LDA alleges that India's acts and omissions resulted in the premature termination of the Contract on 31 October 2012.[27] LDA divides those acts and omissions into three chapters.[28] LDA's first chapter alleges that India obstructed HBT from "operationalizing" the Project by, *inter alia*: (i) KoPT acting to prevent the Contract from becoming effective; (ii) the Indian police failing to ensure safe passage of HBT's cargo handling equipment to the Berths; and (iii) KoPT coercing HBT to employ redundant workers and engage redundant sub-contractors, which resulted in financial strain to HBT.[29] LDA's second chapter argues that KoPT "choked" HBT's finances by deciding not to optimize the use of the Berths through maximum cargo allocation, and by failing to make timely payments to HBT.[30] LDA's third chapter argues that HBT was ultimately "forced" to terminate the Contract. LDA submits that HBT was "[u]nable to withstand the continued financial pressure and administrative hostility" and so issued a Notice of Suspension of Operations on 23 August 2012 ("**Notice of Suspension**"). This ultimately led to a settlement by way of a Consent Order issued by the Calcutta High Court on 12 September 2012 ("**Consent Order**"), which, *inter alia*, "remind[ed] KoPT of its commitment to prioritize the allocation of cargo to [HBT's Berths]."[31] To control costs and salvage the Project, HBT also retrenched the excess workers and subcontractors it allegedly had been forced to take on.[32] HBT then was "subjected to a violent backlash," including "mobs preventing operations, assaulting HBT personnel …, and threatening their personal security," to which KoPT, the police, the District Magistrate, and the Ministry of Shipping ("**MoS**") allegedly were unresponsive.[33] The crisis culminated in the alleged abduction at gunpoint of three HBT employees and

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[25] Further Amended Statement of Claim, ¶ 130. LDA increased its shareholding to 50% as of 4 March 2015, but it does not rely on that more recent increase for purposes of this case. *Id.*, ¶¶ 130, 359(a), 360.

[26] Further Amended Statement of Claim, ¶¶ 128, 130.

[27] Notice of Arbitration, ¶ 1.7; Further Amended Statement of Claim, ¶ 8.

[28] Further Amended Statement of Claim, ¶ 11.

[29] Further Amended Statement of Claim, ¶¶ 12-16.

[30] Further Amended Statement of Claim, ¶¶ 17-19.

[31] Further Amended Statement of Claim, ¶ 20.

[32] Further Amended Statement of Claim, ¶ 20.

[33] Further Amended Statement of Claim, ¶ 22.

their families.[34] LDA states that it and its Indian collaborator, ABG Infra, "could not compromise on the security of personnel on the Project and resolved to end their participation in the Contract," resulting in HBT having "no choice but to terminate the Contract."[35] LDA adds that KoPT thereafter undertook "vindictive actions harming HBT in the aftermath of its exit," including imposing a lien on equipment, engineering a "patently mala fide claim through the commissioner of customs," and subjecting HBT to a "manifestly unfair blacklisting procedure."[36]

91. At the heart of LDA's case is the proposition that India's State authorities (allegedly including KoPT) either affirmatively conspired to favor, or at minimum failed to protect LDA against the concerted hostile efforts of, certain powerful "**Vested Interests**" at HDC. The Vested Interests are said to have included both the local stevedoring company Ripley & Co. Ltd ("**Ripley**") and local union leaders affiliated with the Indian Trinamool Trade Union Congress ("**INTTUC**"), all of whom were connected to the ruling political party in West Bengal, the All India Trinamool Congress Party ("**TMC**").[37] According to LDA, the Vested Interests worked in conjunction to destroy HBT's operations, by threatening HBT personnel and vandalizing and sabotaging HBT's operations, premises, and equipment.[38] LDA suggests that the Vested Interests changed KoPT's board composition to ensure its compliance with their interests,[39] and exercised control over both the MoS and the state government in West Bengal to the detriment of HBT.[40] LDA maintains that these authorities not only were aware of the Vested Interests, but also either directly supported them or failed to protect HBT from them.[41] LDA defines the "central issue of [its] case" as involving "the sabotage of the Contract by instrumentalities of the Respondent state at the behest of the

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[34] Further Amended Statement of Claim, ¶ 26.

[35] Further Amended Statement of Claim, ¶ 27.

[36] Further Amended Statement of Claim, ¶ 28.

[37] Further Amended Statement of Claim, ¶¶ 135, 141-144; Reply, ¶ 18.

[38] Further Amended Statement of Claim, ¶ 156.

[39] Further Amended Statement of Claim, ¶¶ 15, 148-149; Reply ¶¶ 27-30.

[40] Further Amended Statement of Claim, ¶¶ 144-148; Reply, ¶¶ 22-26.

[41] *Compare* Further Amended Statement of Claim, ¶¶ 18, 33(a), 155, 368AC, 392, 397, 401(a), 418, 483(a) and p. 77 (subhead) (alleging that KoPT acted "at the behest" of the Vested Interests, "aided" and "assisted" the Vested Interests, "protect[ed] the … interests of" the Vested Interests, and made a "conscious decision" to harm HBT "on account of the influence of" the Vested Interests), *with* Hearing Transcript, 27 November 2017, pp. 18, 21, 23 (alleging that "the Indian authorities elected not to lend the necessary and expected support," and that this "staggering failure to support" the Project "amounts to a breach of the Treaty").

Vested Interests," with "[t]hese instrumentalities therefore act[ing], or fail[ing] to act, to serve the purposes of the Vested Interests."[42]

92. LDA develops this theme in its Post-Hearing Brief, where it summarizes its core case as follows:

> The Claimant's case is that at the behest of "Vested Interests" … various instrumentalities of India first tried to frustrate the commissioning of the Project and then to choke it financially by under-allocating cargo to HBT and forcing it to take on a wildly excessive labour force. When the Project was finally put on track, in September 2012, there erupted widespread disorder and violence, culminating in risk to human lives. This risk LDA (and its Indian partner ABG Infra) were not prepared to take; and they were forced to abandon the Project, thereby losing the investment that ALBA had made in HBT. To make matters worse, even after this forced exit, India continued to take punitive actions against LDA.[43]

93. LDA asserts that India's conduct was in breach of the following Treaty provisions[44]:

- Article 6(1), which prevents India from taking "any measure of expropriation or nationalisation or any other measures having the effect of dispossession, direct or indirect," unless it satisfies the conditions laid out in that Article;
- Article 4(2), which obliges India to "extend fair and equitable treatment in accordance with internationally established principles" to the investments of French investors in India;
- Article 4(1), which provides that investments made by French investors "shall enjoy full and complete protection and safety" in India; and
- Article 5, which requires India to accord French investments "treatment which shall not be less favourable than that accorded to" either national or third-State investments, and to accord to French investors "treatment which shall not be less favourable than that accorded to" third-State investors.

94. With respect to relief, LDA claims that India "has a duty to make full reparation" in "the form of a monetary award reflecting the loss of the value of the Claimant's shareholding in ALBA which value was substantially eroded on account of the Respondent's violations of the Treaty," and in the form of "damages for moral and reputational harm suffered by the Claimant, associated economic losses, and a formal and unqualified apology by the Respondent." [45]

95. Specifically, in its Reply, LDA requests the following relief:

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[42] Reply, ¶ 15.

[43] LDA's Post-Hearing Brief, ¶ 2.

[44] Further Amended Statement of Claim, Sections V.B, C, D, and E.

[45] Further Amended Statement of Claim, ¶ 31.

a. DECLARE that India has breached the Treaty.

b. In respect of the Respondent's Counterclaims:

   (i) DISMISS India's Counterclaims for lack of jurisdiction.

   (ii) Should the Tribunal uphold jurisdiction over the Respondent's counterclaims, DISMISS these counterclaims on the merits.

c. ORDER India to compensate the Claimant for its breaches of the Treaty, in the aggregate.

d. ORDER India to compensate the Claimant for its breaches of the Treaty, in the aggregate amount of USD 36,155,825, plus further interest accruing from 1 January 2016 to the date of full and effective payment of compensation.

e. ORDER India to compensate the Claimant the amount of USD 4.5 million, for moral and reputational harm, caused by India's breaches of the Treaty.

f. ORDER India to pay all of the costs and expenses associated with the Anti-Arbitration Proceedings, as described in ¶¶ 349 to 355 of [the Further Amended Statement of Claim] and Chapter XI above.

g. DECLARE that:

   (i) the award of compensation and interest above be made net of all Indian taxes; and

   (ii) India may not deduct taxes in respect of the payment of the award of compensation and interest above.

h. ORDER India to indemnify the Claimant

   (i) for any taxes India assesses on the award of compensation and interest above; and

   (ii) in respect of any double taxation liability that would arise in France or elsewhere that would not have arisen but for India's adverse measures.

i. ORDER India to make a formal and unqualified apology to HBT's staff for its egregious failure to protect their physical security, and in particular those persons and their family [sic] who were abducted: Manpreet Jolly, Jagdish Behara, Bhushan Patil and his wife and daughter;

j. ORDER India to pay all of the costs and expenses of this arbitration, including the fees and expenses of the Tribunal, the fees and expenses of any experts appointed by the Tribunal and the Claimant, the fees and expenses of the Claimant's legal representation in respect of this arbitration, and any other costs of this arbitration.

k. AWARD such other relief as the Tribunal considers appropriate.[46]

[46] Reply, ¶ 1150.

B. SUMMARY OF INDIA'S POSITION

96. India disputes as a threshold matter that the Tribunal has jurisdiction over these claims and that the claims are admissible.[47] With respect to the merits, India denies that it has violated any of the standards of protection set forth in the Treaty, and that it is responsible for any loss incurred by LDA as a result of the violations alleged.[48]

97. To the contrary, in India's telling, KoPT was committed to increasing HDC's competitiveness through mechanization of operations at the Berths, and the Project's failure was due to "the bad business decisions [LDA] made with its partners, and not any neglect of duty or wrongful acts" by KoPT or India.[49] India contends that the bid was "overly aggressive" and made without adequate knowledge of local conditions, and relied on "overly optimistic projections of cargo" and "wholly unrealistic assumptions about labor relations at HDC."[50] In consequence, LDA's investment was "doomed to suffer," and its lack of preparation "led to significant operational shortcomings, which degenerated even further as the global economic downturn and increased competition from other ports began affecting overall cargo volumes handled at Haldia."[51] According to India, the best evidence that there was no conspiracy to shut HBT down is that it was able to operate the Project "peacefully and undisturbed for more than two years,"[52] until its own economic difficulties led it to "seek a way out" under "false pretexts for first threatening, and then actually carrying out, the suspension and eventual termination of the Contract without any legal

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[47] India's jurisdiction and admissibility objections may be summarized by reference to the subheadings in Section III of its Counter-Memorial, which contend that (a) "Even As Reformulated (Twice), Claimant's Claims Remain Premised On Treatment of HBT And, As A Result, The Tribunal Has No Jurisdiction Over Them"; (b) "Claimant's Investment In The Project, Through ALBA, Was Premised On Fraudulent Misrepresentations And, As A Result, Claimant's Claims Must Be Dismissed"; (c) "The Conduct Of KoPT And The So-Called "Vested Interests" Is Not Attributable To the State of India"; (d) "Alternatively, LDA's Claims Should Be Dismissed Because The Parties And The Claims Under The Present Proceedings And The Domestic Arbitration Are Substantially The Same And There Would Be No Material Prejudice Resulting to Claimant From Continuance Of Proceedings In The Ongoing Arbitration Under The Contract Between KoPT And HBT"; (e) "Even If KoPT's Actions Are Attributable To India, LDA's Claims Based Upon Disputes Resolved As Between HBT and KoPT By The Settlement Recorded In The Consent Order Of the Calcutta High Court Are Inadmissible And Outside The Tribunal's Jurisdiction"; (f) "The Tribunal Lacks Jurisdiction Over LDA's Claims Of Treaty Breach And Loss Allegedly Occurring Before LDA Made Its Investment In India"; and (g) "The Tribunal Lacks Jurisdiction Over Any LDA Claims Based Upon Actions Or Omissions That Occurred Before India Acquired Knowledge of Claimant's Shareholding In HBT."

[48] Counter-Memorial, ¶¶ 1-36.

[49] Counter-Memorial, ¶¶ 2-3.

[50] Counter-Memorial, ¶ 5.

[51] Counter-Memorial, ¶¶ 6-7.

[52] Counter-Memorial, ¶ 21.

justification."[53] This involved, *inter alia*, pressing for its Berths to be allocated cargo above all others, which "unsurprisingly led to complaints by workers at other berths," and then terminating its agreement with a labor supplier and retrenching a large number of its own workers, "knowing full well" that this would precipitate a crisis and "thereby provide the perfect excuse for exiting the stage."[54]

98. By contrast, India contends, KoPT (whose conduct it asserts is not attributable in any event to India) tried to support the Project, within the terms of the Contract and even in the face of local opposition.[55] The police and the Central Industrial Security Force ("**CISF**"), which is tasked with providing security at major ports in India, provided "adequate assistance" and "investigated each and every incident" that HBT reported.[56] HBT's eventual unlawful Contract termination imposed significant harm on KoPT, which acted appropriately thereafter to protect its interests.[57]

99. Based on this framing of events, India presents several "conditional" counterclaims, on which it seeks a ruling only if the Tribunal upholds jurisdiction to examine the merits of any of LDA's claims and the admissibility of such claims, and only if it finds KoPT's conduct to be attributable to India.[58] India's counterclaims are grounded on alleged losses suffered by KoPT after LDA terminated the Contract on 31 October 2012. India seeks compensation for: (i) losses suffered by KoPT resulting from the inability to conduct cargo operations from 23 September 2012 to 28 February 2013; (ii) costs of shifting ships not serviced by HBT at the Berths from 23 September 2012 to 31 October 2012; (iii) amounts paid to an interim short term contractor for onshore operations at the Berths from 10 October 2012 to 16 March 2013; (iv) loss of income that KoPT could have earned under the Contract from 1 March 2013 to 1 June 2016; (v) recovery of outstanding bills and repair expenses; and (vi) recovery of charges and taxes for occupying space in the dock area.

100. In its Rejoinder, India has requested the Tribunal to render an award: [59]

> (i) in favour of India and against LDA, dismissing LDA's claims for lack of jurisdiction and/or as inadmissible in their entirety and with prejudice;

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[53] Counter-Memorial, ¶ 9.

[54] Counter-Memorial, ¶¶ 24-26.

[55] Counter-Memorial, ¶¶ 24, 28.

[56] Counter-Memorial, ¶ 27 (emphasis in original).

[57] Counter-Memorial, ¶¶ 30-32.

[58] Counter-Memorial, ¶ 860.

[59] Rejoinder, ¶ 1340.

(ii) should the Tribunal uphold jurisdiction to examine the merits of any of LDA's claims, and the admissibility of such claims, finding and declaring that India has not breached any obligation owed to LDA under the Treaty;

(iii) should the Tribunal uphold jurisdiction to examine the merits of any of LDA's claims, and the admissibility of such claims, finding and declaring that India has not caused any loss to LDA or, in the alternative, is not obligated to pay LDA damages, interest or costs in the amounts claimed;

(iv) should the Tribunal uphold jurisdiction to examine the merits of any of LDA's claims, and the admissibility of such claims, as such holding relates to the conditions for India's Counterclaim, finding and declaring that HBT has breached the Contract and that LDA is responsible for those breaches and award India damages in the amount of Rs 2,27,80,49,212.58 together with interest thereon;

(v) pursuant to paragraphs 1 and 2 of Article 40 of the UNCITRAL Arbitration Rules, ordering that LDA bear all the costs of this arbitration, including India's costs for legal representation and assistance, together with interest thereon; and

(vi) grant such other relief that the Tribunal may deem legally available to India.

VI. STATEMENT OF FACTS

101. The Tribunal describes below in some detail, as a useful predicate for the discussion that follows, the facts that are agreed or that the Tribunal has found to be proven by the evidence. Nonetheless, the Tribunal does not purport to set out *all* facts considered for purposes of this Award, and the absence of reference to particular facts or assertions, or to the evidence supporting any particular fact or assertion, should not be taken as an indication that the Tribunal did not consider those matters. The Tribunal has carefully considered *all* evidence and argument submitted to it in the course of these proceedings.

A. THE TENDER FOR CARGO HANDLING OPERATIONS AT THE BERTHS

1. The Unprecedented Nature of the Proposed Project

102. On 13 August 2007, KoPT recommended the mechanization of Berth Nos. 2 and 8 at HDC for the purposes (in the Parties' agreed description) of "improving productivity and capacity augmentation."[60]

103. On 13 November 2007, KoPT floated Tender No. Ad/Equipping/2007-08 for "Supply, Operation & Maintenance of Different Cargo Handling Equipment" at the Berths ("**Tender**").[61] The Tender envisioned that onboard and onshore cargo handling operations would be contracted out to a single entity and priced on a "service model," under which KoPT would directly charge end-users for their ships' use

[60] Agreed Chronology of Events, #1 (citing **AD-13**).

[61] Agreed Chronology of Events, #2 (citing **C-1**).

of the Berths, and then would pay the winning contractor a portion of its revenues pursuant to a contract that (a) required the cargo handler to use certain mechanized equipment (including "Mobile Harbor Cranes"), and (b) pegged rates to the volume of cargo handled, based on a rate per ton quoted by the contractor in its bid. This was a departure from traditional practice, in which onboard operations were handled by KoPT using the ships' built-in cranes, and onshore operations were conducted manually by stevedoring agents, who operated under a KoPT license but contracted directly with end-users for their rates of service.[62]

104. The Parties agree that the Project envisioned in the Tender was not only innovative but unprecedented at HDC. India describes it as a "first-of-its-kind project,"[63] and its witness A.K. Dutta characterizes it as a "turning point in HDC's history," "the first time KOPT opted for a model whereby a Contractor would carry out integrated shore handling services on behalf of the port," introducing mechanization to "displace the traditional stevedoring agencies."[64] LDA's opening statement referenced Mr. Dutta's description of the project as historic, and stated, "we agree."[65]

2. The Terms of the Tender

105. The Tender was a lengthy document, and was accompanied by a set of "Clarifications" issued in response to queries by potential tenderers. The Tribunal does not purport to summarize all of the terms of the Tender or the various Clarifications. For purposes of this dispute, the following provisions were of particular relevance.

106. First, the "Scope of Work" was described as "[s]upply, installation, operation and maintenance of different cargo handling equipment as well as undertaking all required onboard and onshore cargo handling operations as given below in an integrated manner upto [sic] delivery / shipment in case of import / export at Berth nos. 2 & 8 … at the cost, charges, expenses, risk, manpower and arrangements of the successful tenderer."[66] In response to a query by one potential bidder, KoPT clarified that "the successful tenderer shall have to handle all kinds of vessels to be berthed by KoPT," without the right to refuse non-standard

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[62] Counter-Memorial, ¶¶ 53-54, 56.

[63] Rejoinder, ¶ 10.

[64] A.K. Dutta I, ¶ 19; *see also* Hearing Transcript, 1 December 2017, p. 1048 (N. Muruganandam characterizing this as "a unique project," "a first of its kind in major ports"); Hearing Transcript, 3 December 2017, p. 1316 (M. Jain describing it as "first of its kind in the country").

[65] Hearing Transcript, 27 November 2017, p. 26.

[66] **C-1**, § 1.1(a).

or very old vessels.[67] Nonetheless, the "cargo to be handled with the equipment to be supplied & installed and manpower deployed under the provision of the contract will predominantly comprise dry bulk cargo," and only in exigent circumstances would the tenderer be required to handle other types of cargo, with different rate terms provided.[68]

107. The Tender specified that "KoPT will not guarantee any minimum cargo for handling by the successful bidder. However, for the benefit of the tenderer, the past performance of handling cargo" at HDC was supplied in an appendix.[69] A separate provision similarly specified that "KoPT will not commit any Minimum Guaranteed Throughput of cargo for both the berths," but would furnish data on cargo handled in recent years.[70]

108. In response to a query from one tenderer suggesting that KoPT "should ensure that Berths 2 & 8 are provided with sufficient vessels to ensure that the equipments … are not idle at any point in time" and the "successful tenderer shall be allowed to do marketing" to end-users,[71] KoPT issued the following Clarification:

> As per present policy of KoPT, commodities like coking Coal, Lime Stone, and Coke of the major steel industries are to be handled at the two berths concerned. However, whenever vessels a/c Steel Industries will not be there at these two berths, Commodities like Iron Ore, Non Coking Coal or any other bulk commodity as may be decided by the port from time to time will also be handled at the two berths concerned.
>
> As KoPT has adopted its own policy for utilization of berth no. 2 and 8 for maximizing cargo at these two berths, the matter of allowing the successful tenderer to do marketing has not been considered favourably.[72]

KoPT also responded to several general inquiries on this subject. In response to the question, "How will the ports divide vessels equitably?", KoPT stated that "[t]his will be determined / governed by the policies of KoPT prevailing at the relevant point of time."[73] In response to a question whether KoPT would

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67 **C-1**, § 1.1(b), Clarification.

68 **C-1**, § 1.5.

69 **C-1**, § 1.39.

70 **C-1**, § 7.6 & Clarification.

71 **C-1**, § 1.39, Query.

72 **C-1**, § 1.39, Clarification.

73 **C-1**, "Clarification to Miscellaneous Queries (Not Specific to Any Particular Clause), p. 111.

provide a "back to back cargo guarantee," it stated that it "will not provide any cargo guarantee to the tenderers."[74]

109. The Tender provided a list of the "Minimum number of equipment to be supplied, installed, operated and maintained at each of the berths,"[75] but expressly permitted the successful tenderer to deploy additional equipment "for the purpose of attaining the MLP."[76] The "**MLP**" was a "Minimum Level of Performance," and the successful tenderer "shall have to achieve MLP in terms of ship day output … failing which penalty will be imposed …."[77] Specifically, the Tender specified that "[t]he successful tenderer shall have to ensure handling of a minimum of 20000 tonnes of cargo per ship berth day at each of the berth,"[78] with calculations of "ship berth day output" based on total cargo loaded and unloaded from a vessel and the "Vessel operation time" running from the "time of readiness of the vessel at the berth … till completion time of loading / unloading of vessel."[79] The Tender stated that "[i]n case of failure to achieve MLP for the dry bulk cargo, KoPT shall make payment at reduced rate in the manner detailed …."[80]

110. The successful tenderer was required to "employ qualified and skilled personnel for operation and maintenance of all the equipment to be installed / provided as also for undertaking other onboard & onshore operations under the contract."[81] The tenderer was also responsible for supplying, "at its cost, arrangement and liability," "[l]ocalized security for all the equipment and other infrastructure to be set up or deployed by the successful tenderer inside the dock …." At the same time, "KoPT will provide general security to the entire dock area at HDC by [CISF] as in existence now."[82] "Strike, boycotts or other forms of labour unrest" would be considered a "Force Majeure Event" under the eventual contract if they "materially and adversely affect the successful tenderer in due performance of its various obligations under the contract," but the provision expressly "exclude[d] strike or boycotts by employees of the successful tenderer or by the employees of the agents/ representatives/ contractors/ sub-contractors

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74 **C-1**, "Clarification to Miscellaneous Queries (Not Specific to Any Particular Clause), p. 112.

75 **C-1**, § 1.2.

76 **C-1**, § 1.3(b).

77 **C-1**, § 1.10.

78 **C-1**, § 7.8(a).

79 **C-1**, § 7.8(b).

80 **C-1**, § 7.8(g).

81 **C-1**, § 1.14(a).

82 **C-1**, § 1.28.

engaged by the successful tenderer."[83] In response to a query about the status of a "Bandh" (or general strike) called by a political party, KoPT clarified that "[t]he Bandh, if originated from the source outside the control of the successful tenderer" would qualify as a force majeure event.[84]

111. For purposes of due diligence by potential tenderers, the Tender provided certain sketch plans, but also provided that "intending tenderers [would] be given the opportunity to inspect the dock area" on 3 December 2007, "to get an idea about the project site, location of the storage area(s) etc."[85] Regardless of whether a tenderer participated in the scheduled site inspection, it "shall be deemed to have inspected the project site and dock area including the available facilities and conditions prevailing thereon, before quoting the rates."[86]

112. Tenderers were required to have certain thresholds of experience handling dry bulk cargo using Mobile Harbor Cranes or other "Quay Crane(s)."[87] In response to a query whether a stevedoring agent would qualify if it previously had worked with other port authorities who operated such cranes, KoPT insisted that "[t]he tenderers must have their own experience of operating Mobile Harbor Cranes or any other quay crane(s)," and that stevedoring agents who had not done so would not be deemed to have the required "Essential Cargo Handling Experience."[88] The requirement of direct experience operating the cranes was maintained notwithstanding objections from potential tenderers that "[t]he experienced Stevedores and Handling Agents at Kolkata and Haldia have not had the privilege of Quay Cranes …, but they too have substantial experience in handling and movement of such cargoes," and that the Tender therefore "restricts potential bidder like us (having vast experience in handling of cargo at Ports)." KoPT insisted that the specified essential cargo handling experience "shall remain as is."[89]

113. The Tender allowed qualified bidders to participate either as a single entity or in a consortium, and stated that in the latter circumstance, the term "Tenderer" for purposes of the Tender provisions would apply to

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83 **C-1**, § 7.24.1(b).

84 **C-1**, § 7.24.1(b), Clarification.

85 **C-1**, § 1.7, Note. KoPT specifically rejected a request by one tenderer that the MLP be reduced in the event cargo was to be transported to plots farther away than the intended storage areas shown in the sketch plans or during the site inspection. **C-1**, § 1.7, Clarification.

86 **C-1**, § 3.1.

87 **C-1**, § 2.3.1.

88 **C-1**, § 2.3.1, Query and Clarification.

89 **C-1**, § 2.3.1, Queries and Clarifications.

such a consortium.[90] For a tender submitted by a consortium, one member must be authorized as the "Lead Member," who "shall hold at least 26% of the paid up Equity Share Capital of the Joint Venture Company to be formed by the members of the Consortium," and shall not reduce its shareholding below 26% during the contract term.[91] The members of such a consortium were required to enter into a "Joint Bidding Agreement" (to be submitted with the tender) that would outline "the proposed roles and responsibilities of each member at each stage," and should "convey the intent to form a Joint Venture Company" if selected as the successful tenderer, for the purpose of entering into a contract with KoPT.[92] A "[c]hange in the composition of a Consortium may be permitted during the bidding stage by KoPT only" subject to certain conditions, with "[a]pproval … at the sole discretion of KoPT" and required to be in writing, and "[t]he modified Consortium would be required to submit a revised Joint Bidding Agreement …."[93] The successful tenderer was expressly forbidden from assigning the contract without KoPT's approval,[94] and "any change in control / ownership of the successful tenderer arising from the sale, assignment, transfer without prior permission of KoPT" would constitute an event of default.[95]

114. The Tender provided that following its completion, KoPT would issue a Letter of Intent ("**LoI**") to the successful tenderer. The tenderer would have 30 days to accept the LoI and post a performance guarantee, at which time – and pending execution of a formal contract – KoPT and the successful tenderer would be "construed" as having an agreement for "fulfilling the scope of work and obligation" of the contract.[96] Within 15 days of "the placement of [the] LoI," KoPT was to provide a "proforma for Agreement … which will basically contain the provisions as detailed in the Tender Document" together with the rate schedule of the successful tender, and the Agreement itself was to be signed within 45 days from "the date of placement of LoI."[97] The contract would commence from "the date of placement of LoI" and would remain in force for ten years.[98] The successful tenderer was required to "complete, supply, installation and commissioning of all the equipment" within 180 days of the LoI,[99] which would be reflected by

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[90] **C-1**, § 2.1.

[91] **C-1**, § 2.7(a), (b).

[92] **C-1**, § 2.7(e).

[93] **C-1**, § 2.8(a), (b), (c).

[94] **C-1**, § 1.23.

[95] **C-1**, § 7.11(f).

[96] **C-1**, § 7.2.

[97] **C-1**, § 7.4.

[98] **C-1**, § 7.5 & Clarification.

[99] **C-1**, § 7.1.

KoPT's issuance of a Commissioning Certificate, and certain liquidated damages would apply for late commissioning of Mobile Harbor Cranes in particular. For late commissioning of other equipment, KoPT "shall be at liberty to hire the required minimum number" of such equipment from elsewhere and to recover its costs and expenses from the successful tenderer.[100]

115. The Tender provided that the contract would be governed by "the prevailing laws of the Republic of India,"[101] and that any contractual dispute that could not be resolved by amicable settlement would be submitted to binding arbitration in Kolkata under India's Arbitration and Conciliation Act, 1996.[102]

3. The Consortium's Bid and the Award

116. On 25 February 2008, a consortium consisting of ABG Infra and its subsidiary, ABG Kolkata Container Terminals Private Limited ("**ABG Kolkata**") (together, the "**ABG Consortium**") submitted a bid for the Project.[103] LDA was heavily involved behind the scenes in preparation of the ABG Consortium's bid, based on discussions with ABG Infra which envisioned LDA's likely collaboration in the event the bid was successful.[104] However, the bid itself did not refer to LDA's potential future involvement.

117. Prior to the ABG Consortium's submission of its bid, LDA did limited due diligence of its own with respect to conditions on the ground at HDC. It did not send an LDA representative to participate in the formal site inspection KoPT offered all prospective tenderers on 3 December 2007.[105] Instead, LDA's representative made an unofficial visit to HDC in February 2008 with an ABG representative,[106] during which they drove around the site but did not engage with anyone from KoPT, except for a casual conversation with one unnamed KoPT employee in the course of returning a borrowed access pass.[107] LDA also referenced a 2007 port development plan prepared by the Port of Rotterdam Authority for the Indian Ports Association.[108] Otherwise, with respect to local conditions, LDA relied heavily on ABG

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[100] **C-1**, § 7.10.

[101] **C-1**, § 7.18.

[102] **C-1**, § 7.17(a), (b).

[103] Agreed Chronology of Events, #3 (citing **C-2**, pp. 789-792, and **R-98**, p. 223).

[104] Maire I, ¶ 6; Starrenburg I, ¶¶ 6-8, 19; Rajeev I, ¶ 12; Agarwal I, ¶¶ 38-41; Maire II, ¶ 7; Hearing Transcript, 28 November 2017, pp. 346-349.

[105] Hearing Transcript, 28 November 2017, pp. 402-403, 428-429.

[106] Starrenburg I, ¶ 11; Starrenburg II, ¶ 9.

[107] Starrenburg II, ¶ 9; Hearing Transcript, 28 November 2017, pp. 387-388, 390-391, 395, 397, 417-418.

[108] Starrenburg I, ¶ 12.

Infra, its intended partner, which had experience with other types of cargo operations at the port of Kolkata, also administered by KoPT.[109] Based on the information gathered, LDA considered HDC's current methods to be "rather primitive and highly inefficient …, decades behind current maritime practices" and involving an "unnecessarily large" workforce.[110]

118. Nonetheless, LDA appears to have based its bid calculations on the assumption that manpower needs for the new mechanized Project at the Berths could be based on more modern levels, even comparable to those at the highly efficient port of Rotterdam.[111] LDA projected a workforce of approximately 300 employees (excluding management and administrative personnel), based on a "scientific[]" calculation of the required equipment, the number of shifts, and a buffer to cover for employee leave and other absences.[112] ABG Infra in turn deferred to LDA's experience with modern mechanized operations.[113] This figure of roughly 300 employees was "an essential aspect of factoring the cost of … operations" for purposes of the bid that the ABG Consortium submitted on 25 February 2008.[114]

119. On 16 April 2008, KoPT informed the ABG Consortium that its price bid was the lowest of the various bidders that had previously survived a preliminary stage evaluating "techno commercial" qualifications.[115] In fact, the ABG Consortium's price bid was significantly lower than all other bids.[116] LDA and ABG Infra explain that they believed the low margins inherent in their bid would be offset by high volumes of dry bulk cargo,[117] based on (a) historical and forecasted tonnage for HDC,[118] (b) extrapolations from the Tender's MLP requirement,[119] and (c) KoPT's "Clarification" during the Tender process about its "own

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[109] Hearing Transcript, 28 November 2017, pp. 395, 417-418; Agarwal I, ¶ 3.

[110] Starrenburg I, ¶ 11; *see also* **C-51**, p. iv (noting as among the "Weaknesses" of India's major ports their "[o]ld infrastructure," "[o]ld and inefficient cargo handling systems," "[p]oor quality of services / business attitude," and "[o]verstaffing").

[111] Hearing Transcript, 28 November 2017, pp. 368-373.

[112] Starrenburg I, ¶ 18; Starrenburg II, ¶¶ 14-16.

[113] Rajeev I, ¶ 25; Agarwal I, ¶ 61.

[114] Starrenburg I, ¶ 18.

[115] Agreed Chronology of Events, #6 (citing **C-2**, p. 905).

[116] Counter-Memorial, ¶ 65.

[117] Starrenburg I, ¶ 25; Rajeev I, ¶ 22; Agarwal I, ¶¶ 36, 53, 67.

[118] Starrenburg I, ¶ 12; Rajeev I, ¶ 13; Agarwal I, ¶¶ 31, 67; Agarwal II, ¶¶ 8-9.

[119] According to LDA's witnesses, the Tender's required MLP of 20,000 metric tons ("**MT**") of cargo per ship berth day at each berth reasonably implied that that KoPT would allocate sufficient vessels to its Berths for it to achieve these rates almost continuously on a 24-hour basis, except for customary equipment down-time for servicing. LDA extrapolates an expectation that it would handle some 10.22 million metric tons ("**MMT**") of compatible dry bulk cargo per year. Starrenburg I, ¶ 20; Rajeev I, ¶ 14; Agarwal I, ¶ 51. India contends that any such reliance on the MLP figure was

policy … for maximizing cargo" at the newly modernized Berths, which was incorporated into the final Contract.[120]

B. THE LETTER OF INTENT

120. As noted above, the Tender provided that KoPT would issue a LoI to the successful tenderer, which upon acceptance would be "construed" as having an agreement in effect, even pending the execution of the formal contract documents.[121] However, while KoPT identified the ABG Consortium as the lowest bidder on 16 April 2008, it did not issue the LoI to the Consortium until a year later, 29 April 2009.[122] The Parties disagree as to whether this constitutes a "delay" in issuance of the LoI.[123]

C. LDA'S ENTRY AS AN INVESTOR INTO THE PROJECT

121. Even prior to KoPT's issuance of the LoI, the ABG companies and LDA had begun to lay the groundwork for a broad collaboration on cargo handling projects in India, not specifically limited to the HDC Project. On 18 November 2008, ABG Ports incorporated ALBA (then known as ABG Bulk Handling Private Limited) as a new subsidiary.[124] A month later, on 16 December 2008, ALBA filed a Foreign Collaboration Application with India's Foreign Investment Promotion Board ("**FIPB**"), a section of the

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unreasonable, as the MLP figures regulated only the *capabilities* of the tenderers' equipment and operations when vessels were docked at the Berths, but in no way guaranteed any particular allocation of vessels or cargo to the Berths, much less the full allocation on which LDA's stated calculation is predicated. *See, e.g.,* Counter-Memorial, ¶ 90.

120 Starrenburg I, ¶¶ 23-24; Rajeev I, ¶¶ 15-18; Agarwal I, ¶¶ 46-49.

121 **C-1**, § 7.2.

122 The ABG Consortium accepted the LoI the same day. Agreed Chronology of Events, ##14-15 (citing **C-2**, pp. 935-939).

123 LDA contends that "[t]ypically, as per commercial practice in the ports sector," an LoI is issued during the validity of the Tender, which in this case was for six months (180 days) from the date of opening of the techno-commercial part of the bids. LDA therefore contends that the LoI "was to be issued" to the ABG Consortium by 25 August 2008. While the Tender allowed KoPT to seek extensions to the Tender period, LDA contends that "such extensions must necessarily be reasonable and justified," and in this case KoPT "abuse[d] that provision to request *nine* extensions … totaling 247 days," which was "at complete variance with the normal practice at major ports in India." LDA contends that the delay eventually exposed it to higher exchange rates when it imported the necessary equipment. Further Amended Statement of Claim, ¶¶ 157-159, 165; Reply, ¶¶ 143-145. KoPT responds that nothing in the Tender established any deadline for the issuance of the LoI, and to the contrary, KoPT had the right to reject the Tender at any time before the six-month expiration, which in this case was "repeatedly extended by agreement of the parties." The extension was necessary, KoPT explains, to address certain challenges that were filed by third parties to the tendering process and the economic viability of the project. Counter-Memorial, ¶¶ 119-125.

124 Agreed Chronology of Events, #8 (citing **C-24**, p. 2). The company was later renamed ABG-LDA Bulk Handling Private Limited, and finally assumed its current name. *See* ALBA's documents of incorporation (**C-24**).

Ministry of Finance, seeking permission to issue 49% of ALBA's equity share capital to LDA.[125] The FIPB application referenced ALBA's intention to "bid in projects involving handling of bulk cargo at various ports."[126] On 16 March 2009, the FIPB approved the collaboration between LDA and ALBA, subject to certain terms and conditions.[127] The approval reflected the FIPB's understanding that ALBA would act as an "operating-cum-holding company" to "[e]ngage in the business of bulk cargo handling at various ports in India," under the administrative supervision of the MoS.[128]

122. With respect to the Project at HDC, the LoI that KoPT issued to the ABG Consortium on 29 April 2009 reiterated the Tender requirement that the ABG Consortium form a joint venture company to sign a contract with KoPT and fulfill the relevant work.[129] The next day, 30 April 2009, LDA recognized internally that there was a delicate issue: the contract with KoPT could not be assigned to ALBA, but LDA was not keen to serve as a subcontractor to the ABG companies, rather than as a part-owner of Project rights.[130] On 1 May 2009, LDA noted that the concern was to find a way to accomplish its objective of partial ownership, without "open[ing] a way for each authority to re-examine the case which would considerably delay the deal." This meant that the links among the various companies would "need to be very carefully worded."[131]

123. On 22 May 2009, ABG Infra and ABG Kolkata incorporated HBT as the joint venture vehicle to contract with KoPT.[132] The ABG Consortium provided HBT's Memorandum and Articles of Association to KoPT immediately following HBT's incorporation in May 2009, including a chart dated 12 May 2009 that showed ABG Infra and ABG Kolkata as HBT's only shareholders.[133]

124. On 16 June 2009, LDA's counsel alerted LDA of a debate with ABG Infra regarding whether, for purposes of the Tender's reference to "any change in control / ownership of the successful tenderer …

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[125] Agreed Chronology of Events, #9 (citing **C-498**).

[126] **C-498**, p. 227, ¶ 12.

[127] Agreed Chronology of Events, #12 (citing **C-497**, **C-498**).

[128] **C-497**, ¶¶ 2, 17.

[129] **C-2**, p. 937.

[130] **R-368**.

[131] **R-368**.

[132] Agreed Chronology of Events, #16 (citing **C-88**); HBT's documents of incorporation (**C-25**).

[133] Agreed Chronology of Events, ##17-18 (citing **C-2**, pp. 967, 969).

without prior permission of KoPT" as an event of default,[134] "the reference to 'successful tenderer' is meant to be a reference to ABG Infralogistics (as the 'Lead Member' of the Consortium) or to the Consortium (*i.e.*, the company which ABG Infralogistics and ABG Container Kolkata Terminal are the shareholders)."[135] LDA's counsel noted the risk that "if the Port authority disagrees in the future" with ABG Infra's interpretation – that only a change in *its* control required KoPT's permission, not a change in control or ownership of the proposed joint venture company – "the risk that it will terminate the LOI/license … cannot be excluded." LDA and ABG Infra agreed to address this risk by ensuring that ABG Infra's shareholding of the joint venture would be 51 percent, so "in theory [it] will continue to have control over the Haldia Joint Venture, and in this respect it can be argued that at least the spirit of Clause 7.11(f) … has not been breached." The plan discussed was to have ABG Infra disclose to KoPT "the proposed new composition of the Consortium," including LDA's "minority participation" in the joint venture, but not to ask expressly for KoPT's consent. LDA's counsel believed ABG Infra did *not* intend to disclose that despite the proposed 51%-49% shareholding structure, the joint venture "will not be effectively controlled by ABG Infralogistics … but will be a 'dead-lock' company wherein both shareholders must always be in agreement or the company will be dissolved."[136]

125. Ultimately, the joint venture was structured essentially in this fashion. The constituent steps were as follows. First, on 21 July 2009, ABG Ports, ALBA and LDA executed a Shareholders Agreement,[137] under which LDA and ABG Ports would be allotted newly issued equity shares in ALBA. Two days later, on 23 July 2009, HBT issued equity shares to ALBA,[138] as a result of which ALBA acquired a 63% shareholding in HBT.[139] Because HBT also issued preference shares to ALBA,[140] ALBA effectively became entitled to 98.78% of HBT's profits.[141] On 24 July 2009, LDA acquired a 49% shareholding in ALBA, remitting Rs. 900 million to it as a foreign investment,[142] with ABG Ports retaining the other 51% of ALBA's shares. However, "both parties retain[ed] joint and equal control over the management of

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[134] **C-1**, § 7.11(f).

[135] **R-370**.

[136] **R-370**.

[137] Agreed Chronology of Events, #19 (citing **C-93**, **C-94**).

[138] Agreed Chronology of Events, #20 (citing **C-93**, **C-94**, **C-502**, p. 7, and **C-14**).

[139] Agreed Chronology of Events, #21 (citing **C-25**, p. 33).

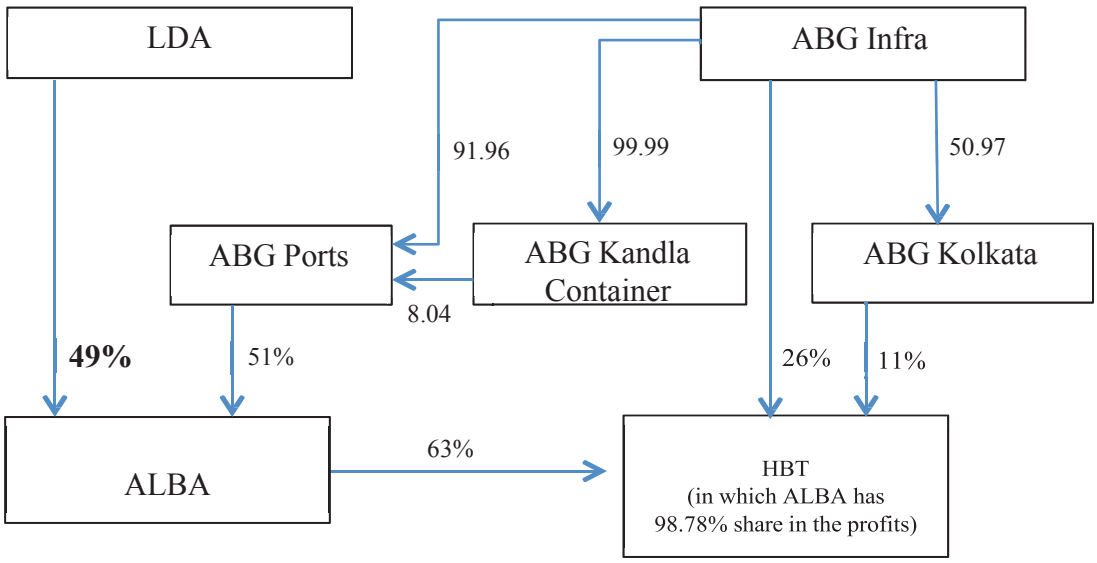
[140] Agreed Chronology of Events, #20 (citing **C-93**, **C-94**, **C-502**, p. 7, and **C-14**).

[141] Preference Share Certificate (**C-94**).

[142] Agreed Chronology of Events, ##22-23 (citing **C-24**, pp. 49-61, and **C-95**).

ALBA," because its Articles of Association ensured that "no shareholders resolution can be passed without the assent of both the shareholders" and both would appoint an equal number of directors to ALBA's Board.[143]

126. LDA illustrates the resulting ownership structure of these companies as follows:[144]



127. On 24 July 2009, the day the transaction closed, ABG Infra announced the deal to the corporate press. One article published on that date announced that LDA had bought a 49% stake in ABG Infra's bulk cargo handling assets, which had been organized into a separate joint venture company, ALBA. The article referenced the approval previously granted by the FIPB.[145] On 4 August 2009, ABG and LDA issued a joint statement about ALBA to "the Press in Kolkata," referring to its plan to provide port services throughout India. The document stated that "[c]urrently ABG is handling Bulk Cargo at three ports" including HDC, and referenced an ALBA proposal for a new project at HDC involving the use of barges.[146]

128. Meanwhile, on 3 August 2009, LDA sent ABG Infra a PowerPoint presentation for use in a planned August 2009 meeting with the Deputy Chairman of the KoPT. The presentation referenced the new "ABG – LDA JV" intended "[t]o build on the synergies of ABG & LDA" for various projects, including

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[143] Maire I, ¶ 14.

[144] Further Amended Statement of Claim, ¶ 131.

[145] **C-534**.

[146] **C-537**.

"[s]tarting Mid October 2009" at Berth Nos. 2 and 8 of HDC.[147] The Parties dispute whether this presentation was ever provided to KoPT.[148]

129. In early September 2009, KoPT requested certain revisions to the "Object Clause" of HBT's Memorandum and Articles of Association, which were made.[149] When HBT provided the revised document to KoPT, however, it still included the 12 May 2009 list of HBT shareholders, without any update to identify the subsequent introduction of ALBA as HBT's new majority shareholder. This version of the Memorandum and Articles of Association was the one included in the Contract signed in October 2009.[150]

D. THE CONTRACT

130. As noted above, the Tender had provided that within 15 days of "the placement of LoI," KoPT was to provide a "proforma for Agreement," and the Agreement itself was to be signed within 45 days from "the date of placement of LoI."[151] The LoI in this case was issued and accepted on 29 April 2009.[152] LDA contends that KoPT did not issue the pro forma agreement until 9 October 2009, a "148-day delay."[153] The Parties disagree as to what caused this delay, with India contending that it was attributable to issues with the Consortium's bank guarantee and the need to revise HBT's founding documents,[154] and LDA disputing this account.[155] The Tribunal does not consider the resolution of this particular factual dispute necessary to its decision.

131. On 16 October 2009, KoPT and HBT entered into the Contract.[156] The Contract incorporated the full text of the Tender, including the provisions quoted in Section VI.A above, as well as various amendments (Appendix 1), additional clauses (Appendix 2), and the "Clarifications to queries made" during the Tender

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[147] **C-536** at 2, 4.

[148] *Cf.* Malhi II, ¶ 7 (contending that the presentation was made); Dutta II, ¶ 55 (stating that he "do[es] not remember any such presentation ever being given" and "did not find any record" of it in KoPT-HDC files).

[149] Agreed Chronology of Events, ##25-28 (citing **C-2**, pp. 1061, 1063-1080, 1085, 1089).

[150] **C-2**, pp. 1091-1111.

[151] **C-1**, § 7.4.

[152] Agreed Chronology of Events, ##14-15 (citing **C-2**, pp. 935-939).

[153] Further Amended Statement of Claim, ¶ 162.

[154] Counter-Memorial, ¶¶ 127-132; Rejoinder, ¶¶ 178-190.

[155] Reply, ¶¶ 160-162.

[156] Agreed Chronology of Events, #30 (citing Contract, **C-2**).

process (Appendix 3).[157] As to the latter, the Contract stated that "[t]he clarifications given in this Appendix against the different clauses of the Tender Document will however not change the clauses concerned which will continue to remain in the form given in the Tender Document."[158] The Contract also included the bid submitted by the ABG Consortium, various correspondence relating to that bid, and a copy of HBT's Memorandum and Articles of Association.[159]

E. EVENTS BETWEEN CONTRACT AND COMMISSIONING

132. As noted above, the Contract (incorporating the terms of the Tender) required HBT to "complete, supply, installation and commissioning of all the equipment" within 180 days of the LoI,[160] which would be reflected by KoPT's issuance of a Commissioning Certificate. However, while the LoI was in place on 29 April 2009, the Commissioning Certificate was not issued until 4 August 2010, due to a series of intervening events.[161] These may be divided conceptually into several categories, although to some extent they occurred concurrently rather than sequentially. First, there were recurring incidents of labor unrest, which resulted *inter alia* in certain obstacles to the delivery of contractually required equipment and in demands that HBT hire more workers than originally envisioned in its business plans. Second, there were renewed questions about HBT's ownership structure. Third, and connected to the prior issues, there was a dispute over the issuance of the Commissioning Certificate, which ultimately resulted in intervention by a domestic court. These categories of events are summarized separately below.

1. Labor Unrest and its Early Manifestations

133. It is undisputed that the Project faced recurring incidents of labor unrest, associated with concerns about worker displacement resulting from the substitution of mechanization for the previous, labor-intensive stevedoring approach to cargo handling, and by the award of the Tender for this mechanization Project to the ABG Consortium and the subsequent signing of a Contract with HBT. The Parties do not dispute that workers in the Haldia area were organized into several powerful unions affiliated with various political parties. LDA describes the main unions as the INTTUC, affiliated with the TMC party and represented by Mr. Suvendu Adhikari, a union leader who also held a seat in Parliament, and the Centre of Indian Trade

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[157] **C-2**, pp. 4-7 (table of contents).

[158] **C-2**, Annexure 2.

[159] **C-2**, pp. 4-7 (table of contents).

[160] **C-2**, § 7.1.

[161] **C-172**.

Unions ("**CITU**"), affiliated with the Communist Party of India (Marxist) ("**CPI**") and led by Mr. Lakshman Seth.[162]

134. It is undisputed that HDC ultimately faced broad employment demands by both these unions, as well as labor protests by workers associated with one or both. LDA contends that the labor protests were "orchestrated" not simply by the unions seeking full employment for their workers, but also by or on behalf of Ripley, the stevedoring company that previously managed cargo handling at the Berths and whose competing bid for the Tender had been unsuccessful.[163] LDA contends that Ripley's owner, known as "Tutu Bose," expressly set out to ensure that "ABG Infralogistics would not be allowed to work in Haldia,"[164] and that he did so both "by orchestrating labour unrest [and] violence" and by using his "considerable influence" with KoPT and Government officials to deny HBT in other ways the benefits of the Contract.[165] LDA's position is that resistance to mechanization by displaced operators and workers was "not unusual and w[as] to be expected," but HBT was entitled to expect greater support from KoPT and "other State bodies."[166] India acknowledges the labor unrest but denies that it was supported either by State bodies or by KoPT (which India also disputes constitutes such a State body).

135. In any event, the Parties agree that the labor concerns manifested very early. On 16 April 2009, shortly before KoPT issued the LoI to the ABG Consortium, representatives of the Haldia Dock Bachao Committee ("**HDBC**"), a group describing itself as including *inter alia* "representative[s] of National Trade Unions and the employees of Haldia Dock,"[167] filed a Writ Petition in the Calcutta High Court challenging the award of the Tender to the ABG Consortium. Among the concerns HDBC articulated in the Writ was that the Tender required use of Mobile Harbor Cranes rather than prevailing cargo handling modes, which was said to reflect KoPT favoritism towards ABG Infra that was not in the broader benefit of the HDC as a whole.[168] While this petition did not in the end prevent KoPT from proceeding with the Contract, it did reflect early opposition to the Project. As discussed below, even before commissioning and the start of operations, this opposition from unions and workers resulted in significant delays to

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[162] Further Amended Statement of Claim, ¶¶ 141, 143, 146, 176.

[163] Further Amended Statement of Claim, ¶¶ 134-137.

[164] Further Amended Statement of Claim, ¶ 137.

[165] Further Amended Statement of Claim, ¶ 139.

[166] Further Amended Statement of Claim, ¶¶ 138-139.

[167] **C-80**, p. 5.

[168] **C-80**, pp. 8, 24.

HBT's delivery of equipment to HDC, and significant demands placed on HDC for wider employment than it originally had planned.

2. Delays and Obstacles to Equipment Delivery

136. Pursuant to the Contract, HBT was to have procured certain specialized cargo-handling equipment for the Project,[169] prior to issuance of the Commissioning Certificate and commencement of operations, which were to occur within 180 days of issuance of the LoI (*i.e.*, late October 2009). During October 2009, KoPT inquired about the status, noting that the six Mobile Harbor Cranes had arrived onsite but other equipment remained outstanding.[170] HBT explained that the delivery of pay loaders and bulldozers had been delayed because the vessel delivering them was unable to enter the Haldia Port, due to a low draft in an access river, which HBT characterized as *force majeure*.[171]

137. By the end of October, HBT reported that "[a]ll of our heavy equipment is there (cranes, wheel loaders, dozers)," and the weighbridges were "ready but because of late in granting the license for installation there will be some delay." However, the dumper trucks, also referred to as tippers, had been "stopped at the main gate of HDC port by port workers and obliged to park outside." HBT stated that "[h]ostility manifested by some categories of port workers is not in our control," but estimated that cargo operations could start around 11 November 2009.[172] On 9 November 2009, KoPT denied that "port workers" were responsible for delays in delivery of the dumpers, and protested continued delays in commissioning of equipment.[173]

138. On 9 December 2009, HBT reported to KoPT that two further attempts at delivery of the dumpers had failed. According to HBT, on 3 December 2009 the "local union" had blocked 25 dumpers at the main gate and "threaten[ed] the drivers who in turn refused to proceed to port."[174] When delivery of twelve

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[169] The list included 6 Mobile Harbor Cranes, 26 pay loaders, 50 dumper trucks, 8 grabs, 2 bulldozers, 2 in-motion weighbridges, and 2 road weighbridges. **C-2**, § 1.2.

[170] *See, e.g.,* **R-7** (referencing prior correspondence).

[171] **C-97**; **C-99**.

[172] **C-101**.

[173] **C-102**.

[174] **C-104**. LDA identifies the 3 December 2009 incident as the first of 18 "Incidents of Violence That HBT's Personnel and Property Were Subjected To," submitted as Appendix I to the Further Amended Statement of Claim. India notes that HBT never reported the 3 December 2009 incident to the police, and accordingly there are no records of it in the police files. *See* S. Jain I, Annex I ("Report on Alleged Incidents of Violence Against HBT's Property and Personnel, December 2009 to October 2012"), entry #1.

dumpers was attempted on 9 December 2009, members of the "local union" again stopped them at the gate, and confiscated the keys of two of the dumpers, with the other ten moved to a yard arranged by ABG. HBT reported to KoPT that that a "Haldia port security officer" had made a record of the incident.[175] On 22 December 2009, HBT informed KoPT that we "are still unable to get entry for the Dumpers inside the Haldia Dock Complex," which constituted a *force majeure* event.[176] On 24 December 2009, KoPT rejected HBT's invocation of *force majeure* for the alleged "obstruction outside the premises" of HDC, and requested copies of any police reports (known as First Information Reports, or "**FIRs**") that HBT had filed "in support of [its] contention," along with any communications to the District Administration requesting "required escort / support / cooperation in enabling you to move your dumpers inside the [HDC] premises."[177] To this point, HBT apparently had not filed any FIRs with the police, but on 29 December 2009 it did so, complaining about obstructions to entry of its dumpers into HDC and requesting that the police "take action to enable us to take the Dumpers inside the Dock Complex."[178]

139. On 2 January 2010, HBT claimed to KoPT that it had "completed the supply, installation and commissioning of all the equipment under the provisions of the contract." The letter noted that one road weighbridge was "expected shortly," and that regarding the 50 dumpers, 37 had been blocked for some time outside the gates, and the remaining 13 would be brought into Haldia only after there was a "resolution to the current impasse on account of labour unrest by blockage/gherao."[179] KoPT forwarded this letter the same day to the District Magistrate, copying the local police, and explained that because "it is in the interest of all concerned to ensure that the [Contract with HBT] commences at the earliest," the authorities were requested to "look into the matter and pass necessary instructions" to enable HBT to bring its dumpers into HDC "without any problem."[180] KoPT also apparently raised the issue with the MoS on 4 January 2010, and on 5 January 2010 KoPT wrote again to the District Magistrate, this time copying the Home Department of the Government of West Bengal, and stated that "the Ministry have taken a very serious note of the above issue and have advised us to take up the matter with the District

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[175] **C-104**. LDA's chart indicates that it first reported the 9 December 2009 incident to the police on 29 December 2009, some three weeks after the event. Further Amended Statement of Claim, Appendix I, entry #2.

[176] **C-106**.

[177] **C-107**.

[178] **C-108**. During the hearing, India's witness Mr. S. Jain testified that he was unable to find a record of police action in response to the 29 December 2009 report of the 9 December 2009 incident. *See* Hearing Transcript, 3 December 2017, pp. 1220-1221 (correcting error in S. Jain I, Annex I, entry #2, which inadvertently had duplicated the entry applicable to a later incident #3 in January 2010).

[179] **C-111**.

[180] **C-109**.

Administration ….”[181] On 7 January 2010, HBT also wrote directly to the District Magistrate, referring to the same 3 December and 9 December 2009 incidents and requesting assistance, because “[a]s a result of the blockade by the labour union … [HBT] is unable to fulfill its contractual obligations as required by the tender….”[182]

140. On 12 January 2010, HBT wrote to the police, requesting “support & necessary protection today” to bring 37 dumpers inside the gates. HBT reported that “[a]t present a group of people have blocked & camped outside the entrance” to the yard where the dumpers were parked, demanding employment by HBT, and “[w]e expect obstruction from them as well as from Union people at the entrance of Haldia port gate.”[183] In response, the police accompanied HBT officers to the yard, but the dumper drivers were delayed in joining them; HBT later reported that by the time the drivers eventually reached the site, the escort police had left, and the drivers were unable to bring the dumpers out of the yard as the exit gate was blocked by “a group of about one hundred people armed with piece of wood.”[184] The police opened an investigation in response to HBT’s report.[185]

141. On 23 January 2010, HBT again invoked *force majeure* in a letter to KoPT, citing as among the reasons it had not yet fulfilled all Contract requirements its inability to bring the dumpers into HDC, despite three separate efforts on 3 December 2009, 9 December 2009 and 12 January 2010.[186]

142. On 8 February 2010, the Additional District Magistrate met with HBT to discuss various issues, including the obstacles to delivery of the dumpers.[187] The Additional District Manager indicated that he would “discuss with the leader of obstructing group to find a solution.”[188]

143. On 16 February 2010, HBT asked KoPT to begin allotting vessels for unloading at the Berths, explaining that its Mobile Harbor Cranes were “ready for operation” and while its dumpers remained blocked, KoPT

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[181] **R-374**.

[182] **C-113**.

[183] **C-114**; *see also* Further Amended Statement of Claim, Appendix I, entry #3.

[184] **C-115**; *see also* **C-118**.

[185] Agreed Chronology of Events, #44 (citing S. Jain I, Annex I, entry #3). India’s evidence is that “the perpetrators could not be identified” by the complainant or through other evidence, and accordingly the investigation eventually was closed. S. Jain I, Annex I, entry #3.

[186] **C-121**.

[187] Agreed Chronology of Events, #51; **C-131**.

[188] **C-131**.

could hire substitute dumpers and recover the costs from HBT.[189] On 5 March 2010, however, KoPT insisted that HBT had not fulfilled its contractual obligations regarding the supply of equipment, and was "still not ready to undertake cargo handling operations ... in the manner provided in the tender document concerned."[190]

144. On 25 March 2010, HBT informed KoPT and the local police of its plan to try again that day to move the 37 dumpers inside HDC. On 26 March 2010, it reported to the police (through an FIR) that upon arrival at the yard, it found that some of the engines had been tampered with. HBT requested that the police provide adequate protection to move the dumpers to a repair yard.[191] The police opened an investigation into this report.[192] On 31 March 2010, HBT informed the police that it would again attempt to move the dumpers on 1 April 2010, but on 7 April 2010 it reported to the District Magistrate that no police were present at the yard, and a group of 25 people obstructed movement of the dumpers and warned HBT employees not to persist.[193] The police opened an investigation,[194] which reportedly led to charges against eight individuals who were granted bail; India's evidence is that "presently the case is sub-judice before the Court and the trial is pending."[195]

145. On 12 April 2010, HBT filed a Writ Petition in the Calcutta High Court, seeking the assistance of the local authorities in moving its dumpers into HDC.[196] In an order dated 21 April 2010, the Calcutta High Court ordered the police to assist HBT in moving the dumpers.[197] The Court stated that "[t]his is the third instance in the recent past where a company caring [sic] on business at Haldia had to approach the Court of Writ for obtaining orders for ensuring normal functioning of its business. In the earlier two cases, it has been reported that after orders were passed by this Court, the same were complied with and normalcy was

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[189] **C-133**.

[190] **C-138**.

[191] **C-143**; Further Amended Statement of Claim, Appendix I, entry #6.

[192] Agreed Chronology of Events, #59 (citing S. Jain I, Annex I, entry #5). India's evidence is that "the perpetrators could not be identified" by the complainant or through other evidence, and accordingly the investigation eventually was closed. S. Jain I, Annex I, entry #5.

[193] **C-148**.

[194] Agreed Chronology of Events, #63 (citing S. Jain I, Annex I, entry #6).

[195] S. Jain I, Annex I, entry #6.

[196] Agreed Chronology of Events, #64 (citing **C-151**).

[197] Agreed Chronology of Events, #65 (citing **C-152**).

restored. It is incomprehensible as to why the administration would force the aggrieved company … to approach the Court …. to obtain orders … to remedy" the grievance.[198]

146. Over two nights between 28 April 2010 and 1 May 2010, HBT moved many of its dumpers into HDC under police protection, although not without incident. HBT reported that the first night, stones were thrown at the dumpers and the police had to intervene to clear the area, making a number of arrests.[199] On 29 April 2010, the police opened an investigation into this attack.[200] HBT thereafter completed the delivery of the remaining dumpers.[201]

3. Demands for Wider Employment

147. The obstruction of the dumpers was simply one manifestation of a bigger issue of labor unrest, another of which was recurring demands for wider employment by workers associated with various unions.

148. With respect to the labor issues, the record indicates that LDA was aware of pressure early on. On 9 December 2009, LDA was sent a press article suggesting public perception that it intended to contract for workers with "private contractors" paying "much less than the stipulated minimum wages," which current workers would oppose. LDA responded internally that this was not its current plan: "Agreement with Labour Contractors will not be finalized because of political problems, we will take all workers on our payroll copying the salary given by Five Star currently Labour Contractor using workers from the main Labour Union of the port (CPI Communist Party of India)."[202]

149. On 27 December 2009, HBT posted a notice for recruitment of all categories of workers, and received "adequate application[s]" in the days that followed, except for insufficient numbers of dumper and bulldozer operators.[203] Then, on 1 January 2010, HBT met with the head of the CITU union, who requested that HBT hire at least 400 CITU workers who had previously been employed by Ripley for shore handling tasks on Berth Nos. 2 and 8, along with 300 workers from the "Cargo pool," which

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[198] **C-152**.

[199] **C-153**; **C-154**. There is no record of any incidents on the second night. **C-155**.

[200] Agreed Chronology of Events, #67 (citing S. Jain I, Annex I, entry #6). The investigation resulted in arrests and trial of 22 people, all of whom were eventually acquitted by the court. S. Jain I, Annex I, entry #6.

[201] Further Amended Statement of Claim, ¶ 181 (stating delivery was completed on 4 May 2010); A.K. Dutta I, ¶¶ 55-56 (stating it was completed on 14 May 2010).

[202] **C-105**.

[203] **C-125**.

traditionally handled shipside operations.[204] It appears HBT did not initially agree to this demand, although it stated in a letter to a *different* union (affiliated with INTTUC) that existing laborers from both Berths were "welcome to apply to us."[205] However, when HBT posted a second recruiting announcement on 7 January 2010, it received "no application … from labours working in Berth 2 & 8." Instead, on 11 January 2010, "labour from Berth No 2 & 8 under CITU union banner … made a deputation in front of our office and submitted a request letter for employment [of] all labour of Berth No 2 & 8 … on the same wage scale earned."[206] The CITU letter explained that its workers had worked for Ripley on the Berths for 20 years, and were "feeling in secured [sic]" now that "tender for both the Berth has gone to ABG." HBT understood the request to re-employ all workers to now be for about 500 people.[207]

150. On 16 January 2010, HBT reportedly "replied to them favourably accepting their conditions and submitted a copy of announcement that will be posted inside HDC for them to apply to us." The announcement posted that day invited requests between 18 and 20 January 2010, but again, "no body from Berth 2 & 8 approached us nor submitted their document with us," while outside applicants who had applied between 1 and 22 January 2010 were "continuously [inquiring] regarding their recruitment."[208] Accordingly, HBT began issuing appointment letters to short-listed candidates, and announced a further recruitment forum beginning 22 January 2010. However, "some workers belonging to local unions collected outside the Training Institute and started shouting and protesting against the recruitment. They threatened to physically attack us and our employees and … burn down our vehicles and equipment unless we immediately stop the recruitment."[209] HBT suspended the recruitment process and requested help from the CISF, who subsequently arrived and escorted HBT employees to safety.[210]

151. On 23 January 2010, HBT reported to KoPT that in addition to the "blockade" of its dumpers, "we are also facing labour boycott to our recruitment process," even though it had already "agreed to a demand of the local union to recruit all those who were presently working" at the Berths. HBT cited this as an

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[204] **C-110**.

[205] **C-125**.

[206] **C-125**.

[207] **C-126**.

[208] **C-125**.

[209] **C-119**; **C-120**; **C-125**; **R-445**.

[210] **C-119**; **R-445**. HBT reported that it also had "sought help from the police on telephone but w[as] advised to come to the police station and register a complaint." *Id.* LDA lists this as the fourth incident of violence included in its claim. *See* Further Amended Statement of Claim, Appendix I, entry #4. India's evidence is that "no such record is available regarding intimation of the incident." S. Jain I, Annex I, entry #4.

additional *force majeure* event excusing its compliance with Contract deadlines for obtaining a Commissioning Certificate.[211] On 25 January 2010, HBT added another *force majeure* claim that at Berth No. 2 (inside HDC), its employees were "threatened by a group of drivers & helpers claiming to be from" Ripley, and its work on the Mobile Harbor Cranes was obstructed by eight dumpers belonging to Ripley.[212] HBT reported the information to CISF, and "CISF force and commander came on site" within ten minutes of the start of the incident, and HBT together "[w]ith Port officials" were able to "control the situation."[213]

152. On 8 February 2010, when HBT met with the Additional District Magistrate to discuss "problems we are facing," it mentioned – in addition to the obstruction to dumpers – the "[o]bstruction in recruitment process," "[e]xorbitant salary demands," and "[t]hreat to our employee & office." HBT reported that to date, the CITU union "has asked us to recruit existing workers abt 540 at a very high wage structure plus 250 labours from cargo pool," but the other union (INTTUC, affiliated with TMC) "has not placed any concrete demands." The Additional District Magistrate indicated that once the District Magistrate returned from leave on 17 February 2010, "he will discuss for a meeting at political level to resolve the issue."[214]

153. LDA's witness Mr. Malhi (who was at the time HBT's Chief Executive Officer) contends that in February 2010, KoPT's then-Manager of Administration (Mr. A.K. Dutta) told him that "the only way in which HBT would be able to resolve the situation is if I agreed to the labour demands of CITU …"[215] Mr. A.K. Dutta denies ever telling Mr. Malhi that HBT had to accept the union demands.[216] In any event, it is clear that HBT and CITU had a number of direct negotiations during February and March 2010.[217] In the end, on 24 March 2010, HBT and CITU signed a Settlement Agreement providing that HBT "will employ not more than 450 employees who are presently working" at the Berths, on a defined wage scale, with the

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[211] **C-121**.

[212] **C-122**; *see also* **C-123** (statement of shift leader regarding incident).

[213] **C-123**. LDA's witness now states that the CISF who came to the site did not assist, and that while a KoPT official did help, this "limited intervention by KoPT was both belated, and highly inadequate." Ghosh I, ¶ 11. LDA includes the incident in its chart of "Incidents of Violence That HBT's Personnel and Property Were Subjected To." *See* Further Amended Statement of Claim, Appendix I, entry #5. There is no claim that the incident was reported to the police, however (*see id.*), and India's police witness (Mr. S. Jain) accordingly does not discuss the incident. *See* S. Jain I, Annex I.

[214] **C-131**.

[215] Malhi I, ¶ 17.

[216] Dutta I, ¶ 67.

[217] Malhi I, ¶ 18.

agreement to become effective only after HBT's dumpers had entered into HDC. All union employees who wished to work at HBT were to report promptly to its office to show documentation of their prior employment and qualifications and to collect a "Joining letter."[218]

154. The agreement with CITU was not, however, the end of HBT's labor problems. On 25 June 2010, Mr. Adhikari – a Member of Parliament and the representative of INTTUC, the TMC-affiliated union – held a rally at the HDC gates. According to a summary prepared by HBT, his remarks seemed designed to "encourage[] existing members of CITU to leave & join" INTTUC instead. Among other things, the speech accused CITU and the local police of helping HBT bring its dumpers into the HDC. Mr. Adhikari reportedly stated that although the equipment had now arrived, it (and HBT more generally) "will never operate …."[219]

155. As of early August 2010, HBT had hired 122 workers directly, and issued "Joining letter[s]" to 203 workers affiliated with CITU. On 2 August 2010, a representative of INTTUC approached HBT and stated that its members had been "instructed by their leader for peaceful deputation in front" of the office. HBT noted that "INTTUC union is the opposition group of CITU in the port," and it was now demanding "recruitment of would be retrenched Ripley workers, also the associated small group of workers under various agencies."[220] Two days later – on 4 August 2010, the same day KoPT finally issued the Commissioning Certificate[221] – the local INTTUC affiliate demanded in writing that HBT employ all prior workers at the Berths, which it stated to be "presently about 1,260 ([Ripley]) & 974 (Cargo Pool) workers."[222] As discussed below in regards to the post-commissioning time period, this would not be the final demand INTTUC presented for hiring of additional workers.

4. Renewed Questions About HBT's Ownership

156. Meanwhile, the issue of HBT's change in ownership structure, from an ABG Consortium-owned company to one majority-owned by ALBA, began to attract attention and generate dispute.

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[218] **C-140**.

[219] **C-157**.

[220] **C-171**.

[221] **C-172**.

[222] **C-173**.

157. As noted above, the HBT Memorandum and Articles of Association incorporated into the Contract signed in October 2009 did not reflect the changes in HBT's ownership that had been effected in July 2009. On 3 February 2010, KoPT requested HBT to clarify the composition of its shareholding.[223] The letter reminded HBT of Section 2.7(b) of the Tender, requiring the minimum shareholding of the lead member of the Consortium, and of Section 7.11(f) of the Contract, concerning an event of default from any unauthorized "change in control / ownership of the successful tenderer." KoPT's letter described HBT as the "successful tenderer" for purposes of the latter provision, and asked it "to indicate … to what extent each of the constituent members of [HBT] holds the paid up Equity Share Capital … and … the extent of shareholding … by others who were not the members of the consortium."[224]

158. On 8 February 2010, LDA noted internally that "[w]e don't have to be too worried about the [Section 2.7(b) inquiry]," because ABG Infra still held the required 26% of shares and "[c]onsequently, we are still fully compliant …." However, LDA recalled its June 2009 debate with ABG Infra regarding which entity could be considered the "successful tenderer," and whether disclosure should be made to KoPT regarding ALBA's purchasing a 63% stake in HBT. LDA wondered internally whether ABG Infra did "finally decide to inform the Port" and whether there was "any letter sent" to KoPT in that regard. It took the position that, in any event, "there is no change of control/ownership," because even if the tenderer was deemed to be HBT rather than ABG Infra, ABG Infra still ultimately controlled HBT through a combination of its *direct* stake (26% of HBT's shares), and its *indirect* stake (by owning 51% of both ALBA and ABG Kolkata, which in turn owned 63% and 11% of HBT, respectively).[225]

159. Following this internal consultation, HBT responded to KoPT's inquiry on 12 February 2010, clarifying that HBT was not itself the "successful tenderer," but rather was the "joint venture company incorporated by the 'successful tenderer' viz ABG Infralogistics …." HBT referred back to the LoI, which was addressed to ABG Infra as lead member of the Consortium, and observed that HBT itself was "not in existence on the date the Tender Document was submitted or on the date of issuance of the LoI." HBT confirmed that "[t]here is no change in control/ ownership of ABG Infra," and "[i]n so far as [HBT] is concerned, we state that the same continues to be controlled by ABG Infra …." It explained that while HBT had issued "fresh capital" in accordance with its Memorandum and Articles of Association, resulting in ABG Infra's direct stake being reduced from 89% to 26% and ALBA obtaining a 63% shareholding,

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[223] Agreed Chronology of Events, #50 (citing **R-9**).

[224] **R-9**.

[225] **R-370**.

"both ABG Kolkata and [ALBA] are subsidiaries of ABG Infra."[226] As India points out in this case,[227] this assertion about ALBA being an ABG Infra "*subsidiary*" may have been technically accurate by virtue of ABG Infra's 51% shareholding, but did not reflect LDA's effective joint control by virtue of having an equal number of Board members as ABG Infra.[228]

160. On 15 March 2010, KoPT's Manager of Finance issued a report about the change in the shareholding pattern of HBT and recommended seeking an opinion from a legal advisor.[229] KoPT thereafter referred HBT's 23 February 2010 letter, along with other information, to the Additional Solicitor General of India, and asked (among other things) whether ABG Infra was in breach of Section 7.11(f) of the Contract as a result of the change in shareholding in HBT.[230] On 12 May 2010, the Additional Solicitor General opined that "[t]he 'change in control/ownership' … contemplated as an event of default is '… of the successful tenderer' and therefore at least not expressly of" the special purpose vehicle to be established upon award of the Tender.[231] However, he continued:

> To me, it appears, change in the shareholding of the SPV is also contemplated as being governed by Clause 7.11(f), in view of the fact that the execution of the tender has to be done by the instrumentality of the SPV.
>
> To conclude, therefore, the express language of Clause 7.11(f) does include a change in control/ownership of the SPV but merely of the successful tenderer, i.e., the ABG Group Group. But in my view, on a meaningful reading of Clause 7.11(f), it can reasonably be contended that a change in control or ownership of the instrumentality by which the successful tenderer is to execute the project would also be covered by the said Clause as an event of default. The query is answered accordingly.[232]

161. Also on 21 May 2010, Ripley wrote to KoPT, raising numerous objections regarding HBT's performance of its obligations under the Tender and the Contract. Among these objections were that "[t]he ABG Consortium has entered into the contract in gross violation of the Tender Documents."[233] Among other things, in Ripley's view, under the Tender rules "[c]hange in the composition of a consortium was permitted only during the bidding stage and that too at the sole discretion of KOPT. … The Joint Venture

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[226] **R-10**.

[227] *See, e.g.,* Counter-Memorial, ¶¶ 157, 521, 579.

[228] *See, e.g.,* Counter-Memorial, ¶¶ 157, 521, 579.

[229] Agreed Chronology of Events, #56 (citing **AD-24**).

[230] **AD-25**, ¶ 8.A.ii.

[231] **AD-25**, ¶ 15.ii.

[232] **AD-25**, ¶¶ 16, 17.

[233] **C-546**, ¶ 3.

Company for implementing the Project would be formed only after completion of the bidding stage. Hence, the Joint Venture Company could comprise only of the consortium members as its shareholders."[234] However, Ripley stated, "[w]e have obtained particulars from Office of the Registrar of Companies which will clearly show that ABG has violated express and specific conditions of the Tender Documents relating to change in the composition of the consortium and control / ownership of the entity awarded the contract."[235] Ripley identified the introduction of ALBA into HBT's ownership and LDA's role in ALBA, and accused the ABG Consortium of "surreptitiously and by subterfuge induct[ing] two additional members into the Consortium after completion of the bidding stage and prior to signing the agreement with KoPT. … If no approval was obtained, such induction … is highly unethical and illegal in terms of the tender documents."[236] Ripley also noted the issuance of preference shares to LDA, which it described as "a way of assigning the contract to a party who was not a member of the Consortium at all."[237] Ripley urged that "KoPT being a government authority should neither encourage nor accept such practice and on the contrary take stern action against such fraud."[238]

162. On 17 June 2010, KoPT requested a second opinion from the Additional Solicitor General, asking whether the change in shareholding "may be treated as fraudulent representation by ABG and on this ground whether the contract is liable to be considered for termination."[239] He noted that neither ABG Infra nor HBT brought to KoPT's attention the introduction of ALBA as a third shareholder in HBT, and that when ABG Infra was forced to admit to the change in response to KoPT's specific inquiry, "[i]t was also mentioned that the new shareholder was a 'sister concern.'"[240] The Additional Solicitor General considered that the failure to disclose the change in shareholding did "amount[] to a conduct of misrepresentation," but ultimately concluded that it was not necessarily a "fraudulent misrepresentation": "[t]he answer to this would depend in part on whether the new shareholder is in fact a 'sister concern' of the existing shareholders/the original tenderer, and also on whether as a result of this induction any detriment was caused to" KoPT, "neither of which is a conclusion completely free from doubt."[241] He

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[234] **C-546**, ¶ 3(l), (m).

[235] **C-546**, ¶ 3(p).

[236] **C-546**, ¶ 3(q).

[237] **C-546**, ¶ 3(r).

[238] **C-546**, ¶ 3(t).

[239] **AD-26**, ¶ 2.

[240] **AD-26**, ¶ 3(iii), (iv).

[241] **AD-26**, ¶¶ 4-12.

added that KoPT might also wish to consider whether it was in its "commercial best interests" to terminate the Contract, even if it had grounds to do so.[242]

5. The Issuance of the Commissioning Certificate

163. While all of these issues were pending, the question arose whether KoPT should proceed to issue HBT with a Commissioning Certificate (as it repeatedly requested), or whether it should refuse to do so on various grounds.

164. As noted above, on 2 January 2010 HBT had claimed it had "completed the supply, installation and commissioning" of all required equipment, except the dumpers obstructed by local unions and a single road weighbridge.[243] On 23 January 2010, HBT asked KoPT to now issue a Commissioning Certificate. HBT acknowledged that it had not fulfilled all the Tender requirements, but sought an extension to do so in light of the continuing obstruction of the dumpers and its recruiting efforts, which it contended were *force majeure* events.[244]

165. On 25 January 2010, KoPT issued a "Show Cause Notice" requiring HBT to demonstrate why the Contract should not be terminated for default. KoPT recalled that under the Tender, equipment was to be ready for commissioning within 180 days of the LoI, which was 25 October 2009, and that delays exceeding 90 days (*i.e.*, after 23 January 2010) would be grounds for termination. KoPT noted that in addition to delay installing dumpers and weighbridges, HBT had not provided necessary details regarding deployment of manpower, all of which were defaults "for which they are entirely responsible."[245] HBT responded in detail on 9 February 2010, explaining why it should not be considered in default of its obligations, and stating that KoPT, "rather than facilitating the smooth implementation of the project ... has been delaying, hindering and coming in the way of smooth implementation …." HBT contended that "but for the complete failure in maintaining the law and order situation within the Port, the operations would have commenced by now …"[246]

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[242] **AD-26**, ¶ 13.

[243] **C-111**.

[244] **C-121**.

[245] **C-124**.

[246] **C-132**.

166. On 12 February 2010, in the context of responding to KoPT's inquiry regarding HBT's current shareholders, HBT reiterated that it "[wa]s ready to commence operations of the different cargo handling equipment" at the Berths.[247] On 16 February 2010, HBT requested KoPT to allot vessels to the Berths, since its Mobile Harbor Cranes "[we]re ready for operation" and the absence of its dumpers could be overcome by KoPT hiring its own dumpers at HBT's expense.[248] On 5 March 2010, KoPT responded that HBT was "still not ready to undertake cargo handling operations … in the manner provided in the tender document … "[249]

167. KoPT presented a series of questions about this impasse to India's Additional Solicitor General, in addition to posing the questions discussed above about the change in HBT's shareholding. Among other things, KoPT requested legal advice on whether HBT was in breach of the Contract by not having complied with the Commissioning Schedule, or whether it could appropriately invoke *force majeure* because of the dumper situation.[250] The Additional Solicitor General observed as a practical matter that the dumper situation had now been resolved after obtaining orders of assistance from the Court.[251] "From a pragmatic commercial viewpoint, the situation which emerges is that there appears to be a default by the ABG Group in meeting the timelines of the tender conditions, but at the same time, the valuable machinery and equipment have been brought in … and there is every likelihood that the same will be commissioned. This installation of equipment and machinery was within the permission and is in the knowledge of [KoPT]."[252] The Additional Solicitor General suggested that rather than terminating the Contract which could result in protracted disputes, the KoPT instead could direct prompt performance while demanding liquidated damages for the past delay, which would be "the preferred ideal solution from a commercial viewpoint."[253] He concluded that "in matters of this nature, notwithstanding the fact that the [KoPT] is an instrumentality of the State, it is always advisable to … take steps which are commercially prudent," rather than a "literal approach based on a purely technical and pedantic interpretation of the

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[247] **R-10**.

[248] **C-133**.

[249] **C-138.**

[250] **AD-25**, ¶ 8 A.(i).

[251] **AD-25**, ¶ 9.2.

[252] **AD-25**, ¶ 9.7.

[253] **AD-25**, ¶¶ 11-13.

contract [which] would only result in a protracted litigation which may not be in the best interests of [KoPT]."[254]

168. On 17 May 2010, HBT advised that it had now completed commissioning of the outstanding road weighbridges, which meant that it had now commissioned all the required equipment, and had arranged for recruitment of over 300 workmen to carry out the contract. It reiterated its request for the Commissioning Certificate and that KoPT allot vessels so it could commence cargo operations.[255]

169. On 29 June 2010, HBT filed a Writ Petition in the Calcutta High Court, seeking the Court's intervention for directions to KoPT to issue the Commissioning Certificate.[256] On 2 July 2010, the Calcutta High Court directed the MoS to decide on the issue of the Commissioning Certificate within 7 days.[257] With respect to HBT's claim that its delay in commissioning should be excused by *force majeure*, the Court noted that its case "cannot be brushed aside altogether," given the KoPT's own prior request to the District Magistrate (on 2 January 2010) for assistance to HBT regarding the dumpers, and HBT's prior resort to the Court for an order of police protection. The Court also noted that "public interest is intimately associated with the execution of the works," so the central government should be asked "to examine the whole matter and decide whether it should give a specific direction to [KoPT] to issue the required commissioning certificate."[258]

170. On 7 July 2010, Ripley wrote to the MoS, requesting an opportunity to be heard on the issue of the Commissioning Certificate.[259]

171. On 20 July 2010, HBT filed a second Writ Petition in the Calcutta High Court, seeking the Court's intervention for directions to KoPT to issue the Commissioning Certificate, in the absence of any decision to date by the MoS. The MoS requested an extension, which the Court granted.[260] On 26 July 2010, the MoS held a hearing on the issue, and HBT followed up with a letter to the MoS, confirming its

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[254] **AD-25**, ¶¶ 35-36.

[255] **R-110**.

[256] Agreed Chronology of Events, #76 (citing **C-158**).

[257] Agreed Chronology of Events, #77 (citing **C-158**).

[258] **C-158**.

[259] **C-548**.

[260] **C-159**.

"unconditional acceptance to any/all requirements as may be stipulated by the MoS for the smooth implementation of the Project."[261]

172. On 28 July 2010, the MoS directed KoPT to issue a Commissioning Certificate to HBT. It concluded *inter alia* that notwithstanding "inordinate delays" in signing the LoI and the Contract, the mechanization project at the Berths would increase efficiency in operations; the "entire machinery is now within the port premises"; HBT provided assurances that it could start operations immediately; and the State Government of West Bengal considered that the "public interest" should be factored into the decision.[262] The MoS also noted "that the issue of induction of a third partner was clarified by [HBT] that it is permissible under … the contract."[263] It concluded that the "ends of justice would be met in this case if KOPT issues the Commissioning Certificate to the successful tenderer … immediately so that they can start the work immediately."[264]

173. KoPT issued the Commissioning Certificate on 4 August 2010.[265] On 9 September 2010, KoPT began notifying existing end users of the availability of HBT's Berths,[266] and on 11-12 September 2010, HBT commenced operations at the Berths.[267] On 16 September 2010, KoPT issued a "Circular" about HBT's commencement of operations.[268]

F. OPERATIONS FROM FALL 2010 THROUGH MID-2012

174. The difficulties with the Project did not abate with the issuance of the Commissioning Certificate and the start of operations. As summarized below, HBT continued to encounter pressure to hire additional workers, and to experience labor issues that impacted its rate of productivity. Other issues impacted its productivity, including disputes over the adequacy of storage facilities and over responsibility for loading

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[261] **C-162**.

[262] **C-163**, ¶ 5.

[263] **C-163**, ¶ 5. The Parties dispute whether this constituted an MoS endorsement or simply an acknowledgment of HBT's interpretation.

[264] **C-163**, ¶ 6.

[265] **C-172**. LDA contends that this imposed additional conditions on HBT beyond those required under the Contract. Further Amended Statement of Claim, ¶ 195. On 3 September 2010 it reported to KoPT that it had met these requirements, which included expanding the resting pads for the Mobile Harbor Cranes, confirming its employment of required manpower, and submission of indemnity bonds. **C-179**.

[266] **AM-11**.

[267] Agreed Chronology of Events, #87 (citing Further Amended Statement of Claim, ¶ 196).

[268] **AM-10** (*bis*).

and unloading "railway rakes." KoPT cited the productivity issues as the basis for imposing penalties and liquidated damages, which resulted in recurring disputes about HBT's invoices. HBT requested a reduction in its required productivity level (the MLP) on account of various obstacles, and also requested additional cargo allocation, complaining that the combination of low cargo allocation and excess labor costs was imposing significant losses. These events combined for an unhappy, if nonetheless functional, window of operations.

1. Continuing Labor Issues

175. As discussed above, on 4 August 2010, the very day KoPT issued the Commissioning Certificate, an INTTUC-affiliated union demanded that HBT employ all prior workers at the Berths, which it stated to be "presently about 1,260 ([Ripley]) & 974 (Cargo Pool) workers."[269] By this time, HBT already had hired between 325 and 350 workers, including as a result of its March 2010 agreement with the CITU union.[270]

176. In its 4 August 2010 letter, the INTTUC union stated that if its demands were met, "we also assure you to extend our co-operation … for smooth handing over of the process of re-employment …." The letter intimated, however, that a failure to comply could have consequences: "We trust, you will not take any decision which leads to labour unrest and jeopardize the whole process."[271] It appears that HBT met with INTTUC leaders on 28 August 2010, and according to a later INTTUC letter may have provided certain assurances, which INTTUC characterized as "that our union members will be absorbed at an earliest convenient [sic]" on the basis of a list names to be provided by INTTUC.[272] On 29 August 2010, the union forwarded an initial list of nine "token name of candidates for immediate employment," "to have a footing/entry directly in your working zone … without disturbing your operational network, planning, progress etc."[273] On 1 September 2010, the union followed up with a list of 713 employees said to have been working under Ripley on Berth Nos. 2 and 8.[274]

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269 **C-173**.

270 **C-163** (28 July 2010 MoS order recording HBT's report of 350 employees); **C-171** (3 August 2010 HBT e-mail reflecting 325 workers).

271 **C-173**.

272 **C-187**.

273 **C-175**.

274 **C-176**.

177. The next day, HBT met with the INTTUC group, in the presence of Mr. Adhikari, who was both the local representative of INTTUC and a Member of Parliament. As reflected in HBT's follow-up letter to the union of 3 September 2010, it explained during the meeting that it already had employed 203 of the former Berth employees, but it also agreed to reinstate "the remaining legitimate employees (about 510) … retrenched by [Ripley] that have the requisite qualifications and experience." HBT sent a copy of its letter not only to Mr. Adhikari but also to the then-Chairman of KoPT, Mr. Meena.[275]

178. LDA contends that the reason HBT copied KoPT on this letter was that Mr. Meena had previously intervened to direct it to accommodate the INTTUC demands. According to Mr. Agarwal (the Managing Director of ABG Infra), "in early September 2010" Mr. Meena had told him by phone that Mr. Adhikari would provide HBT with a list of INTTUC workers "who had to be unquestioningly taken on its rolls, regardless of qualification or necessity."[276] Mr. Meena denies having done so, stating that "[n]either I nor any of KoPT officer working under my supervision ever instructed or demanded HBT to employ any workers" or that HBT "had to accept employment demands by Mr. Adhikari."[277]

179. On 8 September 2010, INTTUC submitted a list of 460 workers, pursuant to what it contended was HBT's prior assurance at the 28 August 2010 meeting "that our union members will be absorbed at an earliest convenient [sic] on the basis of the name list."[278]

180. On 9 September 2010, ALBA's Operations Manager reported internally that while "Haldia is about to start finally" and "this will surely [be] a good news for the bankers," there remained significant "[m]anning problems." These were summarized as follows. First, HBT was caught "between two union equally important (CITU and TMS Trinamul Congress) where the workers are playing between the two to get job and salary increment." The result was that "we will have to employ more people than scheduled and we will have to pay them more." In addition, "[t]he cleaning of holds/wagon, wagon trimming and labelling will need about 300 peoples. This job is in Haldia the private garden from Cargo Pool and will fight to keep it."[279]

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[275] **C-176**.

[276] Agarwal I, ¶ 104; *see also* Malhi I, ¶ 38 (stating that Mr. Agarwal had informed him of such a call from Mr. Meena "[a]round the last week of August 2010").

[277] Meena I, ¶ 12.

[278] **C-187**.

[279] **C-178**.

181. On 15 September 2010, the local INTTUC-affiliate submitted a list of 39 further names.[280] On 18 September 2010, it wrote to complain that HBT had not indicated how it would handle their recruitment, and warned that if there was no response in two days, "we will go on agitation (Gharao Karma Suchi,[281] Abasthan), Relay Strike, Hunger Strike beyond [HBT] office and inside the Dock Complex and we will be compelled to ask our union workers to go slow in work" at Berth Nos. 2 and 8. The letter stated that it was "our last Ultimatum."[282]

182. Meanwhile, HBT was also facing separate demands from the Five Star Shipping Agency ("**Five Star**"), an agency representing a group of workers who provided on-board cargo services (sometimes referred to as the "cargo pool"). LDA alleges that on 11 September 2010, workers from Five Star obstructed HBT's operations and demanded that HBT engage their services; it contends that the KoPT Chairman then "intervened at the scene and prevented the cargo pool from obstructing HBT's operations by removing the cargo pool labourers with the assistance of the CISF."[283] An internal LDA e-mail from 12 September 2010 indicated that the next day, HBT's CEO (Mr. Malhi) left for Haldia "to negotiate and resolve the Cargo Pool issue."[284] Accounts of the genesis of the September 2010 meeting with Five Star differ, with ABG Infra's Managing Director Mr. Agarwal contending that the KoPT Chairman (Mr. Meena) told him by phone that "HBT was also to engage the services" of Five Star,[285] and Mr. Meena denying that he "[]ever asked – let alone compelled – [HBT] to hire the services" of Five Star,[286] or even "invited the attendants to the meeting …, let alone … 'orchestrated' [it], as LDA alleges."[287] In any event, it seems clear that both Mr. Meena and the INTTUC representative and Member of Parliament Mr. Adhikari were present at the meeting between HBT and Five Star.[288] Mr. Malhi contends that during the meeting, Five

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[280] **C-186**.

[281] A "gherao" generally denotes the surrounding of a building until labor demands are met. *See* https://en.wikipedia.org/wiki/Gherao.

[282] **C-187**.

[283] Malhi I, ¶¶ 43-44 (reciting information conveyed to him by another HBT official, Capt. Chatterjee).

[284] **C-182**.

[285] Agarwal I, ¶¶ 106-107; *see also* Malhi I, ¶¶ 44-46 (testifying that "Mr. Agarwal informed me that Mr. Meena had spoken with him and informed him that if HBT intended to operate smoothly in the long term, it would not be possible to do so without engaging the services of the cargo pool," and characterizes this message as an "insistence" that the cargo pool be engaged).

[286] Meena I, ¶ 13.

[287] Meena II, ¶ 5.

[288] *See* **C-185** (HBT e-mail of 14 September 2010 stating that "[a] meeting is scheduled this afternoon … with the Member of Parliament (Haldia area) & the Chairman of KoPT to resolve the outstanding 'Cargo Pool' issue"); **C-198** (Five Star e-

Star pushed for a flat monthly fee and HBT insisted instead on a per-tonne fee related to cargo volume, and that Mr. Meena then "assured" Mr. Malhi of certain minimum cargo volumes for HBT (discussed *infra*) that would bring a per-tonne fee for Five Star close to the monthly fee level it had sought.[289] HBT contends that on this basis, it agreed to employ Five Star's services.[290] Mr. Meena denies any cargo allocation promises,[291] and contends that his presence in the meeting was not unusual and in no way constituted a compulsion on HBT to hire Five Star.[292] A 14 January 2011 e-mail from Five Star contends that HBT agreed during the meeting to hire Five Star for an initial two-month period with a monthly fee, pending a "permanent agreement based on actual facts & figure," in return for which "Five Star will resolve all labour related issues."[293]

183. By February 2011, HBT's internal profitability analysis reported that it had completed its "Manning" recruitment "after tough negotiations with Labor Unions amid Political Turmoil," and it would be difficult to reduce manning levels before the May 2011 elections, but after the elections, "in confidence with winning party," it would "attempt to reduce manning levels." HBT also reported that it was having to pay for additional "Contracted Labor" which was "[u]nexpected & not a part of the [Business Plan]," but the "[l]ocal labor situation warranted engagement." The specific price terms had not yet been finalized with the cargo pool contractor (Five Star).[294] That lack of clarity about the terms of Five Star's engagement continued to generate disputes, with Five Star contending on 24 March 2011 that HBT was withholding full payment due to it and "stopp[ing] operations" as a result.[295] HBT's invoice dispute with Five Star continued into 2012, with KoPT taking the position (in response to an HBT letter) that contractually HBT

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mail of 14 January 2011, describing a meeting the first week of September 2010 as having been "chaired by Chairman KoPT – Mr. Meena" and attended by Mr. Adhikari).

289 Malhi I, ¶¶ 47-48.

290 Malhi I, ¶ 48.

291 Meena I, ¶ 15; Meena II, ¶¶ 7-8. Mr. Meena's denial of having provided minimum cargo assurances to HBT is also reflected in a KoPT Board Resolution two years later, in September 2012, which records a statement by the then-Chairman of KoPT (Mr. M. Jain) that "the ex-Chairman was spoken to and he had communicated that no such assurance was given" to HBT. **MM-1**.

292 Meena II, ¶ 4 (stating that he "often participated or chaired meetings between contractors, sub-contractors and their workforce in the broader interest of the Port and upon their invitation," and "[t]herefore, the fact that I was present in the meeting [between HBT and Five Star] does not somehow lend credibility to LDA's allegation that I 'asked/compelled HBT to hire the services of Five Star.'").

293 **C-198**; *see also* **C-203** (24 March 2011 e-mail from Five Star, describing this as a "verbal order to start" and as a "gentleman agreement made in presence of the dignitaries.").

294 **C-550**, Slide 3.

295 **C-203**.

bore the "entire responsibility" for any financial obligations and disputes with respect to any subcontractors.[296]

184. As early as August 2011, HBT began considering internally the possibility of retrenching excess workers, indicating to an outside legal advisor that it presently had 628 employees and wished to retrench approximately 100 of them. On 25 August 2011, the legal advisor advised that "labourers can be retrenched either upon one month[']s notice in writing or payment of compensation in lieu of notice," and recommended that "[t]he advisable procedure" was to terminate workers "without prior notice and upon payment of adequate compensation." The legal advisor acknowledged that termination of workers could result in "industrial disputes" which might end up in Labour Court, or in "agitation in the premises" for which HBT could "inform the local police authorities or even file a criminal complaint."[297]

2. Shore Handling Issues, the Request for MLP Reduction, and Invoice Disputes

185. HBT's period of operations was plagued by other disputes with KoPT. On 13 October 2010, roughly one month after commencing operations, HBT requested a reduction in the MLP rate from 20,000 to 14,000 metric tons ("**MT**") per ship berth day, invoking certain "factors, which are beyond our control, [which] are adversely affecting our productivity." HBT cited: (a) the arrival condition of vessels, including the fact that some cargo had been offloaded at a prior port due to the "the declining draft in the navigable channel to Haldia" and the remaining cargo was "not spread out evenly" in accordance with "the normal practice of good stevedoring"; (b) "the supporting infrastructure inside HDC [which] is not conducive and is not geared towards achieving" the MLP, including poor roads, lighting, and stockyard area and layout; (c) the lack of railway rakes, requiring HBT to use payloaders over long distances; and (d) poor "[w]ork culture & habits" of the available workforce, whose "mindset has been moulded and hardened to a specific style of working" and who were "vehemently opposed" to change.[298]

186. HBT's internal profitability analysis from February 2011, just a few months after beginning operations, confirmed that it was struggling to achieve the MLP, and noted that productivity was "affected by Human factor & [Vessel's] arrival condition." As to the former, HBT reported "[f]requent disruptions by our Unionized labor and contracted labor for higher salary." HBT recognized it would need to "[e]nsure MLP

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296 **C-224**.

297 **C-217**, pp. 5, 8, 9.

298 **C-190**.

is exceeded on each vessel (easier said than done)."[299] Other factors also contributed to HBT's continuing struggle to meet efficiency metrics. On 28 May 2011, HBT forwarded KoPT a presentation on "Infrastructure Constraints affecting the productivity of Operations" at Berth Nos. 2 and 8, which complained *inter alia* about the dimensions and location of its dedicated storage facilities, and stated that "with given infrastructure even though vessel is able to discharge" cargo at the MLP rates, "leftover cargo … will still remain on jetty for evacuation."[300] It provided a "[c]alculation for Ideal condition" to evacuate cargo at the MLP rate, although its own calculations under these conditions still showed a small "[b]alance quantity" of cargo that could not be shifted within the 24 hours.[301]

187. The storage constraints continued to be an issue, with HBT advising on 13 July 2011 that its evacuation of cargo from the jetty following unloading of one vessel had been "severely affected due space constrain[t] in the yard," resulting in HBT's request that KoPT not assign the next vessel for unloading "till such time the cargo on the jetty is fully evacuated or substantial space is available on the jetty for discharge of cargo."[302] KoPT's position was that "[p]oor evacuation owing to dearth of space at storage yard, as alleged by you is not acceptable," particularly as additional stacking space already had been allotted; KoPT alleged that the real problem was "improper stacking of cargo at concerned storage yard by you."[303]

188. Additional operational issues also cropped up during 2011. In April 2011, there was a dispute over responsibility for unloading export cargo from railway rakes. HBT took the position that this was not within its contractual scope, and the relevant equipment was not included in the Contract list of "[m]inimum number of equipment" to be supplied and operated. KoPT disagreed with HBT's reading of the Contract.[304] There were also recurring complaints about the functioning of HBT's weighbridges, with KoPT repeatedly requesting corrective action between July and November 2011.[305] HBT's December 2011 notice to its supplier confirmed the "repeated failure & malfunctioning" of the weighbridge

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[299] **C-550**, Slide 2.

[300] **C-208**. India notes that on several occasions in 2011, HBT's own records show unloading or loading operations being stopped due to large back-ups of cargo on the jetty. *See, e.g.,* **R-256**, p. 126 ("operation stopped … due to high heap at Jetty" on 1 January 2011); **R-266**, p. 41 (operation "stopped by port due to huge cargo on jetty").

[301] **C-208**.

[302] **SR-14**.

[303] **SR-15**.

[304] **R-259**.

[305] **R-23**; **R-24**; **R-25**; **R-27**; **R-28**; **R-29**; **R-30**; **R-31**.

equipment and blamed the equipment failure for its loss of 60,000 MT of monthly cargo.[306] KoPT again complained about the weighbridges in December 2011 and January and April 2012.[307]

189. HBT's inability to meet MLP targets, for all of these reasons, resulted in a recurring dispute about HBT's invoices and KoPT's payments. On 30 May 2011, HBT asked KoPT for a meeting under the Contract's amicable dispute settlement clause, to discuss several outstanding issues, including a dispute about KoPT's deduction of liquidated damages, and HBT's complaint that infrastructure issues, including the poor arrival condition of the cargo, were impeding optimization of its operations.[308] On 8 June 2011, HBT appealed to the MoS for support, indicating that KoPT had not responded to its request for an amicable settlement meeting.[309] Ten days later, on 18 June 2011, HBT again requested the MoS to intervene and direct KoPT to reverse invoice deductions and make payments.[310] On 24 June 2011, HBT filed a Writ Petition in the Calcutta High Court against the deductions made by KoPT from its invoices and to recover payments.[311] The petition was withdrawn in light of a settlement meeting held on 12 July 2011,[312] during which HBT repeated its concerns about the invoice issues, and again requested a reduction in the MLP "due to inadequate infrastructural support." KoPT declined HBT's requests, stating as to the latter that HBT "was aware of the infrastructural situation of the two berths while bidding for the contract and inspected the area in terms of clause 3.1 of the contract, hence there was no point in raising the issue now." KoPT also again insisted that HBT was responsible for unloading of export cargo from the railway rakes.[313] In the absence of a negotiated resolution, HBT filed another Writ Petition on 29 August 2011, seeking rulings on the payment issue and also demanding Central Government supervision and direction to KoPT, to ensure appropriate implementation of the Project.[314] On 15 December 2011, the MoS belatedly responded to HBT's 8 June 2011 and 18 June 2011 letters about the invoice disputes, "regret[ing] that instructions to KoPT under Rule 111 of the Major Port Trust Act, 1963 cannot be issued

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306 **C-555**.

307 **R-32**; **R-34**; **R-35**; **R-36**; **R-37**.

308 **C-209**, pp. 1-2.

309 **C-210**.

310 **C-211**.

311 **C-212**.

312 Agreed Chronology of Events, #98 (citing Further Amended Statement of Claim, ¶ 235).

313 **R-26**.

314 **C-218**.

as the dispute between [HBT] and KoPT is that of a commercial nature involving contractual commitments."[315]

190. The payment dispute continued to fester, however, with HBT on 23 April 2012 demanding "immediate and complete payment of outstanding dues," including reversal by KoPT of various penalties and liquidated damages deductions that HBT challenged. It reminded KoPT that "the rates quoted by us are the lowest in the country," and stated that "we were forced by the labour unions to hire a large number of surplus employees prior to the start of our operations." It stated that together with declining volumes of cargo handled, the excess labor resulted in HBT's "incurring huge losses in running our operations," which were compounded by the outstanding invoice amounts. HBT stated that it had "now reached a critical situation where we no longer have funds to purchase fuel, pay salaries and carry out maintenance of our equipment or to make any payments to our sub-contractors."[316]

3. Cargo Allocation to HBT

191. The record also reflects that KoPT's allocation of cargo to the Berths during the operational period from fall 2010 through mid-2012 was well below the volumes that LDA states it had anticipated, at the time of its bid, in order to offset the low margins from its very low bid price.

192. As noted above, LDA contends that in September 2010, KoPT's Chairman Mr. Meena promised that in return for hiring the Five Star cargo pool, KoPT would allocate HBT at least 900,000 MT of cargo per month, amounting to 10.8 MMT per year.[317] Mr. Meena denies any such promise, noting that the Contract guarantees no minimum cargo amount, that he "had no reason whatsoever" to make such a commitment in violation of the Contract terms, and "[i]ndeed, I could never have done so" because "[t]he assignment of ships to berths rests primarily on user preferences … and I could never have promised to unilaterally override them."[318] India also contends that LDA's claim of a KoPT promise is inconsistent with the absence of any written complaints from HBT to KoPT, prior to March 2012, about receiving insufficient cargo.[319]

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[315] **C-223**.

[316] **C-227**.

[317] Agarwal I, ¶ 107 (stating that Mr. Meena provided these assurances to him by phone); Malhi I, ¶ 48 (stating that Mr. Meena provided these assurances during the 14 September 2010 meeting with Five Star).

[318] Meena I, ¶ 15.

[319] Counter-Memorial ¶ 206.

193. Whatever the state of HBT's communications with KoPT, it is clear that *internally*, the company was worried early on about cargo levels. HBT's internal profitability analysis from February 2011 observed that its "[b]reak even" rate was expected to be 600,000 MT per month, and notwithstanding the assurance of 900,000 MT per month that HBT believed it had received from KoPT's Chairman, actual volumes were around 400,000 MT per month. HBT's proposed solutions included to "[i]mprove relations with KoPT," to "[s]tart handling export Cargo (presently handling only import cargo), KoPT's concurrence required," and to "[c]onvince KoPT to allow use" of a third Mobile Harbor Crane."[320]

194. LDA contends that the issue of inadequate cargo allocation (along with the pending invoice disputes) was raised at a meeting in Kolkata in December 2011 with the KoPT Chairman (Mr. Meena), but that Mr. Meena "merely told us that he had done all that he could to help us."[321] According to LDA, the KoPT chairman instead suggested that HBT engage directly with Ripley's owner, Mr. Bose, to discuss various operational hurdles, and thereafter organized a meeting with Mr. Bose at Mr. Meena's house on 15 December 2011. That meeting was allegedly "infructuous," with Mr. Bose attempting to interest LDA in collaborating on a different project and disclaiming any interest in operations at Berth Nos. 2 and 8 at HDC.[322] Mr. Meena denies any recollection of such meetings, but states that even if he may have discussed operational problems with HBT, he never would have proposed a meeting with Mr. Bose or any other third party as a way to work through the implementation of a KoPT contract with HBT.[323]

195. Be that as it may, a few months later, on 5 March 2012, HBT wrote to KoPT to "once again … bring to your kind notice that the [Berths] are underutilised." It contended that "[t]he project was envisaged on an estimated volume of at least 8 Million tons of cargo per annum but the trend during the last 17 months indicates that approximately 5.5 Million tons per annum of volume will be handled …. The heavy shortfall in the cargo volumes is rendering the Project uneconomical and unviable." HBT referred to the clarification KoPT had issued during the Tender process to Section 1.39 that KoPT's "present policy" was to allocate "commodities … of the major steel industries" to the Berths but "whenever vessels a/c Steel Industries will not be there at these berths, [other] commodities … as may be decided by the port from

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[320] **C-550**, Slide 2; *see also id.*, Slide 4 ("LOBBY with KoPT to … maximize volume at our berths … commence handling export cargo ... [and] start putting the standby MHC to use").

[321] Morel-Jean I, ¶¶ 13-14.

[322] Morel-Jean I, ¶¶ 15-16; Morel-Jean II, ¶ 9.

[323] Meena I, ¶¶ 6, 8.

time to time will also be handled" at the Berths. It requested KoPT accordingly to "provide more volumes of cargo …."[324]

196. On 23 April 2012, in the context of a letter to KoPT regarding the ongoing invoice disputes, HBT again raised the cargo volume issue. This time it stated that "[t]he available draft in the navigable channel has also been steadily dropping thereby resulting in very low volumes being handled" at the Berths.[325] The May 2012 annual reports of HBT, ALBA and ABG Infra for the year ended March 2012 – the only full year of operations – similarly attributed the low cargo volumes to an overall decline in traffic at the Haldia Port.[326] LDA now contends that these publicly filed documents did not purport to address "the catena of obstacles and problems [HBT] was facing."[327]

197. In any event, by the summer of 2012, as discussed further *infra,* HBT's concerns about the cargo volumes had reached a critical point, leading it to contemplate a suspension of operations.

198. The Parties disagree about the percentage of HDC's overall compatible dry bulk cargo that ultimately was allocated to the Berths during the Contract period. LDA maintains that HBT received only 32% of the compatible dry bulk cargo in the HDC during the operational period, despite HBT's operations being more efficient than other operators' berths.[328] India criticizes LDA's figures on several grounds, including that Berth Nos. 2 and 8 could not handle certain types of dry bulk cargo, that HBT generally refused to handle export cargo because of a dispute about whether it was obligated to purchase an excavator for unloading export rakes, and that KoPT was contractually obligated to supply 2 MMT on cargo to another berth.[329] India submits that in 2011-2012, HBT actually handled at least 53% of the total compatible dry bulk cargo,[330] which it contends was as much as KoPT reasonably could allocate to it, while taking into

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[324] **C-225**.

[325] **C-227**.

[326] **R-139**, p. 1 (HBT handled 5.45 million MT, 39.5% of total bulk cargo at HDC, but "[d]ue to decline in volume at Haldia, … could not handle volume to its potential"); **R-140**, p. 1 (HBT "is handling around 40% of the total bulk cargo," but "[d]uring the year, the total volume of cargo handled at Haldia Port has declined, due to low traffic of vessels"); and **R-141**, p.12 (similar).

[327] Morel-Jean II, ¶ 8.

[328] Further Amended Statement of Claim, ¶ 17; Reply, ¶ 252(a); **C-513**, p. 1; *see also* Malhi I, ¶ 64 (citing **C-12**); LDA's Post-Hearing Brief, ¶ 53 (contending that HBT "was allocated 27% in 2010-2011, 36.81% in 2011-2012 and … 35.64% in 2012-2013").

[329] *See, e.g.,* Counter-Memorial, ¶¶ 208-210, 221-222, 225, 229.

[330] Counter-Memorial, ¶ 211 (citing **R-2**, calculations showing that HBT handled 5.5 million MT, or 53.95% of compatible cargo). India contends in its Post-Hearing Brief that overall, "when factors such as compatibility of cargo and the amount of dry bulk cargo allocable to HBT's berths are applied, in reality, HBT handled *more than 71%* of the compatible dry

account constraints imposed by user preferences and by HDC's various shore handling problems.[331] LDA contests India's evidence and contends in any event that these shore handling issues were at most "teething" issues, which KoPT used as an excuse not to allocate additional cargo that HBT could have handled,[332] particularly if it had been allocated larger or closer storage yards or if KoPT took steps to improve other infrastructure constraints.[333]

G. THE CRISIS PERIOD LEADING TO CONTRACT TERMINATION

1. Issues Heating Up in the Summer of 2012

199. By the summer of 2012, the various issues that had plagued the operational period were each coming to a head.

200. First, HBT received a vivid reminder in June 2012 about the volatility of local labor issues and the power of local unions. On 16 June 2012, after it issued a termination letter to two of the management staff on disciplinary grounds, HBT reported to the police by telephone that "about 100/150 workers … are gathered and showing agitation at HBT office," and requested police intervention. The police sent officers to the scene, who recorded later that evening that the "agitated workers had dispersed" from the HBT office area without any reported "incident of assault or manhandle …."[334] HBT's summary of the day's events, sent to the police a few days later, recounted that a crowd had surrounded an HBT car, forced the HBT officers out, and angrily demanded the employees be reinstated, insisting that HBT had no power to terminate employees, only to suspend them or shift them to other departments.[335]

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bulk cargo that was actually allocable to its berths." India's Post-Hearing Brief, ¶ 9 (emphasis added); *see also id.*, ¶¶ 55, 61, 74.

[331] Counter-Memorial, ¶¶ 202-219. With respect to shore handling, India contends that HBT experienced delays in cargo evacuation from the jetty and stockyard and frequent breakdowns of its rail and road weighbridges, which resulted in user complaints and a backlog of cargo at various points from the quay to the stacking yard, making it difficult for KoPT to allocate more cargo to the Berths. *Id.*

[332] Malhi II, ¶¶ 41-42, 45-46, 55, 59.

[333] Malhi II, ¶¶ 49-51, 54, 64-69.

[334] **R-446**.

[335] **C-235** ("Statement of Facts" filed with the police on 19 June 2012); *see also* Further Amended Statement of Claim, Appendix I, entry #8.

201. Then, on 18 June 2012, some 150-175 people reportedly protested outside HBT's offices, and at least 25 people entered it for a sit-down protest.[336] HBT sent a formal letter to KoPT's Chairman in Kolkata, asking for KoPT "to immediately take suitable actions to defuse" the situation.[337] In the meantime, HBT also called the local KoPT "Traffic Manager" at HDC, who "was very understanding and suggested that HBT should try to contact" the INTTUC union leader, "who can address and help in the matter." The union leader invited HBT to a meeting, at which he explained that under applicable labor laws in West Bengal, HBT could not terminate anyone directly, but rather must first issue a "show cause notice" with a temporary suspension. HBT responded that the "appointment letters" the employees had signed permitted termination. The union leader requested HBT in any event to reconsider the termination. The same evening, a strike was called at Berth Nos. 2 and 8 stopping all work for about four-and-a-half hours. The situation at the Berths reportedly had returned to normal by the next morning, 19 June 2012, but HBT kept its office closed as a precaution, later learning that a group of about 25 people had gathered there but then dispersed. On 19 June 2012, HBT filed a detailed report of this chronology with the local police, noting its fear that the "mob will gather around our office" again.[338] LDA claims that later that evening, two HBT officials were assaulted by another individual and "forced to reinstate … employees,"[339] but it appears that no police report of this assault was filed.[340] On the morning of 20 June 2012, HBT telephoned the police to report that a crowd had assembled again overnight in front of the HBT offices, and police records report that they visited the offices and "[a]fter prolonged discussion with the higher officials of HBT all the agitated workers had left the office campus."[341]

202. Second, HBT began to threaten a suspension of operations if KoPT did not increase its allocation of cargo to the Berths. On 4 July 2012, HBT wrote to protest that the volumes allocated had been "unexpectedly low," with HBT handling around 5 million MT per year rather than its estimated volume of 9 million MT, around which HBT stated "[t]he entire infrastructure is designed … and hence it is imperative … to

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[336] **C-235**; *see also* Further Amended Statement of Claim, Appendix I, entry #9.

[337] **C-234**.

[338] **C-235**. Police records show that upon receipt of this report, the police enquired about the 16 June 2012 incident (which at that point was three days old), and determined that the "agitation" that day ultimately had been "at last settled up amicably." S. Jain I, Annex I, entry #7. With respect to the 18 June 2012 protest and sit-in, the police reported that the law and order situation thereafter had returned to "normal," with the terminated staff submitting resignation letters to the competent authorities. S. Jain I, Annex I, entry #8.

[339] Ghosh I, ¶ 24.

[340] LDA's chart references **C-234** and **C-235** with respect to this incident (*see* Further Amended Statement of Claim, Appendix I, entry #10), but those documents predate and do not allude to the alleged assault. India's evidence is that "there was no such incident reported …." S. Jain I, Annex I, entry #9.

[341] **R-446**.

sustain its fixed and variable costs," particularly in light of "our extremely low tariff, which is lowest in the country." HBT indicated that its break-even point was 7.5 million MT per year, and "beg[ged] [KoPT] to allocate us the requisite volumes at our berths so that we may achieve breakeven," otherwise it would "suspend operations and stem our losses."[342]

203. On 20 July 2012, KoPT convened a meeting among HBT, the INTTUC union, the Five Star agency representing cargo pool workers, and other Port stakeholders, including a representative from Ripley. The purpose was to discuss a union threat that the cargo pool workers would work only for four hours unless their wages were increased. KoPT reportedly stated that this was an "internal matter between [HBT] and Five Star," but that "any action that delays operation will directly impact the end users" who will be deterred from bringing more cargo to the Port. KoPT requested "all to arrive at solution and keep stoppage of cargo ops completely out of the process," while resisting union efforts to characterize it as the "Principal Employer" to the wage negotiations. Meanwhile, HBT insisted that its revenue would not support additional payments to workers unless it received more cargo. KoPT stated that "there are many constraints in increasing the cargo inflow into Haldia beyond anyone's control." The meeting adjourned with no progress, but HBT privately expecting the cargo pool to make good on its threat of reduced work hours and concerned that the risk of a labor "Gherao" of both "[HBT] and [KoPT] officials remains on the anvil."[343]

204. Separate from the continuing dispute with Five Star, by August 2012, HBT and its ultimate parent companies (LDA and ABG Infra) were actively considering a significant retrenchment of surplus labor, which they considered to be a "huge strain on HBT's resources."[344] This issue is discussed further below.

205. Finally, in late August 2012 KoPT floated a tender for mechanized operations at Berth No. 4B, which HBT worried would create further competition for cargo allocation. LDA's witnesses contend that this was inconsistent with an alleged contractual obligation to "mak[e] optimal use" of HBT's equipment and "ensure that our equipment does not remain idle," which KoPT could have fulfilled by "deploying our spare [Mobile Harbor Cranes] at other berths" rather than pursuing a new tender for a competing mechanized operator.[345]

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[342] **C-240**.

[343] **C-241**.

[344] Agarwal I, ¶ 129; Malhi I, ¶ 90.

[345] Morel-Jean I, ¶ 21.

2. The Notice of Suspension and the Consent Order

206. In the absence of any resolution of HBT's concerns, on 23 August 2012 it issued a Notice of Suspension to KoPT.[346] In the Notice, HBT stated that it would cease operations by 8 September (later revised to 12 September) unless it saw an increase in the allocation of cargo to its Berths, stating:

> In spite of repeated reminders and [p]etitions KoPT has, for reasons best known to them, failed and neglected to remedy and resolve the various grievances and claims which continue to plague the Project.... You will appreciate, that since HBT is already incurring huge financial losses, unless adequate cargo is allocated to berth nos. 2 and 8, as proposed above ["at least" 750,000 MT per month], HBT would not be left with any other alternative, but to suspend cargo operations.[347]

207. By e-mail and letter, dated 23 and 24 August 2012 respectively, KoPT denied that the Contract provided any guaranteed minimum cargo allocation, insisted that HBT continue operations, and invited HBT to a meeting on 31 August 2012 to discuss the matter.[348] In advance of the meeting, KoPT discussed internally the various issues HBT had raised. It observed regarding cargo allocation that a "policy decision" would be required, since on the one hand "there is no cargo commitment" to HBT in the Contract, but on the other hand it "was financially beneficial for KoPT" to place cargo at the Berths whenever they were vacant, even though "there have been occasion when the importers have expressed their reluctance to work their ships under [HBT] handling for various shore related problems." Because this involved a "policy related issue which cannot be looked into from operational point of view alone," no commitment could be given to HBT in the upcoming meeting. As for HBT's security concerns, "it was agreed that KoPT would ensure providing general security in the port premises, no such guarantee could be given for the incidents happening outside port." Finally, with respect to any termination by HBT of its "additional workforce including those of … Five Star Shipping engaged by [HBT] through contractors," this was considered an "internal matter" of HBT, with which "KoPT had got nothing to do…."[349]

208. The meeting was held as scheduled and HBT and KoPT agreed to form a joint committee for the settlement of the disputed issues.[350] On 2 September 2012, KoPT nominated its representatives to the

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[346] **C-244**.

[347] **C-244**, ¶¶ 1, 3.

[348] **R-38**; **R-39**.

[349] **R-144**.

[350] Agreed Chronology of Events, #114 (citing **DN-3**).

committee, and requested HBT to do so as well.[351] On 5 September 2012 HBT stated that "[d]iscussions … were initiated a long time ago, and … the same has led to no result." HBT again requested at least 750,000 MT of cargo per month be allocated "immediately" to the Berths, "failing which, it would lead to suspension of cargo handling operation" beginning 8 September 2012. "The remaining issues can thereafter be jointly addressed and considered by the joint committee as proposed by you."[352]

209. LDA's witnesses contend that at a further meeting on 6 September 2012 between Mr. Agarwal of ABG Infra, Mr. M. Jain (KoPT's Acting Chairman) and Mr. Adhikari (the INTTUC representative and Member of Parliament), Mr. Agarwal broached the possibility of a large-scale retrenchment in connection with its threat to suspend operations, and obtained some measure of reassurance.[353] Mr. Agarwal testified that Mr. Adhikari warned that a retrenchment of 350 workers would spark a "bloodbath," but then stated that he could "manage" the hostility arising from retrenchment of 275 workers, which Mr. Agarwal took as a "blessing" from both Mr. Adhikari and KoPT to proceed at that level.[354] By contrast, Mr. Jain testified that the meeting was held "to discuss the possible impact on the labour force if HBT suspended operations," about which Mr. Adhikari was "very concerned."[355] In the context of these concerns, Mr. Jain stated that neither he nor Mr. Adhikari would have blessed any plan for HBT "to let go of half of its workers," which was sure to cause unrest that would threaten disruption of operations.[356]

210. In the wake of this meeting, and still on 6 September 2012, LDA and ABG Infra decided to move forward with the suspension of HBT's operations. Despite what they understood to be Mr. Adhikari's agreement that he would "cooperate[]" if HBT had to reduce its bloated workforce, LDA and ABG considered that this still would be insufficient to stem HBT's losses, without a significant concurrent boost in HBT's revenues.[357] At best, LDA and ABG Infra agreed, the labor cost savings would "sort about 15% of our problem," with 85% of HBT's losses (mainly attributable to low cargo volume) still unresolved. That necessitated suspending operations, to "try to be in a position where the Contract … can be renegociated

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[351] **DN-3**.

[352] **R-147**; **DN-2**.

[353] Agarwal I, ¶ 130; Malhi I, ¶ 94 (reporting what Mr. Agarwal told him of the meeting); **C-632** (internal e-mail referencing the meeting).

[354] Agarwal I, ¶ 130; *see also* **C-354** (internal HBT chronology dated 17 October 2012, referring to the 6 September 2012 meeting as obtaining a "blessing to retrench employees").

[355] M. Jain I, ¶ 20.

[356] M. Jain II, ¶¶ 9-10.

[357] **C-632**.

[sic]." HBT's plan upon suspending operations was to discharge *all* of its employees, which would "allow us to dispose of those union people who are deliberately damaging our [equipment], and bring people we can trust" when HBT resumed operations.[358]

211. The same day, however, KoPT filed a Petition in the Calcutta High Court seeking an injunction preventing HBT from suspending operations.[359] On 7 September 2012, "[a]t the request of the Court," HBT agreed to extend the planned date of suspension from 8 to 12 September 2012.[360]

212. Meanwhile, in an internal meeting on 7 September 2012, KoPT observed the following, *inter alia*:

- "[D]uring 2011-12 about 49% of the total … dry bulk cargo … was handled at berth no 2 & 8."
- "The productivity of ships handled by MHC at these 2 berths has substantially improved … The use of MHC has also resulted in HDC's capacity to serve gearless ships and the users like SAIL, Tata etc. have increased their cargo booking in gearless ships."
- "[T]he operating profit generated from each ton of cargo handled at Berth No. 2 & 8 is above Rs150/- compared to other multipurpose berths where the dry bulk cargo is handled …."
- "However, … allocation of cargo is not merely based on the ability to unload from the ship but also depends upon the rate at which the cargo is evacuated from the storage area throughout the year. HBT has been able to achieve a maximum evacuation about [500,000 MT] in May, 2011…. At this peak evacuation rate HBT can at best evacuate 6 million tons of cargo per annum …. This is restricting the possibility of allocating more cargo … for handling by HBT."
- "It has clearly stipulated in the contract that there would be no [minimum guaranteed tonnage] commitment from the KoPT. Therefore, HBT cannot demand for MGT commitment of [750,000 MT] of cargo per month …."
- "As regards manpower, the contract clearly speaks that the same is the responsibility of HBT …. KoPT cannot be made a party to the retrenchment of the alleged surplus manpower contracted by HBT."[361]

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[358] **C-632**.

[359] Agreed Chronology of Events, #116 (citing **C-247**).

[360] Agreed Chronology of Events, #118 (citing **C-248**).

[361] **C-251**, pp. 4-5. According to a KoPT Resolution dated 14 September 2012, during the KoPT Board meeting on 7 September 2012, KoPT's then-Chairman Mr. M. Jain also stated that the former KoPT Chairman (Mr. Meena) had been "spoken to and he had communicated that no … assurance" was given to HBT regarding a minimum annual cargo allocation. **MM-1**.

213. KoPT also expressed concern that a sudden stoppage of work by HBT could harm major steel industries who were relying on KoPT, and "[t]he interest of the industries … in the hinterland … would be severely jeopardized."[362] In addition, "[t]here would be a potential law & order threat both inside & outside the dock at HDC … as [HBT's suspension of work] would lead to loss of employment of a large number of personnel. Operation at other berths of the port may even come to a standstill due to widespread labour unrest."[363] Based on all these factors and after extended debate, KoPT's Board of Trustees decided to inform HBT that "while KoPT was not contractually obliged to give any commitment on MGT to them, it would examine the possibility of making suitable operational arrangements … whether KoPT could provide more vessels to Berth Nos. 2 & 8 subject to [HBT] taking steps for faster evacuation of cargo … like proper maintenance of rail/road weighbridges, etc. … [This] possibility should be examined by a Joint Committee of officials of HBT and KoPT."[364] KoPT reported as much to HBT by letter dated 7 September 2012, and requested HBT to accept the proposal of the Joint Committee.[365]

214. KoPT also reported to the Chief Secretary of the Government of West Bengal that in its internal meeting, it had "resolved to explore the possibility of providing more cargo to HBT," notwithstanding that "there is no mention of minimum guarantee tonnage in the existing agreement," in light of "the utilization percentage of berths and other relevant factors … in the interest of Trade & Industries of the hinterland." KoPT envisioned however that "while we are following up the issue of additional cargo with HBT, we need the intervention of State Government at appropriate level to address their issue of large work force and local law & Order problems, as any disruption to the smooth operation of port at these two berths" would affect many important end-users, "caus[e] colossal loss … to the port," "cause law and order problems inside and outside port area besides," and "may lead to diversion of cargo to other ports due to non availability of alternate mechanized facilities at HDC …." KoPT requested the State Government to "issue suitable instructions … for early intervention in the matter."[366] Two days later, on 9 September 2012, KoPT sent an almost identical letter to Mr Adhikari, stating that "we need your intervention also to address their issue of large work force and local law & Order problems…."[367]

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362 **C-251**, p. 7.

363 **C-251**, p. 8.

364 **C-251**, p. 16.

365 **C-249**.

366 **C-250**.

367 **C-252**.

215. For its part, on 7 September 2012, HBT reported to LDA and ABG Infra its own internal assessment of the situation. It was unimpressed by KoPT's "talks of endeavours and setting up of a committee," particularly "against the backdrop" of HBT's continued losses with current cargo volumes, the fact that KoPT had recently issued a tender for mechanization of another HDC berth, and "[f]alling over all cargo volumes at HDC." HBT considered that suspension of work could make KoPT to "finally take notice and realise that they can no longer push us around," and provide a "real chance to reduce workforce." It "fully realise[d] that Kopt cannot give us a [minimum guaranteed tonnage," but "[w]e could get from them priority utilisation" of the Berths, and perhaps attention to other HBT wish-list items, such as a Contract rider allowing it to reduce its deployed equipment depending on cargo volume, cancellation of the new tender for a competing mechanized berth, and a commitment of "NO MORE MECHANIZATION OF BERTHS."[368] As of 11 September 2012, LDA and ABG Infra were discussing imminent plans for the retrenchment of all 626 workers at HBT, as part of a planned suspension of operations.[369] HBT also informed the West Bengal Government on 11 September 2012 of its intention to suspend operations the next day, "[u]nless a firm commitment on volume is given."[370]

216. Later that day, however, HBT and KoPT reached a settlement agreement to prevent the suspension of operations.[371] The next day, 12 September 2012, the Calcutta High Court recorded the "Terms of Settlement" in the form of a Consent Order.[372] As reflected in the Calcutta High Court document, the agreed terms included, *inter alia*, that "[d]ry bulk vessels … will be allocated to berth nos. 2 or 8" unless those berths were busy, subject to certain KoPT contractual obligations to other berth operators; that KoPT would "maximize the utilization of HBT's equipment" by relocating its Mobile Harbor Cranes to other berths when Berth Nos. 2 and 8 were vacant; HBT would be allowed to use a third crane at its Berths to improve productivity; and KoPT "shall resolve" the pending invoice disputes.[373]

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368 **R-278**.

369 **R-253**, pp. 5-6.

370 **C-253**.

371 Agreed Chronology of Events, #120 (citing Nayak I, ¶¶ 16-17).

372 Agreed Chronology of Events, #121 (citing C-255); *see also* **R-281** (KoPT Resolution of 14 September 2012, summarizing the events leading up to the Consent Order).

373 **C-255.**

3. Labor Unrest Against KoPT Outside the Dock Area

217. The Consent Order had almost immediate ripple effects. Operators at other berths, including Ripley, attempted to appeal, contending that the terms of the Consent Order envisaged preferential treatment of HBT by KoPT, and would lead to business losses.[374] These appeals were dismissed by the Calcutta High Court on 26 September 2012.[375]

218. In the meantime, however, on 14 September 2012, Ripley (which ran cargo operations on other berths at HDC) wrote to KoPT to announce that it would have "no other alternative but to retrench" its workers handling bulk cargo, because KoPT's reported decision that "all bulk vessels will go to" HBT's Berths would mean that "there will be no cargo at other berths where our work force is engaged to handle the vessels."[376] The next day, HBT reported internally that KoPT was planning to allocate a coal vessel to HBT's Berths "but expect to have some resistance on the berth from Ripley on that account"; "[t]here is a feel of gloom and foreboding in Haldia and people are expecting there to be some violence/trouble over the next few days."[377] KoPT was also girding for protests, alerting the District Magistrate (with copies *inter alia* to the local police, the CISF, and the Home Secretary of the Government of West Bengal) that it expected a "deterioration in the law and order situation outside the dock area" of HDC, and that while "[t]he CISF Unit of Haldia Dock Complex has already been advised to beef up security inside the dock area … we need assistance from the State [Government] in maintaining law and order situation outside the dock area."[378]

219. As foreseen by KoPT, labor protests against the Consent Order began almost immediately, initially outside the dock area and targeting KoPT and HDC officers themselves. On 18 September 2012, KoPT notified the police that a group of 200-250 workers, mostly from Ripley and another operator (A.M. Enterprise), had gathered to protest outside of the main HDC offices; according to the INTTUC labor leader, "[t]hey were protesting against KoPT's decision to take vessels at Berth No. 2 & 8 on priority over other berths" under the Consent Order, which would lead to retrenchment of workers employed on other berths. KoPT reported that the crowd was blocking the main gate of its offices and "not allowing any Port Officials or vehicles to pass through." The police were requested to take action "so that the blockade at

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[374] **C-347**.

[375] **C-303**.

[376] **C-256**.

[377] **C-257**.

[378] **C-258**.

the gate is lifted forthwith."[379] By KoPT's account, the police thereafter intervened and the workers "lifted the blockade of the office"[380]; police records suggest that no active intervention was needed, as the officer who visited the site of the demonstration (at least upon his arrival) reported the site to be "peaceful," with no obstruction of the gates.[381]

220. However, on 19 September 2012 there were similar demonstrations at the HDC offices, temporarily blocking the gates,"[382] and on 20 September 2012 "around 300 workers having allegiance" to INTTUC "again gheraoed both the gates" of HDCs offices, reportedly "threatening to carry out physical assault" on named HDC officers,[383] and expressing concerns about "retrenchment by their employers in view of anticipated fall in cargo handling" at their berths.[384] On 19 September 2012 KoPT again wrote to the Home Secretary, reporting that the events it had anticipated in its letter of 15 September had now occurred,[385] and on 20 September 2012 it appealed to the police for assistance,[386] separately forwarding its FIR to the District Magistrate and requesting "necessary action" to provide security and ensure safe movement at the HDC offices.[387] The police did send officers on both occasions, but found the demonstrations (upon their arrival) to be peaceful and not obstructing normal movement in and out of HDC.[388] KoPT subsequently told the police that it had learned the blockade of its offices was planned to

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379 **C-264**; *see also* **R-135**, p. 38 (CISF report confirming worker demonstration on 18 September 2012 at the HDC office).

380 **C-273** (referring to a past incident on 17 September 2012, but which by its description appears to be the same one that **C-264** describes contemporaneously as occurring on 18 September 2012).

381 **R-386**, police log entry #4.

382 **C-273**.

383 **C-273**; *see also* **R-135**, p. 42 (CISF report confirming worker demonstration on 20 September 2012); **R-386**, police log entry ##11-12, stating that upon receipt of HDC's report, the police directed an officer "to proceed to the spot with force who is on mobile duty," but that the officer thereafter reported that the demonstration was peaceful and did not restrain movement in and out of HDC).

384 **C-272**.

385 **C-266**.

386 **C-273**.

387 **C-274;** *see also* **C-272** (separate KoPT letter to District Magistrate, of same date). The District Magistrate followed up the same day in a letter to the Home Secretary, stating that he had requested the police "to keep close vigil on the situation and take all necessary steps to ensure that law and order situation is maintained." **R-422**, p 2. The Superintendent of Police forwarded the letter to the Haldia police station, directing it "to take necessary action as per legal provision of law." **R-422**, p 1.

388 *See* **R-386**, police log entry ##2, 7 and 8 (confirming police presence at 19 September 2012 demonstration, with entry #7 stating that it was led by the local INTTUC leader and aimed at port officials; "[t]o keep peace," the officer submitted a prosecution against the local INTTUC leader); *id.*, entry ##11-13 (police reporting peacefulness of 20 September 2012 demonstration at HDC offices, and also reporting that no agitation was taking place at Berth No. 8).

continue "from tomorrow,"[389] and on 21 September 2012 KoPT reported that "about 150-200 workers have once again gheroaed" the HDC offices.[390] According to an internal CISF report, the INTTUC representative Mr. Adhikari vowed that union members would continue their agitation and demanded that KoPT "should stop partisan attitude towards the agitating workers because they have genuine demands,"[391] but the police officer detailed to investigate again found the demonstrations to have been peaceful and not unlawful.[392] On 21 September 2012, the Haldia Dock Officers' Forum requested assistance from KoPT, which forwarded their letter to the District Magistrate and the police.[393] The same day, KoPT's Chairman asked the MoS to excuse him from a planned delegation to the United States, citing the turmoil in front of its offices but also noting that "[t]ill now there has been no disruption inside the dock area."[394] On 22 September 2012, CISF personnel were deployed on an emergency basis at a CPT guest house outside the dock area, in response to a gathering of about 70 workers of Ripley and A.M. Enterprises.[395]

221. On 24 September 2012, KoPT wrote to the Chief Secretary of the Government of West Bengal, copying *inter alia* the police and District Magistrate, to report that "recently, the smooth functioning of HDC has come across severe impediments created by some vested interests group. The KoPT employees … are getting regular threats and intimidation by some musclemen … and they are passing through a state of constant agony and worry for their safety." KoPT enclosed an appeal from the Kolkata Port Officers' Federation "for restoration of peace" at HDC, and requested intervention "so that confidence of the port employees can be restored and the port can undertake cargo operations smoothly in the dock."[396] The

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[389] **C-275**.

[390] **C-631**; *see also* **R-135**, p. 44 (CISF report confirming worker demonstration on 21 September 2012, and stating that "the matter of concern is that, the above agitators are becoming furious" and threatening to lodge police reports against the CISF if it "tries to intervene … and tries to protect the management officials").

[391] **R-135**, p. 45 (CISF report, also stating that its security arrangements around HDC had been strengthened).

[392] **R-386**, police log entry #18 (describing HDC's allegation of "unlawful activities" to be "totally baseless," with no blockade at the gate, and the allegation of threats on port officials "could not be substantia[ted] too").

[393] **C-280**.

[394] **C-279**.

[395] **R-135**, p. 49.

[396] **C-290**; *see also* **R-416**, pp. 5-6.

District Magistrate forwarded both letters to the local police, requesting it to "take necessary action in this regard,"[397] and the Superintendent of Police likewise forwarded the letters to the local station.[398]

222. Meanwhile, notwithstanding the protests, vessels still continued to arrive at HDC and required allocation among its various berths. LDA complains that KoPT was slow to allocate vessels to HBT's Berths after the Consent Order,[399] a contention with which India disagrees.[400] Among other things, the record reflects that on 19 September 2012, KoPT informed one vessel owner that had specifically requested assignment to a berth *other* than Berth Nos. 2 or 8, on account of its perception of a "higher turn around time at these berths" due to HBT's shore handling issues,[401] that KoPT nonetheless was assigning the vessel to Berth No. 8.[402] HBT remained pessimistic that there would be a significant increase in its allocations, noting that "Berth 2 rec[eived] last vessel on 31 Aug[ust]" and "[f]rom the current position of vessel line up we shall be lucky if we get 5 vessels" in the next period.[403] By 20 September 2012, however, HBT reported that "[w]e now have vessels working at both our berths."[404]

4. HBT Terminates Five Star and Retrenches 275 Workers

223. Amidst this rising turmoil, and notwithstanding the Consent Order recently agreed with KoPT to forestall a suspension of operations, LDA and ABG Infra decided to move ahead with significant reductions to HBT's workforce. HBT evidently did not view the Consent Order – reflecting KoPT's agreement to prioritize cargo allocation to HBT's Berths – as alleviating the separate burdens imposed on it by excess labor. Indeed, its witness Mr. Malhi testified that "[o]nce the Consent Order had been passed on 12 September 2012, we came to the conclusion that the express commitment by KoPT to allocate cargo more

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397 **R-416**.

398 **R-428**; *see also* **R-439**, **R-440** (further forwarding of KoPT letter among police authorities).

399 *See, e.g.*, Malhi II, ¶¶ 78, 92.

400 Mahapatra I, ¶¶ 23-25.

401 **AM-7**.

402 **AM-8**.

403 **C-265**.

404 **C-268**. The following day, HBT reported to HDC that it had not been able to achieve the "discharge norms" (MLP) for the two vessels docking on 20 September 2012, because of a variety of factors including specific requirements of the vessel owners and an "All India" (*i.e.*, nation-wide) strike called for that day. **R-42**.

optimally was an appropriate opportunity to salvage the Project and make it commercially viable" by significantly reducing labor costs.[405]

224. On 15 September 2012, in the wake of KoPT's notice that it expected some resistance to its allocation of a new vessel to HBT, HBT discussed the currently volatile labor situation at HDC. It observed that there was rising "factionalism on the ground" between the CITU union associated with the "Left Front," which was "now gaining power" in Haldia and was "blaming the TMC & Ripley for the issues" troubling HBT's operations, and the INTTUC union associated with TMC. HBT predicted "different power centers emerging in the coming weeks," with expectations of "some violence / trouble over the next few days," and acknowledged that "[g]iven the present scenario our retrenchment plan may be the spark that may set it all off since the different unions will try and force us to take them back." Nonetheless, it considered that "this may be the only opportunity that we may have to take this action, without which we may not be able to survive."[406] On 20 September 2012, HBT's management informed its Board of Directors that "[t]he Management had decided to retrench the 275 workers of the Company," and asked for Board approval to proceed, which was promptly granted.[407]

225. Meanwhile, on the same day – 20 September 2012 – Five Star demanded that HBT pay a substantial sum for cargo pool services, claiming that unless HBT released these sums within 48 hours, Five Star would be unable to issue the workers with holiday bonuses and statutory payments.[408] Following "a meeting called by the Cargo Pool labor union … all cargo pool got off the vessel[s]" then working at both the Berths and refused to return for five hours, and since then "have been working extremely slowly …." The workers apparently "have been told to tell us that due to non payment they have been asked to go slow on the work."[409]

226. On the evening of 22 September 2012, HBT notified Five Star (copying KoPT) that it was "extremely dismayed" to have received letters from KoPT "expressing their dissatisfaction with the work carried out at [the Berths] which squarely falls within your scope of work," and that "[s]ince you are unable to perform the services for which you have been engaged, we have no option but to discontinue your services

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[405] Malhi I, ¶ 93.

[406] **C-257**.

[407] **C-267**.

[408] **C-271**.

[409] **C-268**.

with immediate effect."[410] Within minutes, HBT separately e-mailed KoPT to alert it that the cargo pool managed by Five Star is "no longer engaged by us,"[411] a step which KoPT viewed as "undermin[ing] the [Consent Order]."[412] HBT also alerted KoPT that its employees and managers were now "being threatened by the Cargo Pool against working on the vessels" docked at the Berths, and that until "the Cargo Pool Labour … [was] removed" from its Berths, "we will not be in a position to carry out our obligations."[413] CISF records indicate that an "[a]dditional deployment [was] made at Berth No. 2" but it is unclear how long the CISF personnel stayed in the area.[414] HBT apparently did not appeal directly to the police about any incident on the evening of 22 September 2012,[415] and the police daily logs contain no entries about an incident at the Berths on the evening of 22 September 2012.[416] The next morning, however, HBT reported to KoPT that after midnight – about five hours after HBT's first evening e-mail to KoPT – "a mob of around 200 unknown person[s]" had blocked cargo discharge operations at Berth No. 2, forcing HBT to "suspend all cargo handling operations" at that berth. HBT stated that "[t]he port has once again failed in its duties under the contract to provide for a safe and amiable working environment."[417]

227. On 24 September 2012, KoPT wrote to HBT that under the Contract, "the manpower ... is to be arranged by HBT & KoPT is not in any manner concerned with the sourcing of labour," provided HBT carried out its "Scope of Work," and noted that HBT had never formally notified KoPT of the engagement of Five Star as a subcontractor. With respect to security issues, KoPT stated under the Contract that it was to provide "general security inside the dock area for your employees with the help of CISF as per usual practice," but "[i]t may be appreciated that the CISF is there to protect the Port properties but Law & Order is maintained by the State Government." KoPT indicated it had informed HBT in the past to take up any "Law & Order problem" with the appropriate State authorities, and requested a copy of any FIR

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[410] **C-283**.

[411] **C-284**.

[412] M. Jain I, ¶ 27.

[413] **C-284.**

[414] **R-135**, p. 49.

[415] *See* First Amended Statement of Claim, Appendix I (not alleging any "incident of violence" against HBT's personnel or property on this evening); *see also* **R-387**, ¶ 5 (later police report to the Calcutta High Court, stating that "no complaint/information from HBT Authority or from any corner was received" on 22 September 2012).

[416] **R-386**.

[417] **C-286**. The cargo pool strike that evening, blocking operations, was documented by various photographs. **C-285**. *See* Further Amended Statement of Claim, Appendix I, entry #11 (referencing 23 September 2012 e-mail to KoPT but no communication with police).

that HBT had filed recently with the police. KoPT closed its letter by requesting HBT "not to resort to any such decision which may lead to Law and Order problem with out consulting us," and insisting that HBT "continues to carry out cargo operations at [the Berths] as per its obligations under the Contract."[418] The same day, KoPT separately advised HBT that it had scheduled a meeting of "all the stakeholders" on 27 September 2012, "with a view to identifying the issues" underlying the "current impasse at [HDC] leading to disruption in cargo and vessel handling operations" and "also to find out the possible solutions ...."[419]

228. However, LDA and ABG Infra already had decided that same day (24 September 2012) that HBT should move forward with the retrenchment of 275 workers.[420] It appears that the workers learned of their retrenchment first by text messages on 24 September 2012,[421] with HBT issuing formal retrenchment letters the next day to 275 workers.[422] HBT notified KoPT of the retrenchment, invoking both the "acute financial constraints" it had faced since the commencement of operations and "large scale indisciplined [sic] activities on the part of the workmen," including "large scale rioting activities." HBT recited that it had been "compelled to bear the unnecessary burden of paying idle wages to a huge surplus work force almost since the beginning of the contractual period," and that "[t]he complete erosion of discipline has further added to the already eroded economic structure of HBT." HBT explained that retrenching the "surplus workmen" had become necessary "for sheer survival of the Company and also to protect the employment of the remaining 350 workmen."[423] On the morning of 26 September 2012, HBT asked KoPT to cancel the dock passes of the retrenched workers.[424]

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418 **C-288**.

419 **R-283**.

420 **R-253**.

421 *See, e.g.,* **R-386**, police log entry #25 (reporting complaints of retrenched workers); **R-427** (local INTTUC-affiliated union complaining to the District Magistrate that retrenchment by SMS text message without prior notice was "harsh, unprecedented and unconstitutional"). LDA denies having notified any workers by text message, and speculates that such messages may have been "intimations from the worker's own banks about the compensation that had been credited to their bank accounts" in accordance with local law requirements. Malhi II, ¶ 98.

422 **C-572**.

423 **C-294**.

424 **C-310**, p. 2.

5. Amid Unrest, HBT and KoPT Call for More Government Assistance

229. The same day that HBT issued its formal retrenchment notices, KoPT wrote to the MoS, asking for it to request the Government of West Bengal to intervene to ensure law and order in the area.[425] The MoS followed through, requesting the West Bengal authorities to "pass necessary instructions to law enforcement agencies so that law and order situation both inside and outside the dock do not deteriorate."[426]

230. Meanwhile, the situation on the ground continued to be volatile. According to a CISF report, on the evening of the retrenchment Mr. Adhikari (the local Member of Parliament and INTTUC union representative) had appealed to the retrenched workers (as well as workers of Ripley and Five Star) to "continue their agitation in peaceful manner and also … enter the dock premises with valid entry pass only."[427] However, on the next day (25 September 2012), HBT reported to the police that its workshop had been "ransacked" overnight and various equipment stolen,[428] and the police went the same day to investigate.[429] Several constables were also reportedly deputed to patrol generally around HDC, and reported "[n]o untoward incident" during the day on 25 September.[430] On 26 September 2012, HBT reported to the police that retrenched workers had surrounded its staff and were forcing them to sign attendance cards notwithstanding their termination.[431] The same day, HBT informed KoPT that given security concerns it would not be able to attend the scheduled "stakeholders" meeting at Haldia on 27 September 2012, and requested that the meeting be moved to Kolkata.[432] It also informed KoPT that "[u]nder the circumstances it has become impossible for HBT to carry on with the said Project."[433] An internal CISF report summarized the situation over these days as involving "workers of Ripley, AME &

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[425] **C-297**.

[426] **C-573**.

[427] **RS-1(*bis*)**, p. 112.

[428] **C-292**; *see* Further Amended Statement of Claim, Appendix I, entry #12. More than a year earlier, HBT had terminated an agreement for the provision of localized security to its premises. **R-127**.

[429] **R-386**, police log entry #19; *see also* entry #24 (police stating after enquiry that the incident "did not occur"); S. Jain I, Annex I, entry #10 (stating that "during enquiry no pilferage or damage of store material" was substantiated).

[430] **R-387**, ¶ 1.

[431] **C-304**; *see also* **C-306**, **C-576** (reporting the same event along with a threatening phone call to an HBT manager); Further Amended Statement of Claim, Appendix I, entry #13. India's evidence is that a case was opened against several individuals but remains open. S. Jain I, Annex I, entry #11.

[432] **C-300**.

[433] **C-302**.

ABG … sitting on dharna[434] and [demonstrating] suddenly on various points inside and outside the Port area without prior notice for several days," with the CISF complaining that the "local police is either not at all coming or coming very late just to show their presence."[435] The police log entry for the day states that "[a]fter reaching" Berth No. 2 in response to a report of "chaos" there, "the mob was dispersed peacefully and the situation became normal. No injury or physical assault was reported."[436]

231. On 27 September 2012, KoPT proceeded with the "stakeholders" meeting in Haldia (without HBT attendance),[437] with "about 250-300" retrenched workers reportedly staging a "dharna … in peaceful manner" outside the building where the meeting was being held.[438] During the meeting, KoPT's Chairman suggested that "the current impasse plaguing Haldia Dock for over the last 3-4 weeks, necessitates a collective endeavor to identify root causes … and … arrive at a solution within the socio-political framework prevailing at Haldia." He identified a recent decline in cargo throughputs at the Port attributable both to a general recession and to the Port's "perennial draft problem," but expressed confidence that in light of efficiency and infrastructure improvements, cargo flow should increase "[a]s soon as the matter related to transloading process is solved."[439] Leading users of the Berths insisted that the situation was of "grave concern," with their cargo piling up at the stockyards for these Berths rather than being dispatched,[440] and their being compelled to take vessels to other berths at extra costs.[441] The next day, the KoPT trustees resolved to ask the State government to convene a meeting of all stakeholders; to ask stakeholders to "take all possible measures … to maintain peace" at HDC; and to ask HBT

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[434] A "dharna" generally denotes a sit-in protest as a means of obtaining payment of a debt or compliance with a demand for justice. *See* https://en.wikipedia.org/wiki/Dharna.

[435] **R-135**, p. 55.

[436] **R-386**, police log entry #26.

[437] LDA's witness contends that HBT was never told the 27 September 2012 meeting in Haldia would proceed in its absence; India's witness contends that HBT should have known an all-stakeholders' meeting would not be adjourned simply because of its non-attendance, and in any event that there was no "concealment" as LDA alleges. *See* Morel-Jean II, ¶ 12; M. Jain II, ¶ 17. Neither side's witnesses discuss an exhibit suggesting that another meeting may have been held that same day in Kolkata between representatives of KoPT, HBT and the two major unions, under the auspices of the Regional Labour Commissioner of Kolkata. **R-430**, pp. 4-5.

[438] **R-135**, p. 53 (CISF report).

[439] **C-575**, pp. 1-2.

[440] **C-575**, p. 3 (SAIL).

[441] **C-575**, pp. 4-5 (Tata Steel).

immediately to resume work in light of the Consent Order.[442] KoPT followed up directly with the State Government.[443]

232. On 28 September 2012, the situation reportedly turned more violent. HBT reported to the police, with copies to KoPT and others, that a "mob of about 400 persons" had arrived at Berth No. 2 "to try to and forcibly stop our ongoing operations," and had beaten several members of its staff,[444] who as a result required medical treatment.[445] While HBT subsequently contended that the CISF officers posted to Berth No. 2 had not "come to the rescue of those been assaulted,"[446] CISF records state that it did dispatch a "mobile patrolling party … immediately" upon being informed of "some commotion" at Berth No. 2, and its officers upon arrival "prevented the manhandling" of two HBT staff and "shifted them in safe place," with the CISF then deploying "additional manpower" and the workers eventually dispersing.[447] The police record of the evening however reports that "after reaching on the spot [its officer] found that some person were demonstrating peacefully and later on they disbersed [sic]," with again "[n]o injury or physical assault … reported."[448] For its part, KoPT responded to HBT's police report by authorizing the police the next day to set up a "suitable camp office inside the port premises if you desire for maintaining the law and order in the port area, for which necessary space can be provided from KoPT side."[449]

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[442] **C-319**, pp. 18-19.

[443] **C-318**. KoPT informed the State Government that port users had requested immediate resolution of the deadlock, which KoPT attributed to "agitations" first by workers at other berths "in apprehension of loss of business of their employer leading to possibilities of their retrenchment," which was "further aggravated" both by HBT's termination of Five Star and by its retrenchment of 275 of its own workers. *Id.*

[444] **C-349**, pp. 17-18; *see also* **C-312** (internal communication regarding same event); **C-323** (letter to KoPT, copied to the police and the District Magistrate); Further Amended Statement of Claim, Appendix I, entry #14. The Superintendent of Police forwarded HBT's letter to the local police station. **R-441**.

[445] **C-312**; **C-314**. HBT also reported that the same day, an outside contractor had been threatened not to try to access its Berths to complete a repair job. **C-320**; *see* Further Amended Statement of Claim, Appendix I, entry #15. The Superintendent of Police forwarded the letter to the local police station. **R-429**.

[446] **C-323**; *see also* **C-311** (internal HBT e-mail on the afternoon of 28 September 2012, stating that "CISF person[nel] … reached the inci[dent] spot only after the incident had taken place").

[447] **R-135**, p. 56.

[448] **R-386**, police log entry #28; *see also* **R-387**, ¶ 2.

[449] **R-289**. KoPT also disputed HBT's statement that demonstrators had "attack[ed] Port Officers" in addition to HBT staff (**C-349**, p. 17), stating to the contrary that "none of the port officers has been attacked in any manner as has been reported in the FIR of HBT." **R-289**.

233. HBT reiterated its request to KoPT that dock entry passes for its retrenched workers be cancelled to "ensure that they do not enter the premises" of HDC.[450] On 29 September 2012 HBT informed KoPT that "we do not have any option but to suspend work and … we will be able to resume work only after safe environment is restored."[451] The same day, the turmoil spilled out beyond the HDC area, with HBT reporting to police on 29 September 2012 that some of its workers had been "gheraoed at their residential areas,"[452] and that one of its staff and been attacked and injured outside the HDC complex.[453] It appears that on 30 September 2012 a police officer was "directed to investigate the case."[454]

234. During this period and continuing through HBT's eventual termination of the Contract, KoPT continued to notify HBT of its allocation of additional vessels to HBT's Berths,[455] despite its own internal acknowledgment that work at the Berths had "remained suspended" since the night of 22 September 2012 and "[t]he Wagon/Truck loading of import cargo has also come to a stands till as HBT workers have refused to undertake the said job."[456] LDA suggests that the continued allocation of cargo was to create a record of non-compliance with the Consent Order;[457] India argues that it was because labor unrest from HBT's workers was not a *force majeure* event under the Contract.[458]

235. On 30 September 2012, KoPT circulated a "Peace Message" to a wide group of recipients, stating that it had "taken all possible steps for ensuring normal port operations" in the face of mass demonstrations that

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[450] **C-310**. India's position in this case is that HBT bore the responsibility of ensuring that its employees returned their security passes before being released from employment, and in any event that it was a "physical impossibility" to cancel them without physical surrender, because the passes are paper (not electronic) and are inspected only visually at HDC entrances, not verified against a list. Checking them against a list in addition to visual inspection would allegedly cause major delays given the thousands of workers entering the Port each day. *See* Nayak I, ¶ 38.

[451] **C-323**.

[452] **C-349**, pp. 13-14.

[453] **C-349**, p. 15; *see also* **C-321**. According to the CISF, protests also continued in other areas, including outside a management officers' residence on 30 September 2012 and the HDC's administrative offices on 1 October 2012. **R-135**, pp. 58, 60.

[454] **R-386**, police log entry ##29-30. India's witness Mr. S. Jain reports that a case was opened against several named individuals with respect to incidents several incidents in late September 2012, with the suspects listed as "absconder[s]." *See generally* S. Jain I, Annex I, entry ##11-13.

[455] *See, e.g.,* **R-33**, p. 97 (KoPT notifying HBT on 27 September 2012 that a ship would dock that evening at Berth No 2, and requesting it to evacuate a prior ship's cargo still lying on the jetty, to enable discharge from the new ship); **R-33**, p. 94 (KoPT notifying HBT on the night of 28 September 2012 that a ship would dock in an hour at Berth No. 8, and advising it "to make necessary arrangement to discharge vessel's operation"); **R-33**, pp. 50, 54, 57, 60, 66-67, 69, 70, 73, 76, 79, 81, 83-85, 90, 93 (similar notices from 29 September 2012 through 31 October 2012).

[456] **C-319**, p. 9.

[457] Further Amended Statement of Claim, ¶ 282.

[458] India Counter-Memorial, ¶ 316.

were disrupting cargo handling operations, and had also requested support from the State Government and the local police. "However, the efforts taken by KoPT are being frequently thwarted by various groups who are trying to creat[e] impediments one after the other for fulfilling their own vested interests." It urged "all stakeholders" to assist in "restor[ing] normalcy," and invited them to participate in a meeting to be convened soon by the District Magistrate.[459] In advance of that 4 October 2012 meeting, KoPT requested assistance from the police and the District Magistrate to ensure adequate security for it to proceed.[460]

236. ABG Infra's Managing Director, Mr. Agarwal, contends that on 3 October 2012, the day before the 4 October 2012 "stakeholders meeting," KoPT's Chairman Mr. M. Jain proposed a private meeting between Mr. Agarwal and with members of the Bose family, who owned the competing cargo handling company Ripley. During this meeting, Mr. Jain is said to have "repeated his refrain about the '*room becoming smaller*' and how Ripley and HBT must share the reduced cargo equally," Mr. Agarwal is said to have responded that HBT should not have to "share cargo that was rightfully HBT's (on account of our competitive operational terms)," and the Bose representative is said to have stated it would "allow" HBT to continue on the condition that it would not ask for more cargo, a statement with which "the [KoPT] Chairman made no attempt to intervene …."[461]

237. With respect to the larger-group meeting on 4 October 2012, LDA's witnesses state that HBT's attendees "stressed [their] desire to continue with the Project … but noted that [they] would be unable to do so unless the hostile atmosphere was contained."[462] They state that KoPT's Acting Chairman characterized the situation as a "socio economic politico problem," and emphasized that "the 'room' had become smaller, and we all had to learn to share the limited space."[463] The outcome of the meeting was a decision

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459 **C-325**; *see also* **C-335** (list of invitees).

460 *See* **R-421 (**KoPT asking police to "ensure there are no agitation and other Law and Order problems at the venue of the meeting or in the HDC area," and requesting the Superintendent of Police's personal attendance; the Superintendent forwarded the letter to the local police station); **R-405** (KoPT asking the District Magistrate to "pass necessary instructions to provide adequate security inside and outside the dock area, Township and various important Offices … so as to protect port infrastructure including the employees of the port and its different users"); **R-431** (Superintendent of Police, who had been copied on KoPT's letter to the District Magistrate, forwarding it to the local police station).

461 Agarwal I, ¶ 133.

462 Malhi I, ¶ 117; *see also* Morel-Jean I, ¶ 35; Agarwal I, ¶ 136.

463 Morel-Jean I, ¶ 35.

by KoPT to constitute a working committee, composed of representatives of HBT, KoPT, and the other cargo handling agencies (Ripley, Five Star, and A.M. Enterprises).[464]

238. Immediately following the meeting, HBT developed an internal list of "[n]on-negotiable Conditions Precedent for amicable settlement," which it intended to present at the working committee meetings. These included, *inter alia*, that KoPT would have to guarantee a minimum tonnage of 6.5 MMT per year to Berth Nos. 2 and 8; agree to let HBT deploy its spare Mobile Harbor Crane to another berth, No. 4B, while scrapping KoPT's pending tender for a new (competing) contract to mechanize that berth; excuse HBT's MLP requirement for reasons beyond its control; adopt a berthing policy where Berth Nos. 2 and 8 would be allocated vessels on a priority basis; and accept HBT's decision to not reinstate the 275 retrenched employees.[465] On 8 October 2012, however, the KoPT committee members publicly circulated their own report of the discussions, which stated *inter* alia that HBT had agreed to consider a possible reinstatement of the 275 retrenched workers, after the cargo handling agencies had insisted that this was a predicate to "any further solution to the problem."[466] HBT immediately protested KoPT's circulation of these "purported minutes … to the media as well," stating that the "meetings were informal and were held on a without prejudice basis," and denying all statements that had been attributed to HBT.[467]

239. Meanwhile, on 8 October 2012, HBT reported to the police that a car transporting its management staff had been surrounded by a mob of about 100 people, who heckled and manhandled the staff and warned them not to attempt resuming work at HDC.[468] The Superintendent forwarded the report to the local police station.[469] On 9 October 2012, KoPT advised the District Magistrate that the INTTUC-affiliated union had announced a hunger strike in front of its offices at HDC, and asked that the authorities not allow it at that location, but rather "at a place far away … where safety and security of HDC would not be affected," because of fears that the strike "may cause serious disturbance and obstruction in normal office

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[464] Malhi I, ¶ 118.

[465] **C-336**.

[466] **C-339**, pp. 2-3.

[467] **DN-20**; *see also* **C-579**.

[468] **C-340**; *see* Further Amended Statement of Claim, Appendix I, entry #16. On 9 October 2012, the local police reported to the Superintendent of Police that "the allegation could not be substantiated," because no witnessed could be found who "could throw any light regarding the alleged incident." **R-396**; *see also* S. Jain I, Annex I, entry #14.

[469] **R-438**.

functions" of HDC.[470] The Superintendent of Police, who had been copied on the letter, forwarded it to the local police station.[471]

240. On 10 October 2012, HBT reported another incident to the police, in which its site office was surrounded and its office staff were threatened not to attempt again to open the office, with the threat reportedly repeated by phone by the Secretary of the INTTUC Union.[472] By the time a police officer arrived, he found no continuing agitation.[473] HBT forwarded its latest police reports (FIRs) to the District Magistrate, insisting that "the police officials as well as the district administration is under an obligation under law to take emergent action ..." to restore a safe working environment at the Berths.[474] The Superintendent of Police, who had been copied on this package of letters, forwarded it to the local police station.[475]

241. On 11 October 2012, HBT advised KoPT of the "further incidents of threat, intimidation, violence and damage to property that were perpetrated against the employees, personnel and property of HBT" on 8 October and 10 October 2012. It acknowledged that KoPT had written in the past to "the State Administration and functionaries" to appeal for assistance with law and order at HDC, but accused KoPT of not "following up with the said authorities and/or ensuring that the issuance of the said letters culminates into some concrete action to restore peace and normalcy at HDC." HBT also "den[ied] that the CISF has in any manner assisted HBT," and stated that "the mere placing of CISF personnel at HDC will not, in itself, assure the safety of HBT's personnel, more so when in the recent past, the said CISF personnel have … refrained from interfering and assisting … when such incidents have taken place." HBT stated that it had now "become impossible for us to undertake any cargo handling operations" at the Berths. HBT sent copies of this letter to the police and the District Magistrate, among others.[476] It also wrote separately to the District Magistrate on 12 October 2012, summarizing the various incidents between 22 September and 10 October 2012, and again requesting assistance.[477] On 12 October 2012,

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[470] **R-406**.

[471] **R-434.**

[472] **C-344**; **C-349**, p. 7; *see also* **C-343**; Further Amended Statement of Claim, Appendix I, entry #17.

[473] **R-386**, police log entry #40; *see also* **R-387**, ¶ 4 (police later reporting to the court that "a good number of witnesses" were examined, "but none could focus any light about the incident"). *See also* S. Jain I, Annex I, entry #15.

[474] **C-345**.

[475] **R-433**; **R-435**.

[476] **C-346**.

[477] **C-349**, pp. 36-43. The Superintendent of Police was "out of station" and only received a copy of this letter on 17 October 2012; on 19 October 2012, he forwarded it to the local police station. **R-437**; *see also* **R-388**.

KoPT sent a report to the Government of West Bengal "on the prevailing situation … and steps taken so far,"[478] with a request "for its intervention on labour welfare and other related local issues."[479]

242. On 12 October 2012, KoPT advised HBT that it must resume cargo operations by 19 October 2012, "failing which it would be presumed that HBT is not interested in continuing the work."[480] On 16 October 2012, HBT reported to the police, with a copy *inter alia* to KoPT and the District Magistrate, that its staff had been "trying to enter the port to report to duty … and attempt to resume our operations," but were receiving "intimidating calls from unknown numbers" and had been told that groups were convened near various HDC entrances, with the result that "[n]aturally our staff is scared to face the group and enter the HDC port area."[481] The Superintendent of Police forwarded this letter to the local police, as with all the other letters he had received from HBT and KoPT.[482]

6. The Court Order of Protection and Efforts to Implement It

243. On 16 October 2012, HBT filed a Writ Petition in the Calcutta High Court, seeking an order of police protection.[483] In response to a court order, the Haldia police submitted a report describing its response to various complaints HBT had filed, from the date of HBT's retrenchment of workers (24 September 2012) through 10 October 2012. In general, the report stated that there had been "peaceful agitation" by union members in the wake of the retrenchment, but that "[t]hough Police was deployed from Haldia [police station] time to time … no major untoward incident related to break down of law and order in and around HDC was reported … till today." The report concluded that "it is basically a labour dispute … and Law and Order situation is over all peaceful," and claimed that the "[s]ituation is kept under continuous sharp vigil by introducing Police Pickets and patrolling in an[d] around the HDC."[484] The Superintendent of

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[478] **C-581**.

[479] **C-582**.

[480] **C-350**. That same day, the CISF reported that about 100 of the retrenched workers were "sitting on peaceful dharna opposite HDC operational building …." **R-135**, p. 74.

[481] **C-353**. LDA does not include this 16 October 2012 event in its pleaded chart of "incidents of violence," *see* Further Amended Statement of Claim, Appendix I, and there appears to have been no relevant Haldia police log entry that day. **R-386**, p. 19 (entries skipping from 14 to 17 October 2012). LDA's witness Mr. Ghosh discusses what appears to be a separate incident the same day – an alleged "attack on [his] house … around 3 kms from HDC," with one individual telling him "to leave Haldia immediately on pain of death," but that HBT "did not lodge an FIR with the police because we felt it was too unsafe to do so as we were vulnerable to further attack." Ghosh I, ¶¶ 32-33.

[482] **R-436**.

[483] **C-352**.

[484] **R-387**, ¶ 6.

Police submitted a separate report regarding HBT's letter of 12 October 2012, stating that based on the report he had received from the local Haldia police, "it is revealed that all necessary actions as per law have been taken by Police," that "no such major incident has happened or reported on last two months" at HDC, and that "[s]ufficient Police personnel have been deployed …."[485] The District Magistrate, in turn, reportedly claimed that the situation around HDC had not taken any turn for the worse as a result of the retrenchment.[486] HBT contended that the police and District Magistrate had never responded to any of their complaints, not even to contend that their allegations were without basis, but that KoPT for its part had "openly supported the cause of the petitioners."[487]

244. The Calcutta High Court expressed deep concern that local authorities had never apprised HBT of the results of their investigations (namely that HBT's allegations purportedly were "incorrect, baseless and unfounded"), stating that this "utter apathy" "shocks the conscience of the Court …."[488] The Court noted that the Superintendent "accepts, prima facie, [that] a labour dispute exists," and the District Magistrate's contention that "no untoward incident has occurred yet" appeared based on limited information provided, without any personal visit to HDC.[489] The Court noted that the Superintendent's report made no reference to any visit on his part to HDC, but simply relied on the local police inspector, whose own report referenced no personal visits to HDC.[490] "This being the state of affairs,'" the Court concluded, "it is difficult … to accept that the situation at berths 2 and 8 are absolutely normal, not warranting any order on the local administration." The Court made no findings about the "motives" of any individuals possibly seeking to disrupt cargo operations, but considered it necessary to issue interim directions, given the apparent "[l]ack of initiative" on the part of senior police officials "to gain first hand knowledge of the situation," and the public interest in resuming cargo operations.[491] The Calcutta High Court accordingly issued an interim order directing the District Magistrate and the Superintendent of Police "to ensure that disruptive activities, if any … does not hinder cargo handling operations at berths 2 and 8." This was to

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485 **R-388**.

486 **C-355**, p. 2 (characterization by the Calcutta High Court). The CISF noted that its personnel deployed at HDC were not responsible for protecting "private property or employees of the private contractors." *Id.*, p. 4.

487 **C-355**, p. 4.

488 **C-355**, p. 6.

489 **C-355**, pp. 6-7.

490 **C-355**, p. 7. In these proceedings, the Superintendent (Mr. S.K. Jain) submitted his tour diary showing that he had visited Haldia on at least one occasion in September after the retrenchment, but it is not clear if this visit (on 28 September 2012) included HDC or the Berths in particular. **R-444**.

491 **C-355**, pp. 8-9.

be accomplished through the deployment of "temporary police guards" at HBT's own expense, with the number of such guards to be assessed by the Superintendent. The retrenched workers and union representatives were to locate any demonstrations at least 100 meters from the HDC entry gate, and police were to prevent any unauthorized persons from accessing the Berths.[492]

245. It took some time for the mechanism the Calcutta High Court had ordered to be put in place. On 20 October 2012, the Superintendent of Police asked HBT to notify the local police of its "specific requirement" for the placement of police guards at specific locations, who would be deployed "after due assessment and [HBT's] depositing Police Cost … to comply with" the Court's order.[493] The local police similarly asked HBT to identify the locations where it needed guards, the time periods of guard duty, and how many days the guards would be required, so the relevant costs could be calculated.[494] HBT responded that it did not have the expertise to dictate the details of the security arrangements, nor had the Court imposed this obligation on HBT.[495] On 21 October 2012, the local police therefore submitted their own suggested deployment plan to the Superintendent, "after jointly visiting the operational area" with HBT, and asked the Superintendent to calculate the costs so HBT could submit payment and arrangements could be put in place.[496] These costs (for a 30 day posting) were transmitted to HBT on 22 October 2012, and HBT responded that it preferred to arrange help initially for only ten days. It appears that HBT ultimately deposited the costs on 26 October 2012,[497] and HBT was informed the next day that the guards were being mobilized to take up their posts at HDC beginning on the morning of 28 October 2012.[498] KoPT's records and police logs suggest the deployment actually began on the evening of 27 October 2012.[499] In the interim between 20-27 October 2012, while the placement of guards at fixed locations was

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[492] **C-355**, pp. 9-10.

[493] **C-583**, pp. 4-5. The Superintendent also asked KoPT to "implement a mechanism" to prevent unauthorized access to the Berths, *id.*; KoPT responded that the Court's order "is clear and unambiguous" that this was a police responsibility, but that it would "render … all possible cooperation within our means," **C-584**, and it asked CISF to coordinate with the police, HBT and HDC. **C-583**.

[494] **R-398**; *see also* **R-386**, police log entry #60 and #68 (noting sending of "[R]eminder letter").

[495] **R-394**, p. 5.

[496] **R-399**; **R-394**, p. 5. The police also asked HBT to arrange suitable temporary accommodations and toilet facilities for the posted guards. **R-400**.

[497] **R-412**.

[498] **R-418**; *see also* **C-365** (HBT acknowledgment on 27 October 2012 that "[p]olice will be deployed from 0800hrs tmrw").

[499] **R-297**, ¶ 17 (cited by the Parties in their Agreed Chronology of Events, #168); *see also* **R-386**, entry #115 (detailing individuals to be posted at the HDC main gate, at HBT's operational offices at each of the Berths, and outside HBT's workshop at Berth No. 2).

still under discussion, the local police stepped up their periodic mobile patrols of the Berths, as reflected in numerous daily reports in the Haldia police duty logs.[500]

246. However, while these arrangements were being put in place *within* the HDC complex, there apparently were additional incidents *outside* the complex. On 23 October 2012, HBT filed two police reports, the first stating that on the previous evening one of its employees had been attacked and severely injured by a mob of over 100 people,[501] and the other stating without details that an employee had been threatened not to enter the port.[502]

7. The "Abduction" and the Notice of Termination

247. Late in the night of 27-28 October 2012, just as the police guards were being posted at the designated spots within HDC, a further, far more serious incident occurred in a residential area roughly 3.5 kilometers away from the complex. LDA presented a witness statement from Mr. Jolly discussing these events, but by the time of the hearings he was no longer in HBT's employ,[503] and Mr. Jolly did not appear for cross-examination despite being called to do so. As noted in Section IV.H above, the Tribunal declined to exclude his statement *in toto*, stating that it would apportion only such weight to its various assertions as it considered appropriate in the circumstances.[504] The Tribunal considers that for the most part, the basic story Mr. Jolly recounted in his witness statement was consistent with more contemporaneous descriptions of these events. However, precisely because of the existence of contemporaneous documents, the Tribunal has no need to rely on Mr. Jolly's witness statement, for the purposes of the chronology of events described in detail below.

248. At the time of these events, it appears that all was quiet at the Berths, which were being monitored by the police.[505] However, based on contemporaneous police logs of the night, the local police received a telephone call from Mr. Jolly at 11:15 p.m., reporting persons loitering in and around a residential

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[500] *See* **R-386**, police log entry #56 ("instruct[ing] all the officers and force to keep close vigil at Berth no. 2 & 8" in accordance with the Court order); *id.*, pp. 21-42 (patrolling reports from 20-27 October 2012).

[501] **C-585**, p. 1; **R-417**; *see also* **R-386**, police log entry #84. KoPT forwarded a copy of one of these FIRs to the local police, requesting that they take necessary action. **C-586**. The District Magistrate, who had also been copied on the FIR, forwarded it to the Superintendent of Police (who already had been directly copied). **R-411**.

[502] **R-386**, police log entry #85, 91.

[503] Hearing Transcript, 27 November 2017, p. 13.

[504] PO11.

[505] **R-386**, police log entry ##115-119.

building in Haldia Township where he and another HBT colleague (Mr. Jagdish Behara) were visiting a third (Mr. Bhushan Patil); an officer was instructed to investigate.[506] That officer subsequently reported that he had arrived at the building within ten minutes of Mr. Jolly's call and remained there from 11:25 p.m. through 12:35 a.m., but "did not notice any suspicious person there." Both Mr. Patil and the caretaker of the housing complex nonetheless confirmed to the officer that five or six people had gathered there for a time but subsequently left, and the officer eventually moved on to other patrolling duty, after leaving his mobile phone number with Mr. Patil.[507] However, the police thereafter received an additional text and call reporting that "a chaos is going on in and around" Mr. Patil's residential complex, and the inspector in charge organized a force to accompany him to the site, in the meantime receiving an additional text from Mr. Jolly's phone (at around 1:10 a.m.) stating that "some had kidnapped their AGM," Mr. Patil.[508] The police arrived on scene at 1:30 a.m. but could not find the HBT officials, nor any "outsider or any gathering," nor could they reach Mr. Jolly by phone. The officers then went to the hotel at which they learned Mr. Jolly had been staying, and discovered that he had checked out at 1:20 a.m., with the hotel manager stating that Mr. Jolly was unaccompanied at the time. The police subsequently received a text from Mr. Patil that "[a]ll is fine we are going from Haldia by our wish," but the inspector in charge nonetheless asked one of his officers to maintain watch around the residential complex.[509] The police logs do not show any other relevant entry until 2:05 p.m., when they received an FIR from HBT stating that its officers had been abducted and forced to leave town.[510]

249. Other contemporaneous documents provide further details from the perspective of HBT. On the afternoon of 28 October 2012, HBT filed a report with the police stating that three of its senior officers (Messrs. Jolly, Behara and Patil, along with Mr. Patil's family members) "were abducted this morning" at about 1:00 a.m. from a residential address, "by a mob of about 50 unidentified persons, threatened with dire consequences and grievous bodily harm and were forced to flee Haldia at Gunpoint," having been advised never to "set foot in Haldia again."[511] This HBT report was supported by several internal HBT

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[506] **R-386**, police log entry #120. The police logs detail worker complaints against these individuals filed earlier that day, including that on 26 October 2012 Messrs. Patil and Behara had "threatened and abused … with filthy language" one HBT employee inquiring about "his due bonus," and that Mr. Jolly had done the same to another employee making a similar inquiry. **R-386**, entry ##109-110.

[507] **R-386**, entry #122.

[508] **R-386**, entry #123.

[509] **R-386**, entry #124.

[510] **R-386**, entry #126.

[511] **R-354**, pp. 40-41.

communications during the events in question. First, at 00:56 a.m., Mr. Jolly e-mailed HBT's CEO to say that at around 11:00 p.m. on 27 October 2012, he had observed a group of 25-30 men approaching the premises "wearing mufflers and monkey caps," and he called the police moments later, being told that a mobile patrolling van "shall be coming in few minutes." The van reportedly arrived at around 11:35 p.m., and the police officer reported to Mr. Jolly by phone that nobody appeared to be present, even though Mr. Jolly could still see "few people … at a distance in a group from our windows." However, "[a]t exactly midnight the[re] was heavy banging on the door and … calling our names. They were trying to break open the door." Mr. Jolly called the police again, "asking them to resend the patrol van," and was told that the officer was on the way back. Mr. Jolly reported that "[w]ith this volatile situation and threat … our intention is to leave Haldia now."[512] About half an hour later, at 1:32 a.m., HBT's CEO received a text message saying "PL CALL ME," and then a further text at 1:56 a.m., reporting that "JOLLY BUSHAN JAGDISH kidnap fr house."[513]

250. The HBT officers provided written statements two days later, on 30 October 2012. According to Mr. Jolly's contemporaneous statement, after the initial midnight knocking on Mr. Patil's door described above, the "mob … left the apartment complex" for a while, but returned around 12:55 a.m. "armed with sledge hammers," broke into Mr Patil's flat and pulled him out. Mr. Jolly states that he both called and texted the police to report these events. Shortly thereafter, the others left the flat after being "asked to come down," were put in a vehicle and were told they would be "taken away from there." Mr. Jolly requested and was allowed first to collect his luggage and check out from his hotel. The group was then driven away – Mr. Jolly observed that "the abductor sitting next to the … driver" had two hand guns – and were taken to the railway station, where "[t]he abductors … purchased tickets" for another town and waited on the platform until the group boarded the train. Mr. Jolly was forced to send a text to the police that all was well and they were leaving town on their own accord.[514] Mr. Behara's and Mr. Patil's statements of 30 October 2012 described the events of that evening similarly.[515]

251. The police opened an investigation into the incident. In addition to taking statements from the HBT officers, the investigation reportedly included examining "a good number of witnesses" and requesting a

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[512] **C-365**.

[513] **C-369**; **C-367**.

[514] **C-373**, pp. 1-3.

[515] **C-374**, pp. 1-3 (Mr. Behara) and 18-20 (Mr. Patil); *see also* Further Amended Statement of Claim, Appendix I, entry #18; Ghosh I, ¶¶ 34-37 (describing telephone communications with Messrs. Jolly and Behara during the incident, and with KoPT officers to notify them in turn).

forensics examination of the place of occurrence.[516] India's evidence is that "[d]uring the investigation, the victims in their statement corroborated the allegations made in the FIR but none could identify a single accused person involved. Extensive attempts are being made to find out the miscreants through different sources."[517]

252. Three days after the incident, on 31 October 2012, HBT issued a letter to KoPT announcing its termination of the Contract ("**Notice of Termination**"). HBT observed that following the 12 September 2012 Consent Order ("based on which HBT agreed not to suspend cargo handling operations"), KoPT "took about 7 … days" to allocate work to HBT, and then failed to provide security to HBT's personnel and property, despite being contractually responsible for "general security to the entire Dock area" and "being well aware that … vested interests would take the law into their own hands and would disrupt operations …."[518] HBT complained that KoPT "refused to provide security" itself and instead asked HBT to request security from the relevant district authorities, which HBT characterized as a breach of its Contract obligations.[519] After HBT obtained the 19 October 2012 Calcutta High Court order of protection, KoPT "has not taken any pro-active steps" to assist, but simply "address[ed] a few token letters to relevant district functionaries," while continuing to pressure HBT to resume work by placing vessels at the Berths before HBT was ready to handle them.[520] HBT characterized the events of 27-28 October 2012 as its final breaking point, through which "the law and order situation has now extended beyond the premises of HDC and perpetuated [sic] the homes of our officers/employees." HBT contended that "[t]he persons who are responsible … are under the control of KoPT," and "by being a mere silently [sic] spectator to all such acts of violence against HBT, KoPT is guilty of aiding and abetting such illegal acts."[521] HBT concluded that "it now appears that KoPT had no intention whatsoever of enabling and/or permitting HBT to obtain the benefit of the [Consent Order] and the entire exercise was nothing but a charade,"[522] in which "KoPT was acting solely at the behest of vested interest and had been doing so all along."[523] HBT also accused KoPT of "suppress[ing] … from the intending bidders" for the Tender KoPT's awareness

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[516] **R-394**, p. 8.

[517] S. Jain I, Annex I, entry #16.

[518] **C-376**, ¶¶ 3(b)-3(e).

[519] **C-376**, ¶ 3(f).

[520] **C-376**, ¶ 3(j)-(k).

[521] **C-376**, ¶ 3(l).

[522] **C-376**, ¶ 3(m).

[523] **C-376**, ¶ 4(d).

that mechanizing the Berths and prioritizing cargo to mechanized berths would lead to resistance.[524] In view of these "fundamental breaches," HBT stated that KoPT "has thereby repudiated its contractual obligations and HBT is therefore, discharged from its obligations arising under the [Contract]."[525] It asked KoPT to protect HBT's equipment until it could be removed from HDC.[526]

253. On 3 November 2012, HBT informed KoPT of the retrenchment of its remaining 341 employees with immediate effect.[527]

H. POST-TERMINATION EVENTS

1. Treatment of HDC's Equipment

254. Following HBT's withdrawal, uncertainty continued over the fate of the equipment remaining at the Berths.

255. First, on 7 December 2012, KoPT petitioned the Calcutta High Court for an interim injunction against the removal of the equipment, claiming a lien in light of damages attributable to HBT's alleged repudiation of the Contract.[528] On 13 December 2012, the Court found that "[o]n the facts as evident at present, [HBT] cannot be burdened by curbing its unfettered right to use and deploy its machinery, equipment and material," as "nothing in the [Contract] gives the Port any lien over or right to withhold the … equipment" and, at least on a prima facie basis, "it does not appear that [HBT] chose to abandon the work or the site without any justification," given the continued law and order situation. The Court appointed Special Officers to oversee the removal of the equipment.[529] This interim order was subsequently modified to permit HBT to use its equipment freely within the country upon notice to the Special Officers, but with the Special Officers remaining in symbolic possession thereof pending final resolution on the merits of the HBT-KoPT contractual dispute.[530]

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[524] **C-376**, ¶ 4(d).

[525] **C-376**, ¶ 4(k).

[526] **C-376**, ¶ 6.

[527] **R-45**.

[528] Agreed Chronology of Events, #176 (citing **C-589** and Reply ¶ 451(b)); *see also* **R-300**, p. 3.

[529] **C-387**, pp. 7-10.

[530] **C-625**, pp. 38-39; *see also* **C-397**, p. 2 (describing history).

256. Shortly thereafter, on 26 December 2012, the Office of the Commissioner of Customs ("**Customs Authority**") sought payment of a duty it contended would be due prior to any removal of the equipment, in light of HBT's original duty-free import of the equipment under the "Export Promotion Capital Goods" ("**EPCG**") licensing scheme.[531] On 2 January 2013, the Customs Authority asked KoPT to take action to ensure that HBT's imported equipment was not removed from the Port pending resolution of the issue.[532] On 16 January 2013, KoPT apparently filed an application seeking to bar removal of the equipment on the grounds that the Customs Authority had a claim over such equipment,[533] and on 13 February 2013 the Calcutta High Court directed that the equipment be moved to an alternate site within HDC.[534] This process was completed by early March 2013, when cargo handling operations by manual means were resumed at Berth Nos. 2 and 8.[535] On 14 March 2013, the relevant authorities confirmed that HBT had discharged its export obligations under the EPCG license.[536]

257. Meanwhile, however, KoPT had continued to press its application for an injunction against HBT's removing the equipment from HDC pending final judgment on the merits of a contractual dispute, which by then had been submitted to domestic commercial arbitration. On 22 March 2013, the Calcutta High Court rejected the application,[537] finding – as it had at the earlier interim injunction stage – that KoPT had not established a basis for a lien. Among other things, the Court observed as follows:

> On the basis of the material now available, it cannot be accepted that merely commercial reasons prompted [HBT] to abandon the agreement. … While there is no evidence of the Port's complicity with the vested interests at [HDC], it is equally unfair of the Port to foist the blame on [HBT] and charge it with abandoning the work, unmindful of the impediments in the way of [HBT] that the Port admitted in its letters to third parties. … [I]t seems that [HBT] was hounded out of Haldia and, given the law and order situation and the apathy of the administration to address the same, it was left with no alternative but to terminate the agreement. …
>
> [HBT] is entitled to remove its machinery and equipment from [HBC], subject, however, to any customs or like claim in respect thereof.[538]

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[531] **R-165**.

[532] Agreed Chronology of Events, #181 (citing **R-48**).

[533] Further Amended Statement of Claim, ¶ 311.

[534] Agreed Chronology of Events, #183 (citing **C-396**, pp. 81-82).

[535] Agreed Chronology of Events, ##184-185.

[536] Agreed Chronology of Events, ##186.

[537] Agreed Chronology of Events, #187 (citing **C-397**).

[538] **C-397**, pp. 20, 23.

258. Following KoPT's appeal against this decision, the Calcutta High Court Division Bench issued an amended ruling dated 14 May 2013, in which it allowed HBT to *use* the equipment anywhere within the country, but enjoined HBT from *disposing* of it without prior leave from a commercial arbitration tribunal empowered to hear Contract disputes between HBT and KoPT.[539] The Indian Supreme Court upheld that decision on 19 July 2013.[540] On 7 October 2013, HBT asked the commercial arbitration tribunal for an interim order permitting it to sell the equipment or remove it from the country.[541] On 13 June 2014, the arbitral tribunal authorized HBT to sell its equipment only if it first made a deposit of the equipment's assessed value.[542]

259. While the commercial arbitral tribunal was considering these issues as between HBT and KoPT, the customs dispute also continued in the local courts. On 26 November 2013, the Calcutta High Court determined that "the customs authorities cannot have any duty claim" against HBT, and therefore certain HBT bank guarantees with Axis Bank could be cancelled.[543] Axis Bank accordingly released and discharged the bank guarantees.[544] The Customs Authority appealed against the 26 November 2013 order, and on 25 March 2014 they issued a notice requesting HBT to show cause why its equipment should not be confiscated under the Indian customs legislation.[545] HBT filed a contempt of court petition before the Calcutta High Court, which was resolved by interim order in HBT's favor.[546] The interim order was subsequently directed to be held in abeyance pending resolution of the Customs Authority's appeal against the 26 November 2013 order,[547] and on 29 April 2014, the Calcutta High Court Division Bench ruled in favor of the Customs Authority, allowing it to proceed against HBT in accordance with the law.[548] HBT appealed to the Indian Supreme Court, which on 24 February 2015 declined to interfere with the pending Customs proceedings.[549] The Customs Authority thereafter completed its examination, finding in March

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[539] Agreed Chronology of Events, #191 (citing **C-401**).

[540] Agreed Chronology of Events, #192 (citing **C-404**).

[541] **C-625**, p. 100.

[542] Agreed Chronology of Events, #205 (citing **C-426**).

[543] Agreed Chronology of Events, #197 (citing **C-416**).

[544] Agreed Chronology of Events, #198 (citing **SL-1**).

[545] Agreed Chronology of Events, #200 (citing **R-197**, pp. 10-12).

[546] **C-418**.

[547] **R-81**.

[548] Agreed Chronology of Events, #201 (citing **C-422** and **R-82**).

[549] Agreed Chronology of Events, #211 (citing **C-465**).

2016 that HBT in fact had complied with its export obligations under the EPCG license, and dropped its proceedings against HBT.[550]

260. As of March 2015, when LDA submitted its initial witness statements, its evidence was that HBT had been able to remove from HDC 25 of its total 50 dumpers and one pay-loader of its 24, along with all of its computers and records. However, on an unspecified date, HBT was reportedly told that "the labour unions had issued a diktat forbidding workers from assisting HBT," in consequence of which "[t]he remaining equipment is still lying idle and unused at HDC."[551] ABG Infra's Managing Director, Mr. Agarwal, contends that ALBA otherwise could have monetized HBT's Mobile Harbor Cranes by hiring them out to other port trusts in connection with various tenders issued in 2016.[552]

261. It is not clear when and in what manner HBT last attempted to retrieve the equipment from the site. LDA's position is that HBT is still effectively blocked from retrieving the equipment.[553] India's position is that HBT has not paid the deposit of the value of the equipment that the domestic arbitration tribunal found was necessary before HBT could move the equipment out of Haldia.[554]

2. Blacklisting Proceedings

262. Separate from the dispute over HBT's access to its equipment, there was an additional dispute regarding HBT's eligibility for further contracts with KoPT. On 28 November 2012, KoPT issued a "Show Cause Notice" indicating that an enquiry had been initiated into HBT's eligibility and requesting HBT to show cause "as to why it should not be banned from having any further business dealings and transactions with KoPT …."[555] On 11 December 2012, HBT replied that the "show cause notice" was "manifestly wrongful, illegal," and in bad faith.[556] HBT sought an injunction, but on 19 December 2012, the Calcutta High Court refused this request, directing HBT to "await the outcome of the process kicked off by the

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[550] Agreed Chronology of Events, #217 (citing **R-197** and **SL-1**).

[551] Agarwalla I, ¶ 64.

[552] Agarwal II, ¶ 32.

[553] *See, e.g.,* Hearing Transcript, 4 November 2017, pp. 1404-1405 (LDA's quantum expert calculating damages on the assumption that HBT cannot retrieve any equipment).

[554] Rejoinder, ¶ 980; India's Post-Hearing Brief, ¶ 114.

[555] **C-382**. While this enquiry was pending, ABG Ports allegedly lost the opportunity to proceed with another project for KoPT, because KoPT allegedly made the award of the project contingent on the outcome of the blacklisting proceedings. *See* Agarwal I, ¶ 150.

[556] **C-385**.

show cause notice."[557] The Calcutta High Court later rejected a further HBT application to adjourn the enquiry proceedings.[558] The enquiry therefore proceeded, with LDA now contending that the Enquiry Officer committed numerous due process errors, including denying HBT an opportunity to submit key documents and denying its right to an independent and impartial tribunal and to a reasoned decision.[559]

263. On 7 May 2014, KoPT's Enquiry Officer submitted his report,[560] concluding that HBT was not justified in terminating the Contract and recommending that HBT be blacklisted from future KoPT contracts.[561] On 16 May 2014 KoPT wrote to MoS, suggesting that "since this is an important issue affecting/likely to affect various Ports across India it is felt that such order for banning of business dealing of HBT may be issued by the Ministry of Shipping" rather than KoPT, and that "[t]he Ministry may also consider banning of business dealing of constituent companies of HBT as well as its group companies with the Ports in view of the extremely adverse report of the Enquiry Officer against HBT."[562] On 30 May 2014, the MoS replied that "the subject matter of the Enquiry … are specific to a particular project" involving HBT, and that KoPT should take "necessary action … to ban business dealings of HBT."[563] On 16 June 2014, KoPT issued an order banning HBT from "any future business dealings and transactions with KoPT" for five years (the "**Blacklisting Order**").[564] On 24 September 2014, HBT challenged the Blacklisting Order before the Calcutta High Court.[565] On 14 March 2015, KoPT informed all the other major ports in India

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[557] Agreed Chronology of Events, #179 (citing **R-47**).

[558] Agreed Chronology of Events, #189 (citing **R-49**).

[559] Further Amended Statement of Claim, ¶¶ 322, 434, 436, 446.

[560] Agreed Chronology of Events, #202 (citing **C-423** and Counter-Memorial, ¶ 384).

[561] **C-423**, p. 41. Among other things, the Enquiry Officer concluded that (a) KoPT was only contractually responsible to provide security (through CISF) to protect public property, not private property, and broader law and order issues both within and outside HDC were the responsibility of the police (*id.*, p. 15); (b) there was no evidence that KoPT "engineered or assisted" labor agitation which was due initially to worry about loss of employment at other berths and then aggravated by HBT's retrenchment of workers and termination of the Five Star contract (*id.*, p. 16); (c) HBT had no contractual right to particular cargo levels or to ensuring that the Berths did not remain idle (*id.*, p. 19); (d) HBT had no contractual basis for suspension of operations or termination of the Contract (*id.*, p. 27); and (e) HBT's retrenchment of labor following the Consent Order was part of a "planned attempt to scuttle the agreement" after "market trends … turn[ed] adverse" (*id.*, pp. 38, 40).

[562] **C-604**.

[563] **C-605**.

[564] **C-427**.

[565] Agreed Chronology of Events, #208 (citing **R-185**).

of its decision to ban HBT from dealings with KoPT for five years.[566] On 4 April 2017, HBT withdrew its pending court petition challenging the Blacklisting Order.[567]

264. In the wake of the Blacklisting Order, LDA and ABG Infra have continued to collaborate through ALBA on other projects in India, based on concessions awarded prior to the Blacklisting Order.[568] ALBA apparently also was declared the leading bidder in two 2016 tenders issued by Port Trusts other than KoPT.[569] ABG Infra's Managing Director contends, however, that the Blacklisting Order "damaged the future prospects" of various ABG companies, namely ABG Kolkata, ABG Infra and ABG Ports.[570]

3. Ministry of Shipping Fact-Finding Report

265. Concurrent with the Calcutta High Court proceedings and the KoPT Enquiry Officer proceedings, the MoS constituted its own fact-finding team to determine the circumstances that had precipitated the crisis at HDC. On 26 November 2012, it issued an interim report, concluding that "[p]rima facie, it appears that the withdrawal of HBT was on account of" five separate factors, including (a) HBT's continuing losses attributable to declining cargo due to overall trends and HBT's aggressive bidding that was financially not viable without high cargo volumes; (b) "lost interest in continuing with the loss-making venture" by HBT's shareholders, following a change in the shareholding pattern of the original bidding consortium; (c) excess labor burdens, "which prima facie appears to have been propelled by political considerations"; (d) "Covert and Overt labour unrest"; and (e) "[l]aw and order issues which occurred outside the dock area" and HBT's "loss of confidence ... in the State Authorities …."[571] The interim report identified as a "contributory factor" that the "business model" of the Contract was "against the interest of the existing parties which had a near monopoly on the on-shore cargo operations."[572]

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[566] Agreed Chronology of Events, #213 (citing **C-635** and Reply, ¶ 488).

[567] Agreed Chronology of Events, #222 (citing **R-355**).

[568] Agarwal I, ¶ 4 (discussing three 30-year concessions entered into in October 2011, March 2012 and April 2013).

[569] Agarwal II, ¶ 32.

[570] Agarwal I, ¶ 151.

[571] **C-392**, p. 4.

[572] **C-392**, p. 5.

266. On 23 April 2013, the MoS fact-finding committee issued its final report, adopting the findings of the interim report and recommending measures to prevent a recurrence in the future.[573]

4. Subsequent Tenders for Cargo-Handling Operations at the Berths

267. The process of replacing HBT, and getting the Berths back into operations, was neither smooth nor quick. In the near-term, KoPT contracted with another company to evacuate the cargo that remained un-cleared at the Berths following HBT's termination.[574] KoPT ultimately engaged in six rounds of tendering for the further equipping of Berth Nos. 2 and 8,[575] beginning with a tender on 9 November 2012.[576] This tender was subsequently discharged, and on 2 April 2013, KoPT floated a second tender.[577] In the interim, in the beginning of March 2013, KoPT resumed cargo handling by manual means at the Berths,[578] following a period of many months in which the Berths were essentially idle. This tender was also ultimately discharged, and on 2 December 2013 KoPT floated a third tender for the Berths.[579] The third tender was likewise discharged, and on 22 January 2015, KoPT floated a fourth round of tenders for the Berths, this time with two separate tenders for mechanized handling of cargo onboard the vessels and non-mechanized shore handling operations.[580] The fourth round was discharged, and on 11 March 2015, KoPT floated a fifth round of tenders, again separated into separate components for mechanized on-board handling and non-mechanized shore handling.[581] Both components ultimately required a sixth round of tendering, with contracts finally being awarded (a) in June 2015 for the onboard operations, to Bothra Shipping Services Pvt. Ltd. for Berth No. 2, and a consortium comprised of Orissa Stevedores Limited (as "Lead Member")

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[573] **R-302**. The measures included (a) development of an MoS modern concession agreement customized for mechanization of operations, as the Contract was a non-standard agreement lacking clarity in numerous respects; (b) avoiding acceptance of rate bids that are not financially viable in the absence of cargo commensurate to equipment capacity; and (c) "strong support of the Port Management and State Government … to handle the realities" of strong trade unions pressuring private operators for employment beyond what they assumed at the time of bidding, particularly where there are competing unions with different political affiliations "each trying to put down the other," which was one of the factors leading HBT to withdraw. *Id.*, pp. 3-5.

[574] Nayak I, ¶ 30 (citing **DN-19**).

[575] Mahapatra II, ¶ 19 (citing **AM-1**).

[576] Agreed Chronology of Events, #173 (citing **R-324** and **AM-14**).

[577] Agreed Chronology of Events, #188 (citing **R-324** and **AM-14**).

[578] Agreed Chronology of Events, #185 (citing **R-54**, pp. 35-36).

[579] Agreed Chronology of Events, #199 (citing **R-324** and **AM-14**).

[580] Agreed Chronology of Events, #210 (citing **R-324**, **R-85** and **R-86**).

[581] Agreed Chronology of Events, #212 (citing **R-324**, **R-87** and **R-88**).

and Ripley for Berth No. 8,[582] and (b) in February 2016 for the shore handling operations, to Ripley at both Berths, on account of its being the lowest approved bidder.[583]

268. LDA maintains that the results of these tenders supports its theory that the "Vested Interests" (as it defines the term) all along were acting in consort to benefit Ripley.[584] India denies the allegation and emphasizes that Ripley prevailed in a competitive bidding process.[585]

5. The Pending Commercial Arbitration

269. As noted, HBT and KoPT continue as parties to a commercial arbitration empanelled under the arbitration clause of the Contract. It appears that arbitration is still proceeding, with periodic hearings for the examination of witnesses, but no clear timetable for its completion.[586]

6. Alleged Obstacles by India to the Commencement of This Arbitration

270. On 11 November 2013, LDA served India with its formal Notification of Claim invoking arbitration under Article 9 of the France-India BIT (the "**Notification of Claim**").[587] This was followed on 31 March 2014 by LDA's Notice of Arbitration, commencing the present proceedings.[588]

271. On 17 June 2014, KoPT approached the Calcutta High Court seeking an anti-arbitration injunction to restrain LDA from proceeding against KoPT under the France-India BIT,[589] on the basis of the Contract's arbitration clause and the pending domestic arbitration between HBT and KoPT under that Contract clause.[590] On 8 August 2014, in response to LDA's request that the PCA appoint the second arbitrator in *these* proceedings, India informed the PCA that the Calcutta High Court had stated that any steps taken by

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[582] Agreed Chronology of Events, #214 (citing **R-324** and **R-89**).

[583] Agreed Chronology of Events, #215 (citing **R-324** and **R-90**).

[584] Reply, ¶¶ 490-493.

[585] Counter-Memorial, ¶¶ 390-395.

[586] Hearing Transcript, 27 November 2017, p. 76; Hearing Transcript, 27 November 2017, p. 294.

[587] Agreed Chronology of Events, #195 (citing **C-414**).

[588] **C-420**.

[589] Agreed Chronology of Events, #207 (citing **C-481**).

[590] **C-481**. Among other things, KoPT argued that "[n]o part of [LDA's] claim [in the present proceedings] is directed against … the Government of India but is wholly and completely connected with the dispute pending between the Port Trust and HBT, which is pending before the [domestic] Arbitral Tribunal." *Id.*, ¶ 12.

LDA in these proceedings would be subject to its orders and that any arbitral tribunal constituted under the France-India BIT should be approached for an adjournment. India suggested that the PCA therefore reject LDA's application, "having regard to the principles of Comity of courts exercising jurisdiction in respect of the same subject matter …." At the same time, India indicated its appointment of Mr. Thomas QC as second arbitrator,[591] which LDA opposed. On 29 September 2014, the Calcutta High Court issued an order restraining LDA from pursuing BIT claims against KoPT, but allowing LDA to pursue BIT claims against India.[592] The Calcutta High Court concluded that:

> The bilateral treaty is between the two sovereign nations. An investor under the treaty has been given certain special rights and privileges which is enforceable under the treaty. Whether the notification of claim falls within such parameters and [LDA] could be treated as an investor is a matter to be decided by the arbitral tribunal duly constituted under the relevant rules. In the event, the preliminary objections are overruled and the arbitral tribunal is of the opinion that the matter can proceed and continuation of such proceeding would not be a recipe for confusion and injustice. …
>
> The Union of India would be required to contest the matter on merits….
>
> The arbitration agreement is only enforceable against the Union of India and not against KOPT. The continuation of any proceeding against KOPT at the instance of [LDA] would be oppressive for the reasons mentioned above. In view thereof KOPT would not be bound to participate in the said proceeding.…
>
> [LDA] is restrained from proceeding with the arbitral proceeding only against the petitioner [KoPT].[593]

VII. THE JURISDICTIONAL IMPLICATIONS OF TREATY ARTICLE 2(1)

A. THE ARTICLE 2(1) OBJECTION IN THE CONTEXT OF INDIA'S OTHER JURISDICTIONAL OBJECTIONS

272. As noted in Section V.B, India disputes that the Tribunal has jurisdiction over LDA's claims and that the claims are admissible. India's jurisdiction and admissibility objections may be summarized by reference to the subheadings in Section III of its Counter-Memorial, which contend that:

> A. Even As Reformulated (Twice), Claimant's Claims Remain Premised On Treatment of HBT And, As A Result, The Tribunal Has No Jurisdiction Over Them [;]

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[591] **C-486**.

[592] Agreed Chronology of Events, #209 (citing **C-445**).

[593] **C-445**.

B. Claimant's Investment In The Project, Through ALBA, Was Premised On Fraudulent Misrepresentations And, As A Result, Claimant's Claims Must Be Dismissed [;]

C. The Conduct Of KoPT And The So-Called "Vested Interests" Is Not Attributable To The State of India [;]

D. Alternatively, LDA's Claims Should Be Dismissed Because The Parties And The Claims Under The Present Proceedings And The Domestic Arbitration Are Substantially The Same And There Would Be No Material Prejudice Resulting to Claimant From Continuance Of Proceedings In The Ongoing Arbitration Under The Contract Between KOPT And HBT [;]

E. Even If KoPT's Actions Are Attributable To India, LDA's Claims Based Upon Disputes Resolved As Between HBT and KoPT By The Settlement Recorded In The Consent Order Of the Calcutta High Court Are Inadmissible And Outside The Tribunal's Jurisdiction [;]

F. The Tribunal Lacks Jurisdiction Over LDA's Claims Of Treaty Breach And Loss Allegedly Occurring Before LDA Made Its Investment In India [; and]

G. The Tribunal Lacks Jurisdiction Over Any LDA Claims Based Upon Actions Or Omissions That Occurred Before India Acquired Knowledge of Claimant's Shareholding In HBT. [594]

273. LDA by contrast considers that it has made a protected investment under the France-India BIT and that its claims in this case relate to treatment by India of that qualifying investment. It also denies each of India's further objections to the Tribunal's jurisdiction. LDA's responses may be summarized by reference to the corresponding subheadings in Section XII of its Reply, which contend that:

A. The Respondent's Submissions on Reflective Loss are Without Merit [;]

B. Claimant's Investment was not Based on Fraudulent Misrepresentation [;]

C. The Claimant's Investment did not Violate Section 108A of the Companies Act [;]

D. The Conduct of KoPT is Attributable to the Respondent as a Matter of International Law [;]

E. The Claimant's Claims Are Not Excluded by Reason of *Lis Pendens* [;]

F. Consent Order is Not Determinative of the Present Disputes [;]

G. The Respondent's *Ratione Temporis* Argument does not deprive the Tribunal of Jurisdiction over its Claims [; and]

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[594] Counter-Memorial, Sections III.A-G.

H. Knowledge of Investment is not a Prerequisite for Raising a Claim under the Treaty.[595]

274. The Parties have briefed each of these objections extensively. The Tribunal believes it appropriate to start with India's first objection, which is closely connected to the Tribunal's prior Decision on Jurisdiction. In particular, the Tribunal focuses below on the implications of Article 2(1)'s exclusion of certain indirect investments from coverage, in light of LDA's reformulation of its claims and the facts as the Tribunal has now found them in Section VI above.

275. Before beginning this Article 2(1) analysis, the Tribunal acknowledges that India has presented a far broader objection to the formulation of LDA's claims: that LDA would have no standing to proceed even absent Article 2(1), because the Treaty allegedly does not permit investors to bring so-called "reflective loss" claims – *i.e.,* claims for harm to the value of their shares in companies allegedly mistreated, without any alleged mistreatment of the investors' shareholder rights as such. India relies on the *Barcelona Traction* case to argue that reflective loss claims are barred by customary international law absent specific treaty authorization, which it finds lacking in the France-India BIT.[596] India also argues that even if the Treaty might permit *some* reflective loss claims, this could not extend to so-called "double reflective loss" claims, in which standing is purportedly not on mistreatment of the company in which the investor holds shares, but rather mistreatment of a further (downstream) company in which the investor holds no shares.[597] India acknowledges that its first argument – against "reflective loss" claims as such – runs counter to the decisions of a number of other investment treaty tribunals;[598] it characterizes its second argument as addressing a "radical and unprecedented" type of claim presented in this case.[599]

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[595] Reply, Sections XII.A-H.

[596] *See* Counter-Memorial, Section III.A.1.a. ("The Admissibility Of Claims Predicated On Reflective Loss Is Highly Questionable").

[597] *See generally* Counter-Memorial, Section III.A.1.b. ("Even If The BIT Provided Standing To Claim For Reflective Loss, Such Standing Would Not Extend to Claims Based On Measures Directed At A Company Other Than The One In Which The Protected Shareholding Is Held").

[598] *See, e.g.*, Counter-Memorial, ¶ 421 (contending that those decisions "not only failed to address certain critical arguments raised by India here, but also suffer from the same mistaken interpretative assumptions"); Rejoinder ¶ 614 ("to the extent the tribunals in question actually attempted to justify claims for reflective loss, their reasoning was typically either cursory or predicated in significant part on treaty language which simply does not exist in this case. …. They accordingly have little to no persuasive value.").

[599] Counter-Memorial, ¶ 410; *see also id.*, ¶ 424 (characterizing this as "a case for an entirely different species of claim" than ordinary reflective loss cases).

276. For its part, LDA characterizes these objections as an attempt to "deny[] protection to the actual investors, and negate[] their rights and remedies under the Treaty."[600] LDA considers the general issue of reflective loss claims under investment treaties to be well settled, and finds no basis for limiting the concept of traceable harm to share value to a *single* level of shareholding.[601] LDA does acknowledge the unusual nature of its "double reflective loss" claim formulation, but explains this as a function of its unusual need (in light of Article 2(1)) to frame its claims not about its indirect investment in HBT as such.[602]

277. While the Tribunal considers the reflective loss arguments of both Parties to be interesting, it is unnecessary ultimately for it to wade into these broader doctrinal debates. Indeed, India itself acknowledges that "the Tribunal does not need to decide the admissibility of shareholder claims for ordinary 'reflective loss,' or even for the 'double reflective loss' claimed here by LDA," in light of its continuing objection to LDA's claim reformulation under Article 2(1).[603] The Tribunal agrees with this logical order of analysis. For the reasons discussed in this Section, it finds that Article 2(1)'s unusual express exclusion of protection for indirect investments made with a minority ownership in the intermediate investment vehicle continues to impose significant special hurdles for LDA's case, which involves just such an ownership structure with respect to HBT. Ultimately, as discussed in the following Section VII.B, the Tribunal finds that LDA has not met its burden of proof with respect to these special hurdles. In these circumstances, it is not necessary to resolve India's other bases for challenging jurisdiction in this case.

B. THE TRIBUNAL'S PRIOR RULINGS AND LDA'S CASE REFORMULATIONS

1. LDA's Initial Formulation and The Tribunal's Decision on Jurisdiction

278. As already noted above, Article 2(1) of the France-India BIT provides:

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[600] Further Amended Statement of Claim, ¶ 368AD.

[601] LDA contends that numerous awards and scholars have confirmed an investor's right to claim for the reflective loss caused to its shares as a result of measures directed at, for example, the company in which it holds a direct or indirect interest," *id.* ¶ 368C, including "where there are a number of company layers between the shareholding making the reflective loss claim and the company that is the subject of the 'acts of the third party'." *Id.*, ¶ 368E.a. *See also* Reply, Section XII.A.1.a ("The Respondent's Submissions that Reflective Loss Claims are not Permitted in International Investment Law are Incorrect") and XII.A.1.b. ("The Respondent's Objections to 'Double' Reflective Loss are Without Foundation").

[602] LDA's Post-Hearing Brief, ¶ 129 ("The Respondent makes much of the argument that no claim of this kind has been permitted before. That does not improve the point. The Claimant has pleaded its case in this way due to Article 2(1) of the BIT as highlighted in the [Decision on Jurisdiction].").

[603] Counter-Memorial, n. 1067.

> [The BIT] shall apply to any investment made by investors of either Contracting Party in the area of the other Contracting Party, including an indirect investment made through another company, wherever located, *which is owned to an extent of at least 51 per cent by such investors*, whether made before or after the coming into force of this Agreement. (emphasis added)

279. LDA's original Statement of Claim sought a monetary award for the "full market value of the Contract" between HBT and KoPT,[604] based on the following characterization of LDA's relevant "Investment":

> [T]hrough its shareholding, the Claimant holds partial rights (in the ratio 49:51 …) to money and claims to performance under the Contract. Consequently, the Claimant's indirect shareholding of, and rights in the Contract held by, HBT qualify as a protected investment in India, as that term is defined in the Treaty (the 'Investment'). Thus, any damage caused to or loss suffered by HBT is also a loss of damage to the Claimant's Investment.[605]

LDA claimed that India was responsible for "a series of targeted actions … aimed at dispossessing the Claimant of its Investment," as defined above.[606]

280. As noted above, India sought and was granted bifurcation (*inter alia*) of its original "Second Objection" to jurisdiction, which was that the Tribunal lacked jurisdiction pursuant to Article 2(1) of the Treaty because LDA's defined "Investment" (its shares in HBT and/or its asserted derivative rights in HBT's Contract) was made indirectly through a company (ALBA) of which LDA owned less than 51%.[607] During the briefing and argument of this bifurcated objection, LDA defended its original framing of the qualifying indirect investment, but it also argued that it could have framed its case alternatively in a way that would obviate the Second Objection. Specifically, LDA emphasized that it had two forms of qualifying *direct* investments in India, the first through its direct shareholding interest in ALBA, and the second through its commitment of finance, personnel and know-how directly to HBT.[608]

281. The Tribunal's Decision on Jurisdiction accepted India's Second Objection with regard to LDA's original framing of its case. Specifically, the Tribunal reasoned as follows:

- "The fact that a particular asset falls within the definition of the term 'investment' [in Article 1(1) of the Treaty] does not necessarily mean that it is a protected investment.

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[604] Statement of Claim, ¶ 31.

[605] Statement of Claim, ¶ 360.

[606] Statement of Claim, ¶ 156.

[607] PO2.

[608] *See* Decision on Jurisdiction, ¶ 149 (citing LDA's arguments).

States are free, if they wish, to extend treaty protection to a subset, rather than to the full universe of potential investments."[609]

- Article 2(1) "restricts the scope of Treaty protections to indirect investments in which an investor from the other Contracting Party owns at least 51% of the intermediate investment vehicle, wherever that vehicle may be located"[610] – and accordingly, "by virtue of Article 2(1), the Claimant may not proceed under the BIT with a claim for harm to its indirect investment in HBT."[611]

- The MFN clause in the Treaty could not "be used to overcome express limits to the threshold scope of the BIT itself, and thus to expand its jurisdiction ratione materiae," because Article 2 "functions as a gateway. Only investors and investments that are entitled to pass through that gateway may then invoke the protections of the Treaty's other provisions," including the MFN clause itself.[612]

- For these reasons, LDA's "indirect investment in HBT does not fall within the scope of covered investments, because the Claimant chose to make that investment through an intermediate entity (ALBA) in which it held less than 51% of the shares. Had the Claimant negotiated a different arrangement with its joint venture partner, so the Claimant maintained 51% rather than 49% of the ALBA shares, then the investment structure would not have fallen afoul of the restriction in Article 2(1)."[613]

282. The Tribunal next analyzed "whether the Second Objection disposes in its entirety of the Claimant's case, or whether a portion of that case may proceed on a basis *other* than with respect to the Claimant's indirect investment in HBT."[614] The Tribunal noted LDA's claim that it had made two distinct direct investments in India that were implicated on the facts, one through its direct shareholding in ALBA and the other through a direct commitment of finance, personnel and know-how to HBT. Since the Parties agreed that the Treaty "imposes no majority ownership restriction on the BIT's coverage of direct investments," the Tribunal concluded that it was "common ground" that the Claimant would have standing to pursue a "properly framed claim for improper treatment of and injury to its direct investment" in India.[615]

283. With respect to a possible reformulation of LDA's claims, the Tribunal noted India's argument that LDA would have to allege wrongdoing that was "*aimed at* the Claimant's shareholding in ALBA itself," and not predicated simply on a derivative injury to ALBA flowing from "State action in relation to HBT, the

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[609] Decision on Jurisdiction, ¶ 133.

[610] Decision on Jurisdiction, ¶ 139.

[611] Decision on Jurisdiction, ¶ 145.

[612] Decision on Jurisdiction, ¶ 146.

[613] Decision on Jurisdiction, ¶ 147.

[614] Decision on Jurisdiction, ¶ 149.

[615] Decision on Jurisdiction, ¶ 149.

indirect investment," since the latter would be "an impermissible end-run around Article 2(1)'s bar on asserting a claim squarely on the basis of the indirect investment in HBT."[616] The Tribunal stated that "[i]t agrees with the Respondent that no jurisdiction would lie for a direct investment claim that is simply a restatement of the indirect investment claim that is excluded from BIT protection under Article 2(1)."[617] The Tribunal then stated as follows:

> In other words, in general the Claimant cannot collapse the distinction between the two types of claims by simply positing, with no economic analysis, that its 49% stake in ALBA entitles it automatically to claim for 49% of whatever injury may have been sustained by HBT. On the other hand, if the Claimant properly can frame an analytically distinct claim, focused on alleged wrongdoing by the Respondent that demonstrably injured the Claimant's interest in assets that it directly owns, such a claim in principle would not be barred under Article 2(1).[618]

284. The Tribunal rejected India's argument that it was too late in the proceedings for LDA to attempt to reformulate its claim in a way that might survive the exclusion in Article 2(1). The Tribunal observed that "[w]hile it is true that the Claimant's initial pleadings did not formulate the claim in this way, they did clearly allege the factual predicate of a direct investment in India. Moreover, the Claimant made clear immediately after the Respondent's request for bifurcation that it intended to proceed in the alternative on the basis of its direct investment, should the Tribunal find jurisdiction to be lacking over its indirect investment claim."[619] The Tribunal acknowledged that a prior investment arbitration tribunal facing a similar issue – in *HICEE v. Slovakia* – had denied an investor's request to re-plead claims in order to focus on a direct rather than indirect investment, on the basis that jurisdiction still would only lie if the claimant could demonstrate wrongful "treatment" of the direct investment itself, as opposed to simply mistreatment of the downstream indirect investment causing injury upstream to the direct investment.[620] The Tribunal stated that it was not persuaded "*at this point*" to follow the *HICEE* approach of precluding a requested re-pleading altogether,[621] because it appeared that jurisdiction to hear any reformulated direct investment claim in this case might be closely intertwined with issues of fact.[622]

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[616] Decision on Jurisdiction, ¶ 150 (emphasis added).

[617] Decision on Jurisdiction, ¶ 151.

[618] Decision on Jurisdiction, ¶ 151 (emphasis added).

[619] Decision on Jurisdiction, ¶ 155.

[620] Decision on Jurisdiction, ¶ 153 (citing *HICEE B.V. v. The Slovak Republic*, PCA Case No. 2009-11, Partial Award, 23 May 2011, ¶ 149 (**RLA-192**) ("***HICEE***").

[621] Decision on Jurisdiction, ¶ 153 (emphasis added).

[622] Decision on Jurisdiction, ¶ 154.

285. "In these circumstances," the Tribunal explained, "it would be premature to preclude a direct investment claim at the outset, without further briefing on the facts (including as to *which entity or entities the State action or 'treatment' in this case was directed*), as well as on the proper boundaries between issues of loss causation and jurisdiction."[623] The Tribunal emphasized that it was not deciding such jurisdictional issues now with respect to a reformulated direct investment claim, but rather was concluding that "claims alleging injury to such direct investments as a consequence of State conduct are not so manifestly flawed that they should be *barred at the door*, simply because the treaty excludes other types of claims alleging harm to certain categories of indirect investments."[624] In addition to these areas of factual briefing which the Tribunal expressly stated could be relevant to its ultimate jurisdictional analysis, the Tribunal also cautioned that "there are significant differences (and arguably greater hurdles) in the way such a 'double reflective loss' claim would have to be proven" on the merits and quantum, "including *inter alia* with respect to issues of causation and loss."[625]

286. With this guidance provided, the Tribunal permitted LDA, should it so wish, to file an Amended Statement of Claim. LDA did so on 17 February 2016.

2. LDA's First Reformulation and the Tribunal's Comments

287. LDA's Amended Statement of Claim reflected a degree of reformulation from its initial Statement of Claim, but for the most part, the amendments related to the tracing of LDA's *injury* through ALBA, not an allegation that India's *conduct* allegedly was directed at ALBA or at LDA itself. For example, LDA added a passage stating that "[t]he destruction of HBT's assets had a substantial and detrimental *impact* on ALBA,"[626] and replaced its initial request for an award for the "value of the Contract" with one for "the

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[623] Decision on Jurisdiction, ¶ 154 (emphasis added).

[624] Decision on Jurisdiction, ¶ 154 (emphasis added).

[625] Decision on Jurisdiction, ¶ 152. With respect to terminology, the Tribunal cited Professor Zachary Douglas for the explanation that "in an action for 'reflective loss' the shareholder is suing for the diminution of the value of its shares caused by acts of the third party directed to the company itself" (*i.e.,* the company in which the investor holds shares). *Id.*, n.301. The Tribunal characterized LDA's theory of its injury stemming from alleged mistreatment of HBT as "one involving 'double reflective loss,' *i.e.*, alleged injury to the Claimant resulting from injury to its minority (direct) shareholding in ALBA, flowing from harm to ALBA's interest in HBT." *Id.* These descriptions of "reflective loss" and "double reflective loss" were included in the footnote to establish appropriate nomenclature for the Parties' subsequent debates about jurisdiction, merits, causation and loss, and not to foreclose additional debate about the jurisdictional basis for such claims, as LDA later contended. *See* Further Amended Statement of Claim, ¶ 368D (contending that "[t]he Tribunal has also confirmed in its Decision on Jurisdiction that the Claimant is entitled under the Treaty to claim for reflective loss …").

[626] Amended Statement of Claim, ¶ 30 (emphasis added); *see id.*, ¶ 125 (adding that ALBA "was vulnerable to, and was directly affected by any measures that impaired the functioning of [its] subsidiaries" including HBT).

loss of the value of the Claimant's shareholding in ALBA which … was substantially eroded on account of the Respondent's violations of the Treaty."[627] However, with respect to India's alleged misconduct, LDA still characterized this primarily as directed at HBT, complaining of "a series of targeted actions by State and non-state actors *aimed at destroying HBT's operations*."[628] The closest LDA came to alleging mistreatment of ALBA as such were two revised sub-section captions: (a) the first replacing the earlier language, "KoPT's attempts to dispossess the Claimant of its equipment and property" with amended language, "KoPT's attempts to dispossess ALBA of its assets,"[629] and (b) the second adding the words "ALBA's and" to the allegation that India "manipulated its administrative processes to damage [ALBA's and] the Claimant's future business prospects."[630] The content of these sub-sections was otherwise unaltered, the first still discussing KoPT's attempts to claim a lien over HBT's equipment,[631] and the second still discussing KoPT's blacklisting of HBT from further dealings for five years.[632]

288. LDA's additional amendments made clear that in its Amended Statement of Claim, it was not trying to plead actions by India directed towards ALBA as such, but rather that "the acts or measures *directed by India at HBT* are the focus of the section below on the breach of the Treaty,"[633] on the theory that the resulting *impact* on share value upstream would be sufficient for jurisdictional purposes. LDA explained this theory as follows:

> [T]he Claimant invested in India and *any conduct of India affecting HBT's rights* affects the Claimant's investment in the form of its shareholding in ALBA. And that is how the reference to 'investment' in the section on breaches should be read: although the *actions are directed towards HBT*, they are also actions against the investment of the Claimant in ALBA. It is these acts that form the claims for violation of the Treaty provisions in respect of expropriation, fair and equitable treatment, full protection and security and anti-discrimination.[634]

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[627] Amended Statement of Claim, ¶ 31; *see id.*, ¶ 368B (explaining that LDA's claim is "for reflective loss based on its shareholding in ALBA").

[628] Amended Statement of Claim, ¶ 156 (emphasis added).

[629] Amended Statement of Claim, Section III.F.1.

[630] Amended Statement of Claim, Section III.F.2.b.

[631] Amended Statement of Claim, ¶¶ 303-308.

[632] Amended Statement of Claim, ¶¶ 318-329.

[633] Amended Statement of Claim, ¶ 368E.c (emphasis added).

[634] Amended Statement of Claim, ¶ 368E.c (emphasis added). *See also id.*, ¶ 376A ("The Claimant's claims in the present case arise out of damage to its investment in ALBA caused by the Respondent's *actions against HBT*") (emphasis added); ¶¶ 376B, 400 (characterizing its expropriation claim as about "the expropriatory measures *directed at HBT* which in turn caused damage to the value of the Claimant's shares in ALBA," and about "the composite act of indirect *expropriation of HBT's rights under the Contract* and therefore the benefits of the Contract enjoyed up the corporate chain by the Claimant

LDA characterized its subsequent task regarding quantum as follows: "[O]nce a violation is proven based on the *acts directed against HBT*, the Claimant must prove that these violations caused its shareholding in ALBA a loss."[635]

289. As discussed in Section IV.E, India subsequently sought permission to file further jurisdictional objections and present a second bifurcation request, on the basis (*inter alia*) that LDA's Amended Statement of Claim still had not properly framed an analytically distinct claim focused on alleged wrongdoing by India towards any direct investment by LDA, as opposed to its unprotected indirect investment in HBT.[636] In granting the requested permission, the Tribunal emphasized "first and foremost, that it has reached no conclusions, preliminary or otherwise, regarding the potential jurisdictional objections that the Respondent has signalled it intends to assert with regard to the Claimant's Amended Statement of Claim."[637]

290. In its Second Bifurcation Request filed on 28 March 2016, along with its Second Counter-Memorial on Jurisdiction, India argued (*inter alia*) that LDA's reformulation was insufficient to overcome the obstacles to jurisdiction imposed by Article 2(1).[638] LDA opposed bifurcation (*inter alia*) on the basis that the Tribunal purportedly had already decided that a reformulation along the lines it presented would comply with Article 2(1), and India's objection accordingly was precluded on the basis of *res judicata*.[639] LDA also argued that its Amended Statement of Claim already reflected the "inescapable reality … that the actions and inactions of the Indian instrumentalities … were very obviously *intended to drive out the Claimant and ABG Infra*, the parties that were the known owners and drivers of the operation at HDC through ALBA," and that these upstream investors in HBT therefore were "the parties who were *intended to*, and did, feel most directly the consequences of the conduct" challenged in this case. LDA stated that

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as a result of is shareholding in ALBA") (emphasis added); ¶ 402A (characterizing its fair and equitable treatment claim as about India's "*unfair and inequitable [treatment] of HBT*" which "is also an unfair and inequitable treatment of the Claimant's Investment viz. its direct shareholding in ALBA") (emphasis added); Section V.D.2 (characterizing its full protection and security claim as about India's "fail[ure] to secure *HBT and its personnel* from physical threats and harm") (emphasis added); Section V.E.2 (characterizing its discrimination claim as "*HBT* (and therefore the Claimant's Investment in ALBA) was treated less favourably than the local port operators") (emphasis added).

635 Amended Statement of Claim, ¶ 368E.d (emphasis added).

636 PO4, ¶¶ 24-25.

637 PO4, ¶ 27.

638 PO5, ¶ 11; *see also id.*, ¶ 30 (noting India's argument that LDA's reformulated claims "remain premised on the wrongfulness of 'measures directed at HBT', … a company in which [its] interest has specifically been found to lie outside the scope of the Treaty").

639 PO5, ¶ 12; *see also id.*, ¶ 36 (noting LDA's argument that the Tribunal "has already decided upon [India's objection] in its Decision on Jurisdiction").

in this sense, HBT "was no more than a proxy for the *real targets*: the Claimant and ABG Infra, through ALBA."[640]

291. In its PO5, the Tribunal emphasized that contrary to LDA's *res judicata* contention, the Tribunal's "earlier Decision on Jurisdiction did not anticipatorily resolve all the issues raised in" India's renewed Article 2(1) objection.[641] Rather, while the Tribunal had permitted LDA an opportunity to amend its Statement of Claim to "reframe its case under one or both of" the alternate "direct investment" theories it had articulated at the jurisdictional hearing, the Tribunal "did not intend to rule anticipatorily on the adequacy … of any particular form of reframing the Claimant might choose to make."[642] Now that LDA had chosen to reformulate its claims entirely based on its status as a direct investor in ALBA, rather than as a direct investor (in different respects) into HBT itself, "[t]his repleading therefore squarely raises the issue of the circumstances in which" such a claim may proceed under the Treaty, notwithstanding the exclusion in Article 2(1). The Tribunal observed that "[g]iven the unusual nature of Article 2(1), the outcome of this analysis … is not dictated by prior jurisprudence."[643]

292. However, the Tribunal denied India's Second Bifurcation Request to have such issues determined at a preliminary phase, prior to full presentation of the evidence. It explained it was "not convinced" that India's renewed objection based on Article 2(1) of the Treaty "can be decided simply as a matter of law, without grappling with the evidence regarding the challenged conduct *and the considerations that drove that conduct*."[644] The Tribunal noted that LDA "now further contends (albeit spelled out more precisely in its [Second Bifurcation Response] than in its Amended Statement of Claim) that the Respondent's subsequent actions were 'obviously *intended* to drive out the Claimant and ABG Infra,'" a theory of intentional targeting of the upstream ownership of HBT that LDA promised "will be explained fully and in detail … at the merits stage."[645] The Tribunal stated that it "offers no view at present about the persuasiveness of this argument," but "observe[s] that the analysis appears to involve important embedded issues of fact, regarding *inter alia* the Respondent's *knowledge and intentions* with respect to the Claimant and ALBA, *separate from HBT*. These issues of fact appear to be closely intertwined with the merits,

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[640] PO5, ¶ 37 (emphasis added) (quoting LDA's Second Bifurcation Response).

[641] PO5, ¶ 42.

[642] PO5, ¶ 43.

[643] PO5, ¶ 44.

[644] PO5, ¶ 48 (emphasis added).

[645] PO5, ¶ 48.

likely requiring detailed review of documentary and witness evidence as well as an evidentiary hearing."[646]

293. India subsequently requested the Tribunal to require LDA to "set forth its arguments and evidence in support of its new theory of intentional targeting of LDA and ABG Infra," before the case proceeded further.[647] LDA responded that its theory about India's intentions was not new, but "in fact permeates through" its Amended Statement of Claim.[648] In PO6, the Tribunal first observed as follows:

> It has been evident for some time that the Parties have very different views about whether, and to what extent, the Claimant ultimately must demonstrate wrongful conduct attributable to the Respondent that *intentionally targeted* either the Claimant or its direct investment in ALBA, as opposed to *merely impacting* that direct investment by allegedly wrongful conduct directed towards HBT, which the Claimant alleges was known by the Respondent to be controlled by ALBA and by ALBA's shareholders (including the Claimant).[649]

294. The Tribunal further noted that in PO5, it had deferred this issue to the merits, "precisely because it believes that the point may be difficult to resolve in the abstract[,]" and the Tribunal still considered that to be the necessary approach.[650] As to the sequence of further pleading, the Tribunal denied India's application to require LDA to particularize its pleading regarding "intentional targeting," but did caution that going forward, the Tribunal would take into account only the arguments and evidence presented in formal pleadings, not in ancillary procedural filings such as the bifurcation exchanges. It accordingly provided LDA the option of either resting on its Amended Statement of Claim, or incorporating into a Further Amended Statement of Claim the allegations and arguments (*e.g.*, about "intentional targeting") that it had raised in its Second Bifurcation Response.[651]

3. LDA's Further Reformulation in Its Further Amended Statement of Claim

295. On 20 July 2016, LDA submitted its Further Amended Statement of Claim. This pleading added several additional contentions related to LDA's standing to pursue its claims.

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[646] PO5, ¶ 49 (emphasis added).

[647] PO6, ¶ 9 (quoting Letter from India, dated 20 May 2016, p. 5); *see also id.*, ¶¶ 12-16.

[648] PO6, ¶ 10 (quoting Letter from LDA, dated 26 May 2016, ¶ 4); *see also id.*, ¶¶ 20-22.

[649] PO6, ¶ 27.

[650] PO6, ¶¶ 30-32.

[651] PO6, ¶¶ 33-36.

296. First, LDA emphasized India's *knowledge* of LDA's "investment structure," in the form of the FIPB approval of ALBA as an "operating-cum-holding company" intending to make "downstream investment in the special purpose vehicles that may be set up … for development of several bulk port projects."[652] LDA alleged that India therefore "understood … that these SPVs operating in the Indian ports were just that – channels through which the Claimant and ABG Infra would be operating in those ports."[653] With respect to the issue of so-called "intentional targeting" raised in LDA's Second Bifurcation Response and discussed in the Tribunal's PO5, LDA maintained without change its prior characterization of "a series of targeted actions by State and non-state actors *aimed at destroying HBT's operations*."[654] However, it contended that India's "singular focus on which actions are directed at whom and what this means for the dispute has obfuscated the factual reality in the present case," and that "to just focus on HBT and no other entity is to ignore what was really happening on the ground at the time."[655]

297. Specifically, LDA now contended that "[a]lthough HBT was the nominal actor, *the real targets* were the Claimant and ABG Infra."[656] It characterized HBT as "a mere vehicle and essentially an accounting heading for the income and expenditure of ALBA on the Project at HDC. HBT was nominally 'the operator' at the port; but the resources, expertise, decisions and all other aspects were in reality the Claimant's and ABG Infra's, acting jointly."[657] LDA also contended as follows, with respect to the *alleged intent* underlying the challenged State conduct:

> The inescapable reality is that the facts demonstrate that the actions and inactions of the Indian instrumentalities, at the behest of the Vested Interests, that are the subject of this claim were very obviously *intended to drive out* the Claimant and ABG Infra, the parties that were the known owners and drivers of the project at HDC, through ALBA. No one had any real interest in HBT as such, as a distinct corporate person. It was the withdrawal of the parties who were driving the Project that was *the aim of the Indian instrumentalities*, acting at the behest of the Vested Interests; and that is what they achieved. The fact that the withdrawal took the form of the withdrawal by HBT, the purely nominal vehicle for ALBA's operation at HDC, was an incidental and contingent consequence of the way that ALBA had … organised its operation. LDA and ABG Infra, through ALBA, were the drivers of the Project … and were the parties who were *intended to*, and did, feel most directly the consequences of the conduct in breach of the Treaty. … [T]he Respondent and Vested Interests *wanted the LDA/ABG Infra joint*

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652 Further Amended Statement of Claim, ¶¶ 126A, 126B (quoting **C-498** and **C-497**).

653 Further Amended Statement of Claim, ¶ 126B.

654 Further Amended Statement of Claim, ¶ 156 (emphasis added).

655 Further Amended Statement of Claim, ¶ 368AA.

656 Further Amended Statement of Claim, Section V.AA.1 (emphasis added).

657 Further Amended Statement of Claim, ¶ 368AB.

> *venture operation out of HDC*. The Respondent and the Vested Interests *not only knew* that LDA and ABG Infra were the drivers behind the project, *but also understood* that they were the parties that had to be displaced in order for the Vested Interests to regain control of the port. Only LDA and ABG Infra could withdraw 'HBT' from the port, by ceasing their joint venture operation there: that is why *LDA and ABG Infra were the parties targeted* by the actions in breach of the Treaty.[658]

298. According to LDA, "[t]o focus on the question of whether the actions could be said to be directed at HBT (which India's actions obviously were) ignores the *factual reality of the targeting* of the Claimant and ABG Infra, through ALBA, and the obvious harm they were *intended to*, and did, suffer."[659] While the challenged conduct thus "could, in the starkly literal terms of the corporate personalities involved, be said to have been *directed* at HBT, this company was no more than a proxy for *the real targets*[,]" and "[t]he actions and omissions were *designed* to cause losses *to them*. To ignore this factual reality … leads inevitably to the denial of protection to the actual investors, and negates their rights and remedies under the Treaty."[660] In summary, LDA contended:

> LDA's losses that form its claims in these proceedings are on account of the specific and *conscious actions directed at HBT but ultimately specifically targeting the Claimant and ABG Infra*. They are not an indirect consequence or an inadvertent effect or the fall-out from a general state measure; and this clearly distinguishes the Claimant's case from other investor-State rulings where the measures or State conduct under challenge was generalised and regulatory in nature, affecting all entities operating in a particular sector.[661]

299. Based on this formulation of LDA's case in the Further Amended Statement of Claim, the Parties proceeded to the further stages of written and oral briefing. A summary of the Parties' legal submissions regarding LDA's standing is set forth below; the Tribunal's analysis follows in Section VII.D.

C. THE PARTIES' POSITIONS REGARDING LDA'S STANDING TO SUE

1. India's Position

300. India contends that there is a critical difference between this case and every previous case allowing a foreign investor to pursue a "reflective loss" claim for conduct directed at a locally incorporated entity: in

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[658] Further Amended Statement of Claim, ¶ 368AC (emphasis added).

[659] Further Amended Statement of Claim, ¶ 368AD (emphasis added).

[660] Further Amended Statement of Claim, ¶ 368AD (emphasis added).

[661] Further Amended Statement of Claim, ¶ 368AE (emphasis added). *See also id.*, ¶ 368E.b (adding contention that "[t]he actions that were 'directed at HBT' were targeted at HBT's actual owners …."), ¶ 368E.c (adding contention that "although the actions were directed at HBT they were deliberately targeted at HBT's real owners….").

those cases, the investor held a protected shareholding interest in the entity to which the challenged conduct was directed.[662] In India's view, even if those cases were considered to be correct in their recognition of reflective loss standing under other investment treaties – which India disputes[663] – they still could not support LDA's claims against India in this case. That is because here, despite LDA's several reformulations of its case, the case fundamentally "remain[s] premised on the alleged wrongfulness of treatment 'directed at HBT'" rather than at ALBA, and LDA's investment in HBT is expressly excluded from treaty protection by virtue of Article 2(1).[664] In these circumstances, allowing LDA to proceed to the merits would circumvent HBT's exclusion from the scope of the France-India BIT.[665] India maintains that only its interpretation can give meaningful effect to Article 2(1), in situations in which an indirect investment in India is routed through Indian intermediary companies owned by French investors to an extent of less than a 51% shareholding interest.[666]

301. India contends it is irrelevant that LDA's shareholding in ALBA is a covered "investment" under the France-India BIT. This is because the question before the Tribunal is not whether LDA has a protected shareholding in ALBA, but rather whether that shareholding "grants it standing to claim for losses predicated on treatment of a downstream company [HBT] when that treatment is expressly excluded from the Treaty's treatment standards."[667] India disputes LDA's reliance on the ICSID concept of "general unity of an investment option" (discussed below), because this concept cannot override the Treaty's express exclusion of LDA's indirect shareholding in HBT from treaty protection as provided by Article 2(1).[668] By contrast, India contends that any application of the "general unity of an investment option" to this arbitration would in fact support India: LDA's real investment was in HBT, making its shareholding in ALBA "ancillary" to the main investment. Therefore, if LDA's investment in HBT is excluded from protection, its investments in ALBA should be excluded as well.[669]

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[662] Counter-Memorial, ¶ 460.

[663] As noted above, India challenges the correctness of past "reflective loss" decisions. *See* Counter-Memorial, ¶ 421; Rejoinder, ¶ 614.

[664] Counter-Memorial, ¶ 454; *see also id.*, ¶ 459.

[665] Counter-Memorial, ¶¶ 454, 463, 465.

[666] Counter-Memorial, ¶¶ 454, 469.

[667] Rejoinder, ¶¶ 715-716.

[668] Rejoinder, ¶¶ 717-720.

[669] Rejoinder, ¶ 720.

302. In other words, India maintains, the fact that LDA's shares in ALBA constitute a "covered investment" does not give LDA "standing to protect those shares from the particular type of indirect harm which [LDA] alleges it suffered."[670] In India's view, the ordinary meaning of the term "shares," either on its own or in proper context pursuant to a VCLT analysis, does not evince any intent by India and France to allow shareholders to sue simply for deprivation of the *economic value* of those shares, divorced from any mistreatment targeted at the shareholding interest itself.[671] This is particularly the case where a contrary interpretation would allow circumvention of Article 2(1), which would be contrary to a "good faith" interpretation of the France-India BIT.[672]

303. India contests LDA's argument that Article 2(1) should be given a "restricted" meaning in light of the object and purpose of the Treaty, adding that such an interpretation in any event would not assist LDA's case.[673] India also denies LDA's allegation that it is seeking to introduce a "suite of limitations" to the word "shares" in the definition of investment, that are unjustified by the context in which that word is used.[674] India maintains that it is not implying terms into the France-India BIT, but merely construing existing terms in accordance with the VCLT.[675] India reiterates that the burden is upon LDA to establish that the France-India BIT allows it to bring shareholder claims, and particularly in light of Article 2(1), "claims of the kind Claimant seeks to bring here."[676] Finally, India submits that LDA's discussion of the manner in which HBT was controlled and managed by LDA has no bearing on the issues before this Tribunal.[677]

304. According to India, in order to succeed with its claims, LDA must prove that India's actions constituted unlawful *treatment* of LDA's shareholding in ALBA – *i.e.*, that such actions, while perhaps "directed at" HBT, also constituted "treatment" of LDA's direct shareholding in ALBA.[678] Yet LDA in its view has been unable to point to a single case that supports its proposition that the "treatment" of HBT could

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[670] Rejoinder, ¶ 724 (emphasis omitted).

[671] Rejoinder, ¶¶ 725-726.

[672] Rejoinder, ¶¶ 728-729.

[673] Rejoinder, ¶¶ 731-732 (responding to Reply, ¶ 650).

[674] Rejoinder, ¶¶ 733-734 (responding to Reply, ¶ 651).

[675] Rejoinder, ¶ 735.

[676] Rejoinder, ¶ 736.

[677] Rejoinder, ¶ 737.

[678] Counter-Memorial, ¶¶ 471, 478; Rejoinder, ¶¶ 739-741. India characterizes LDA's position as presenting an "issue … of first impression." Rejoinder, ¶ 742.

constitute "treatment" of ALBA (an entirely different company).[679] For India, LDA's argument that India's "treatment" need *not* be directed at ALBA ignores the text of the France-India BIT, and particularly the definition of the word "treatment."[680] India relies primarily on the dictionary definition of that term, which it contends supports the proposition that state action must be "directed at" the investment in question in order to qualify as "treatment" of that investment,[681] but it submits that this definition is also supported by the VCLT and by case law.[682] India also analogizes the notion of "treatment" of an investment to the phrase "measures … relating to" an investment, which appears in NAFTA Chapter 11, and which was interpreted by the *Methanex* tribunal as requiring something more than a "mere effect of a measure on … an investment."[683] It criticizes LDA's attempt to distinguish *Methanex* as reflecting concerns unique to that case about granting standing to a potentially very large class of putative claimants, arguing that LDA's legal theory here (if accepted as sufficient for standing) likewise also could generate an indeterminate class of investors.[684]

305. India rejects LDA's submission that by including indirect investments within the definition of "investment," the France-India BIT confirms that the challenged treatment in this case need *not* be directed at LDA's shareholding in ALBA. India highlights the difference between "indirect treatment" and "indirect ownership" of shares, arguing that the fact that shares are held indirectly does not obviate the fact that the "object of the treatment" under the Treaty's substantive standards "is always in the 'investment' in question, … not the 'investor.'"[685] India also emphasizes that the Tribunal has not made a decision yet with respect to India's treatment-based objection, but rather expressly joined that issue to the merits.[686]

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[679] Counter-Memorial, ¶ 475.

[680] Counter-Memorial, ¶¶ 472-473; Rejoinder, ¶ 743.

[681] Counter-Memorial, ¶ 473; Rejoinder, ¶¶ 743-745.

[682] Rejoinder, ¶¶ 746-747.

[683] Rejoinder, ¶ 748 (citing *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002, ¶ 147 (**RLA-86**) ("***Methanex***").

[684] Rejoinder, ¶¶ 749-750.

[685] Counter-Memorial, ¶ 477; *see also id.*, ¶ 480 ("Claimant as such is not protected under the BIT …. What is protected under the BIT is an 'investment' made by an 'investor.'"); Rejoinder, ¶ 755 (emphasis omitted).

[686] Rejoinder, ¶ 757 (citing Decision on Jurisdiction, ¶ 154).

2. LDA's Position

306. Relying on the Tribunal's statement in the Decision on Jurisdiction that LDA would have standing to "pursue a properly framed claim for improper treatment of and injury to its direct investment in ALBA," LDA submits it has now satisfied the jurisdictional requirements of the Treaty.[687] In essence, LDA contends that Article 2(1)'s exclusion of protection to HBT does not prevent it from pursuing a claim focused on injury to the value of its shares in ALBA, even if the decline in ALBA's share value in turn derives from HBT's loss of the anticipated value of the Contract.[688]

307. LDA argues that while tribunals in other cases have precluded shareholders from bringing claims in relation to *assets* of a local company in which they hold shares, this has not precluded them from bringing a "reflective loss" claim for the injury to *share value*, in consequence of interference with the downstream asset. By analogy, according to LDA, Article 2(1)'s exclusion of Treaty protection to its indirect investment in HBT should not preclude it from bringing its claim here. "Just as the preclusion of claims in relation to assets of a company does not preclude a claim for the loss up the corporate chain caused by interference with that asset, so too the preclusion of a claim based on an interest falling within Article 2(1) does not preclude the shareholder claim based on the loss of value caused to a shareholder further up the corporate chain by interference with the aforementioned interest."[689]

308. LDA concedes that no investment tribunal has yet granted standing for a claim on precisely this basis, but contends "this is hardly a surprising conclusion, given the somewhat unusual circumstances in which this claim is brought."[690] But there is no reason why a tribunal should not consider LDA's shareholding in ALBA to qualify as an investment covered under the France-India BIT.[691] LDA observes that Article 1(1) of the France-India BIT defines "investment" broadly, and similar language in other treaties has been interpreted expansively,[692] with tribunals declining to separate out aspects of each investment and instead upholding the "general unity of an investment operation."[693] Accordingly, LDA submits that "investments" for purposes of the France-India BIT include not only the core investment, but also

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[687] Further Amended Statement of Claim, ¶ 359 (citing Decision on Jurisdiction, ¶ 149).

[688] Further Amended Statement of Claim, ¶¶ 368D, 368E.

[689] Further Amended Statement of Claim, ¶ 368E(e); *see also* Reply, ¶ 636.

[690] Reply, ¶ 643.

[691] Reply, ¶ 643.

[692] Reply, ¶ 644.

[693] Reply, ¶ 645.

ancillary transactions connected thereto that might not constitute covered investments in their own right.[694] For LDA, its direct shareholding in ALBA falls squarely within the definition of "shares" (and within the wider class of "investments") in Article 1(1)(b) of the France-India BIT, and is therefore protected from all categories of harm to ALBA that are attributable to improper State action.[695] LDA suggests that "in light of the clearly expressed object and purpose of the Treaty and the extremely broad definition of 'investment' in Article 1(1)," Article 2(1) "ought to be given a restricted meaning."[696]

309. LDA disputes India's contention that the word "treatment" as used in the France-India BIT must be "construed in the restrictive" sense, meaning "treatment directed at" the investment, to establish jurisdiction.[697] If this principle were accepted, LDA contends, then no reflective loss claims ever would be permitted, because the shareholder would "at best be 'affected indirectly' by a state's actions and not be the 'object of 'treatment'."[698] This is because, according to LDA, reflective loss claims by their very nature are directed at the corporate entity or asset.[699] LDA considers that the same approach should apply here, with Article 2(1) preventing it from suing for HBT's Contract losses, but not preventing it from suing for its own losses in ALBA's share value, even if traceable to the same underlying events involving HBT. LDA fundamentally disagrees with India's alternate framing of the jurisdictional issue, which it characterizes as permitting only shareholder claims involving State interference with shareholder rights as such, *e.g.*, the right to vote and attend meetings and claim dividends. By definition, LDA argues, these are not reflective loss claims.[700]

310. LDA recalls that while this Tribunal's Decision on Jurisdiction rejected LDA's claim based on its indirect investment in HBT, this was due to Article 2(1), and not to India's arguments about the Treaty purportedly limiting jurisdiction to "treatment" aimed directly at the qualifying investment.[701] The Tribunal did not state that LDA would be required to show "treatment" directed at ALBA or at LDA's shareholding in

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[694] Reply, ¶ 646.

[695] Reply, ¶ 647.

[696] Reply, ¶ 650.

[697] Reply, ¶ 610.

[698] Reply, ¶ 612; *see also* Further Amended Statement of Claim, ¶¶ 368E.b ("a reflective loss claim relates to the devaluation caused to the investor's shares as a result of the 'acts of the third party directed to the company itself.' By definition, therefore, … the relevant acts of the third party forming the breach are those which are *directed* at the company and not the shares themselves.") (emphasis in original).

[699] Reply, ¶ 534.

[700] Reply, ¶ 613.

[701] Reply, ¶ 613.

ALBA.[702] In any event, LDA submits, nothing in the text of the France-India BIT states that "treatment" of a protected investment must involve actions directed at that investment.[703] LDA maintains that State acts resulting in harm to the value of its shareholding in ALBA would still constitute "treatment" of that protected investment, at least in the circumstances of this case, where "measures downstream constitute treatment upstream even though the particular losses suffered upstream may be different."[704]

311. LDA rejects India's analogy between "treatment" of an investment for purposes of the France-India BIT and the phrase "measures … related to" an investment in NAFTA Article 1101(1), on the basis that the latter appears in a provision unambiguously addressing the scope of State consent to arbitration, whereas "treatment" under the France-India BIT appears only in provisions addressing substantive obligations (and not in all of such provisions).[705] Moreover, unlike *Methanex* where the tribunal expressed concerns about very attenuated or remote claims of shareholder standing, the measures here were not many levels removed from the entity asserting consequential harm.[706] LDA is "in a position that is nothing like that of a portfolio or remote investor"; to the contrary, "[t]he actions that were 'directed at HBT' were targeted at HBT's actual owners," LDA and ABG Infra.[707] LDA emphasizes this alleged intentional targeting, stating that the case involves a "targeted and concerted effort to harm the Claimant's protected Investment by destroying one of its key projects *i.e.* the Contract between HBT and KoPT"; India's acts and omissions, "although nominally directed at HBT, were perpetrated with the knowledge of the true ownership of the investment."[708] There is no threat in these circumstances that allowing LDA's claims could give rise to an "indeterminate class of investors" claiming loss in analogous cases.[709]

312. LDA also rejects India's "linguistic argument" that the word "treatment," as used in the France-India BIT, implies "movement 'in the direction' of the object of treatment."[710] First, LDA notes that India's

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[702] Reply, ¶ 617.

[703] Reply, ¶ 615.

[704] Reply, ¶ 619 (emphasis omitted).

[705] Reply, ¶¶ 621-622.

[706] Reply, ¶¶ 623-625.

[707] Further Amended Statement of Claim, ¶ 368E.b.

[708] Reply, ¶ 660; *see also id.*, ¶ 663 ("By knowingly undertaking measures that crippled HBT (and ALBA), the Respondent was targeting the entities who created, owned and controlled HBT and ALBA"); ¶ 665 (criticizing India for "set[ting] up a false distinction between knowledge and intent to harm," and contending that "in this case both are the same …. [I]t is the [Claimant's] case that LDA and ABG Infra were the true (and intended) targets of the Respondent's action.").

[709] Reply, ¶ 625

[710] Reply, ¶ 627.

argument is tied to specific treaty standards that mention "treatment," and leaves unaddressed LDA's claims under Articles in the France-India BIT that do not mention "treatment," such as the "full and complete protection and safety" standard of Article 4(1) and the expropriation standard of Article 6.[711] LDA also emphasizes that India's argument is based largely on dictionary definitions of the word "treatment," without citing any authority to support exclusion of a claim on this basis.[712] India's dictionary understanding of the word "treatment" is also said to be contrary to Article 31(1) of the VCLT, under which interpretation of treaty terms must take account of the object, purpose and context of the treaty, which here require that "treatment" be given a meaning conducive to the promotion of foreign investment.[713]

D. THE TRIBUNAL'S ANALYSIS: THE CONTINUING IMPLICATIONS OF ARTICLE 2(1)

313. As the Tribunal noted in its Decision on Jurisdiction, "States are free, if they wish, to extend treaty protection to a subset, rather than to the full universe of potential investments."[714] This can be done in a variety of ways, including (a) narrowing the *general definition* of "investment" in a treaty; (b) maintaining a broad general definition of "investment" but specifying that the treaty *as a whole* applies only to a subset of investments (for example in a "scope" clause); (c) maintaining applicability of the treaty as such to all investments, but limiting *specific substantive obligations* to a subset of investments; or (d) specifying *carve-outs* from coverage through separate "exclusion" provisions.[715] There is no one mechanism for specifying intent with respect to the scope of intended protection, and a tribunal must be cognizant of intended restrictions wherever they appear in the text of a given treaty.

314. In this case, as the Tribunal already has noted, the France-India BIT contains a "very broad definition of investment, as comprising 'every kind of asset […] invested in the area of the Contracting Party' in accordance with its laws."[716] At the same time, the Treaty also includes a provision entitled "Scope of the Agreement," whose "very function … is to delineate … the Treaty's jurisdictional reach."[717] By virtue of

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[711] Reply, ¶ 628.

[712] Reply, ¶ 629.

[713] Reply, ¶¶ 630-633.

[714] Decision on Jurisdiction, ¶ 133.

[715] *See* Decision on Jurisdiction, ¶ 133 (noting that States can limit protection through treaty provisions other than the one defining the basic term "investment").

[716] Decision on Jurisdiction, ¶ 132 (citing Article 1(1) of the Treaty).

[717] Decision on Jurisdiction, ¶ 133 (citing Article 2 of the Treaty).

this provision, the Tribunal has found that the Treaty excludes indirect investments structured in a certain fashion. Here, LDA and its joint venture partner made a choice in designing the investment structure for HBT, namely that they would invest in it through an intermediate entity (ALBA) rather than directly, and that they would allocate less than 51% of ALBA's shares to LDA. Such choices have consequences, however, and in this case, the consequence is that LDA's "indirect investment in HBT does not fall within the scope of covered investments" under the France-India BIT.[718]

315. Given these findings, the Tribunal must be careful to read each of the Treaty's *substantive* protections as referring, each time it references the term "investment," only to a *protected* investment, and not to HBT itself as an unprotected investment. As the Tribunal already has noted, only in this fashion can one respect the intentions of the Contracting Parties, because "[a] provision delineating the 'Scope of the Agreement' … functions as a gateway. Only investors and investments that are entitled to pass through that gateway may then invoke the protections of the Treaty's other provisions, including … its provisions on substantive protection …."[719] Another way of stating the proposition is that the Tribunal will have jurisdiction to consider claims of Treaty breach *only insofar as* those claims are presented as challenging conduct attributable to the State with respect to a protected, rather than an unprotected, investment.

316. The substantive provisions of the Treaty will be relevant in another respect. These provisions not only address the particular type of State conduct that is proscribed; they also contain what might be called "linkage" language, specifying – through words like "treatment" or otherwise – the nature of the *connection* that is required between the State conduct and the protected investment, in order for the proscription on that conduct to apply and the violation of that proscription to give rise to a Treaty breach. A claimant bears the burden of showing not only that certain State conduct has occurred, but also that it occurred *vis-à-vis* (*i.e.*, with the requisite connection to) the protected investment. That burden cannot be circumvented by showing State conduct with respect to a *different*, unprotected investment, unless the same conduct also satisfies the required connection to the protected investment.

317. In focusing on this question – whether the State conduct satisfies the required connection to a protected investment – it generally will not be sufficient simply to observe that conduct taken with respect to an unprotected investment may have consequential impact on a protected one. LDA appears to recognize this at least at the level of principle, in attempting to distinguish its case (on the basis of the "intentional targeting" theory) from one where an upstream entity experiences "an indirect consequence or an

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[718] Decision on Jurisdiction, ¶ 147.

[719] Decision on Jurisdiction, ¶ 146 (emphasis omitted).

inadvertent effect or the fall-out from a general State measure …."[720] This is because *tracing economic impact* – a necessary exercise for a damages claim by an upstream entity – is not the same thing as *demonstrating wrongdoing* in the first place. Since State conduct towards an unprotected entity cannot be wrongful under a treaty – the treaty not proscribing any particular conduct with respect to unprotected entities – then the fact that such conduct might have ripple effects on other protected entities will not, in and of itself, render the same conduct wrongful. Something additional (beyond an economic ripple effect) must be demonstrated in order to establish a violation of treaty obligations with respect to the protected investment itself.

318. This proposition may be best illustrated by analogy to a different type of exclusion from treaty coverage, namely an exclusion for investments in particular economic sectors. In a hypothetical situation where a treaty expressly denies protection to investments in a given sector (for example, oilfield investments), an investor who holds shares in an entity in another sector (say, financial services) could not point to the fact that the financial services entity held shares in an oilfield entity, and thereby establish jurisdiction to challenge State conduct in the oil sector simply because such conduct had ripple effects that diminished the value of the claimant's investment in the financial services entity. The fact that this was a protected investment under the applicable treaty might be undisputed, but this would not be sufficient to circumvent the exclusion of treaty protection for oilfield investments. Rather, the investor would have to show some wrongful conduct with respect to the *protected* (financial services) investment, and not simply the consequential effect on that entity of State conduct in the oil sector for which it had expressly excluded any treaty obligations.

319. So, too, in this case. The France-India BIT's specific exclusion of protection to indirect investments such as LDA's investment in HBT cannot be circumvented by presenting a challenge that *remains predicated* on State conduct vis-à-vis HBT, simply by observing that such conduct had a traceable economic impact through HBT to ALBA, and accordingly on the value of LDA's shares in ALBA. Whatever one may think about reflective loss theory as it pertains to investment treaties, that theory alone – while helpful as a mechanism to measure damages upstream for wrongful conduct occurring downstream – cannot obviate the need to first demonstrate the existence of a *State obligation* owed to a protected investment, and then to show a *breach* of that obligation. In a situation where a given indirect investment is protected by a treaty, then the first prong of this analysis (a *duty* owed by the State to that indirect investment) will be met, and the tribunal may move without predicate to issues of breach and traceable reflective loss to the upstream investor. This was the nature of the exercise in most or all of the cases on which LDA relies,

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[720] Further Amended Statement of Claim, ¶ 368AE.

which involved challenges to State conduct taken with respect to entities in which the investors had some protected interest, even if channeled through intermediate companies or involving a locally incorporated entity. LDA's analogy between its case and "shareholder claims in respect of actions against local companies and/or assets which *themselves* are not protected by the investment treaty" is therefore imperfect.[721] What matters is not whether the local company could avail itself of the treaty, but rather whether the foreign investor has a *treaty-protected interest* in that company.

320. LDA's collected reflective loss cases accordingly do not present the threshold issue involved here. In this case, the Tribunal already has found that a particular indirect investment (LDA's investment in HBT) is *not protected by the Treaty*. It is therefore not possible to move directly to an evaluation of alleged Treaty breach, without first considering whether LDA has shown *something more* than simply State conduct with respect to HBT. As reflected in the Decision on Jurisdiction, LDA had argued that it could reformulate its original claim (which was clearly predicated on its indirect investment in HBT) to focus on either its *direct* investment in ALBA or a then-asserted *direct* investment by LDA into HBT.[722] LDA's Amended Statement of Claim chose to proceed exclusively based on the former (LDA's direct investment in ALBA), without asserting any claim based on a direct investment by LDA into HBT. That pleading choice therefore starkly presented the question of what "something more" LDA had pleaded, beyond merely State conduct with respect to HBT. In response to India's Second Bifurcation Request, LDA identified as its putative "something more" an alleged "*intentional targeting*" by State actors of LDA and its direct investment in ALBA. LDA's theory was that India had improperly sought to destroy or harm *that protected upstream investment*, even while implementing such a scheme through the convenient vehicle of ALBA's known investment in HBT.[723]

321. It was because LDA offered a theory by which it might demonstrate something *more* than simply State conduct vis-à-vis HBT that the Tribunal ultimately permitted LDA's reformulated case to go to the merits, to determine whether LDA could prove such a theory on the evidence.[724] In that sense, the Tribunal's approach was consistent with that taken in *HICEE*, which was the only investment treaty case cited by either Party that involved a treaty exclusion clause analogous to the present one. In *HICEE*, the tribunal faced a treaty that narrowed the scope of protected investments through the definition of "investments,"

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[721] Reply, ¶ 636 (emphasis added).

[722] Decision on Jurisdiction, ¶ 149.

[723] *See* PO5, ¶¶ 37, 48 (acknowledging LDA's new intentional targeting theory).

[724] PO5, ¶¶ 48-49.

rather than through a separate "scope" provision, as in the France-India BIT, but the exclusion was equally clear: the definition extended only to assets invested directly or "through an investor of a third State." The claimant nonetheless alleged loss to a downstream (indirect) investment that was channeled through a vehicle in the respondent State, not through a third State.[725] The tribunal acknowledged that the treaty before it "plainly admits a company like [the direct investment] as an investment in its own right," with "[t]he consequence … that a claim under the Agreement would lie (*in appropriate circumstances*) in respect of losses sustained by" the direct investment.[726] The *HICEE* tribunal considered it "equally plain," however, that such circumstances would have to involve losses "sustained as a result of *treatment* of [the direct investment] by the Respondent State or its agencies that is found to be in breach of the guarantees which the [treaty] establishes," as opposed to State conduct only towards the downstream indirect investment.[727] The tribunal further explained as follows:

> Once the subsidiary/sub-subsidiary structure is found to lie outside the Agreement's field of protection, it becomes obvious that treatment meted out to [the direct investment's] own investments through one of its local subsidiaries does not meet this requirement, whether or not treatment of that kind might otherwise fall foul of the substantive standards under the Agreement. The … business of the sub-subsidiaries … is covered by national law, not by the [treaty]. It is not enough for the Claimant to say that HICEE suffered a loss via the effect of national law on that business, unless the loss followed in some direct sense from a treaty breach.[728]

322. It is not clear to what extent the claimant in *HICEE* ever contended that it could prove differential circumstances beyond an upstream impact of the State's conduct with respect to the downstream entity. What is clear is that the tribunal evidently did not consider the pleadings before it sufficient to present a plausible alternative legal theory, beyond the mere "impact" argument it rejected, that might allow the investor to proceed on the basis of its protected direct investment. In this case, by contrast, the Tribunal permitted LDA to attempt to state a "properly framed claim for improper treatment of and injury to its direct investment," which it was "common ground" that LDA would have standing to pursue.[729] At the same time, the Tribunal cautioned that "no jurisdiction would lie for a direct investment claim that is *simply a restatement* of the indirect investment claim that is excluded from BIT protection under Article

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[725] *HICEE*, ¶¶ 51-53 (**RLA-192**).

[726] *HICEE*, ¶ 147 (**RLA-192**) (emphasis added).

[727] *HICEE*, ¶ 147 (**RLA-192**) (emphasis added).

[728] *HICEE*, ¶ 147 (**RLA-192**).

[729] Decision on Jurisdiction, ¶ 149.

2(1)."[730] The Tribunal distinguished a scenario in which LDA might present "an *analytically distinct* claim, focused on *alleged wrongdoing* by the Respondent that demonstrably injured the Claimant's interest in assets that it directly owns."[731] The Tribunal's emphasis on a need to show "alleged wrongdoing" with respect to a protected investment, and not just a traceable injury, was not accidental; as noted above, the Treaty only imposes duties on the Contracting Parties with respect to protected investments. The Tribunal also emphasized that it expected "further briefing on the facts (including as to *which entity or entities the State action or 'treatment' in this case was directed*) …."[732]

323. As noted above, LDA made only minimal adjustments to its pleading in the Amended Statement of Claim, and the Tribunal granted India permission to present its Second Bifurcation Request. In the wake of that Request, however, LDA finally articulated the theory that has since been characterized as "*intentional targeting*," namely that LDA and ABG Infra (through ALBA) were "the real targets," and HBT "no more than a proxy," for "actions and inactions of the Indian instrumentalities … [that] were very obviously intended to drive out" LDA and ABG Infra from HDC, in favor of other owners with greater local connections and influence.[733] LDA promised to explain this intentional targeting theory "fully and in detail … at the merits stage."[734] The Tribunal emphasized this new theory in denying India's Second Bifurcation Request, describing LDA's reconceptualized case now as "one about wrongdoing *both aimed at* and impacting its direct investment in ALBA, even if channeled proximately through its indirect investment in HBT."[735] On the basis that LDA was now alleging wrongdoing by India *vis-à-vis* ALBA, the Tribunal allowed it the opportunity to try to prove its case. It emphasized, however, that LDA's alternative theory of jurisdiction would require "evidence regarding the challenged conduct *and the considerations that drove that conduct*,"[736] since the theory "involve[d] important embedded issues of fact, regarding *inter alia* the Respondent's *knowledge and intentions* with regard to the Claimant and ALBA, *separate from HBT*."[737]

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[730] Decision on Jurisdiction, ¶ 151 (emphasis added).

[731] Decision on Jurisdiction, ¶ 151 (emphasis added).

[732] Decision on Jurisdiction, ¶ 154 (emphasis added).

[733] Second Bifurcation Response, ¶¶ 16-17.

[734] Second Bifurcation Response, ¶ 16.

[735] PO5, ¶ 37 (emphasis added).

[736] PO5, ¶ 48 (emphasis added).

[737] PO5, ¶ 49 (emphasis added).

324. In the Tribunal's view, the "intentional targeting" theory did have the potential, if ultimately substantiated on the evidence, to constitute the "something more" that could form the foundation of a claim properly within its jurisdiction. To illustrate why, it is useful to recall that the issue of State *intention or motivation* is not unconnected to the analysis of several common investment treaty standards, including for example protections against discriminatory treatment, against irrational or arbitrary treatment, or against expropriation without valid public purpose. At least at the level of theory, it is possible to posit situations under analogous treaty provisions where a State might violate these obligations by a broader scheme intentionally targeting an investor and its upstream investments, even while implementing the scheme through a series of measures against its targets' downstream holdings.

325. To take an extreme hypothetical, imagine a State that is determined to drive out all investments by Ruritanian investors. The State might seek to accomplish this objective first by identifying the full chain of holdings of a disfavored Ruritanian investor, including those structured through an intermediate holding company, and then systematically undermining each downstream holding to the point of making it, and through it the holding company and therefore the full Ruritanian investment, ultimately unviable. If it could be demonstrated that the acts against particular subsidiaries were simply constituent elements of a broader attack on the investor's upstream investment, motivated by discriminatory animus arising from the investor's Ruritanian nationality, then the State's violation of its duty of non-discrimination to the Ruritanian investor with respect to its protected holding company investment could not be excused, simply by showing that one or more of the constituent acts undermining that protected investment were taken through vehicles that were not independently protected by the treaty.[738] The fact that the State's motivation was directed upstream, towards a protected investment and with discriminatory animus traceable to the investor's nationality, could bring this conduct nonetheless within the scope of an investment treaty between the State and Ruritania, notwithstanding a provision identical to Article 2(1). The same could be true, in theory, if the State's motivation was not discrimination on the basis of nationality but some other prohibited rationale, such as (for example) to remove valuable property interests from their present upstream owners and give them instead to State officials or political allies.

326. In either situation as posited above, the State's *intentions* for its conduct would require examination, in order to assess whether the conduct was aimed simply at the constituent downstream vehicles in isolation,

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[738] *See, e.g., Bernhard Friedrich Arnd Rudiger von Pezold et al. v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, ¶ 325 (28 July 2015) (annulment application pending) (finding, in the context of expropriation allegedly motivated by racial animus towards the ultimate owners of certain investments, that "[a]ny conduct by the Respondent targeted towards the Zimbabwean Companies thus was also conduct targeted towards the von Pezold Claimants (indeed, the fact that the measures taken by the Respondent tended to be directed at farms perceived to be held by 'foreigners' provides further support for the proposition that the measures were really directed at the von Pezold Claimants").

or alternatively was part of a broader scheme aimed at the foreign investor and its protected upstream holding company. The fact that the economic *injury* to the investor might have to be measured through a reflective loss-type analysis, focusing on the lost value to the investor from destruction of its downstream holdings, would not necessarily protect the State conduct from assessment. The important question would be whether the State conduct violated its obligations with respect to a *protected* investment.

327. This hypothetical example is not far divorced from the case that LDA ultimately pleaded in its Further Amended Statement of Claim. LDA pleaded that "the Respondent and Vested Interests wanted the LDA/ABG Infra joint venture operation out of HDC," and "knew that LDA and ABG Infra were the drivers behind the project … and the parties that had to be displaced in order for the Vested Interests to regain control of the port. Only LDA and ABG Infra could withdraw 'HBT' from the port, by ceasing their joint venture operation there; that is why LDA and ABG Infra were the parties targeted by the actions in breach of the Treaty."[739] In LDA's words, the case was thus about "specific and conscious actions directed at HBT but ultimately specifically targeting the Claimant and ABG Infra," in violation of LDA's direct investment rights in ALBA.[740] LDA also pleaded certain conduct alleged to have been directed specifically at ALBA and LDA (and not just at HBT), including alleged efforts to blacklist ALBA from further State business. The Tribunal accordingly allowed LDA to try to prove its case on the merits, *i.e.*, to show that its claims truly were about something *more* than simply the economic effect upstream of State conduct taken with respect to HBT, an investment that falls outside the Treaty's protection.

328. Now that the case has proceeded past pleading to a full presentation of evidence, the time is ripe to assess whether LDA has met its burden of proof. In the section below, the Tribunal first assesses, for each substantive treaty provision LDA invokes, the specific requirements of the provision with respect to the *connection* between State conduct and a protected investment. The Tribunal then examines *the specific conduct* that LDA invokes as putative violation of the standard, to determine whether such conduct reflects the *requisite jurisdictional relationship* to a protected investment. Only if such a jurisdictional basis has been demonstrated is it appropriate and necessary to proceed to the final stage of the analysis, which would be the ultimate merits question of whether the challenged conduct was (or was not) consistent with the State's *obligations* under the Treaty owed to that protected investment. The Tribunal turns to this step by step analysis below.

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[739] Further Amended Statement of Claim, ¶ 368AC.

[740] Further Amended Statement of Claim, ¶ 368AE.

VIII. ASSESSMENT OF LDA'S CLAIMS IN LIGHT OF ARTICLE 2(1)

329. LDA contends that India breached four separate obligations under the Treaty: it "failed to provide [the Claimant's] investment with fair and equitable treatment,"[741] "failed to provide the Claimant's investment with full protection and security,"[742] "discriminated against [the Claimant's] investment,"[743] and "unlawfully expropriated [the Claimant's] investment."[744] The Tribunal examines these claims separately below, to determine whether LDA has met the jurisdictional requirements of proceeding with a claim given the Treaty's unusual exclusion of protection for its indirect investment in HBT. Only if the answer is yes is it necessary to determine whether LDA has proven a substantive violation of the required standards of treatment.

A. FAIR AND EQUITABLE TREATMENT

1. The Jurisdictional Requirements for a Claim

330. Article 4(2) of the France-India BIT states:

> Each Contracting Party shall extend fair and equitable treatment in accordance with internationally established principles to investments made by investors of the other Contracting Party in its area and shall permit the full exercise of this right in principle and in practice….

331. Consistent with the exclusion in Article 2(1), the Tribunal considers that the phrase "investments made by investors" in Article 4(2) must be read as referring to "[*protected*] investments made by investors," and in this case, as LDA's direct investment in ALBA. This means that the jurisdictional requirement of Article 4(2) – *i.e.*, the *predicate* to even assessing whether challenged State conduct met the required merits standard of being "fair and equitable treatment in accordance with internationally established principles" – is that the conduct in question must involve "treatment" by the State that was "extend[ed] …to [a protected investment]" of LDA's, namely ALBA, and not simply treatment extended to HBT, which is an unprotected investment.

332. The question is thus squarely presented: what does it mean to "extend … treatment … to" a given investment, the phrase used in Article 4(2)? Consistent with the Tribunal's general discussion of

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[741] Further Amended Statement of Claim, Section V.C (capitalization from header omitted); Reply, Section XV.

[742] Further Amended Statement of Claim, Section V.D (capitalization from header omitted); Reply, Section XVI.

[743] Further Amended Statement of Claim, Section V.E (capitalization from header omitted); Reply, Section XVII.

[744] Further Amended Statement of Claim, Section V.B (capitalization from header omitted); Reply, Section XIV.

"intentional targeting" in Section VII.D above, the Tribunal considers that the notion of "*extending*" treatment to any entity may involve either the taking of action *directly with respect to* that entity, or the taking of action with respect to another entity but with the *intention of having an effect on* the subject entity. By contrast, it is more difficult to accept that a State has "extended" treatment to an upstream entity simply because it has *knowledge* that the downstream entity which it intends to affect has certain upstream owners. All entities are owned by someone, and unless the owners are individuals, the first level of juridical-entity owners will themselves have owners (either individuals or further juridical entities), and so on, potentially up through many levels. If the upstream owners have a protected indirect investment interest in the proximate target of the State's conduct, the fact that this interest is indirect (whether through one or more level of corporate structuring) might not be an impediment to proceeding, because the downstream entity to which the State's "treatment" was "extended" is *itself* one with respect to which the State owes the foreign investor certain duties under the treaty. But where (as here) there is *no* protected indirect investment interest in the downstream entity, LDA cannot sidestep the need to show either State conduct *towards* or *intending to affect* an upstream entity, simply by positing that the State knows the identity of the upstream owners. If that proposition were true, then the mere receipt by a State of a corporate ownership chart for investments in its territory would mean that any action taken with respect to entities at the bottom of that chart – even entities that are *expressly excluded* from protection as an indirect investment, as was HBT here – would qualify simultaneously also as "treatment … extended … to" every other entity appearing above the target on the ownership chart. This would distort the common sense meaning of the words "extended … to," essentially transforming that into "having any ripple effect whatsoever upon." The phrase cannot support such a broad construction.

333. Accordingly, the Tribunal considers that it would have jurisdiction under Articles 2(1) and 4(2) of the France-India BIT to evaluate the wrongfulness of any State conduct either taken *directly* with respect to ALBA, or taken with respect to HBT but with the *intention* of harming ALBA (or LDA itself by means of its ownership of ALBA). By contrast, the Tribunal does not have jurisdiction to evaluate conduct taken towards HBT without any demonstrated intention by the State of targeting its upstream owners. Since State conduct towards HBT alone is not regulated by (and therefore cannot be wrongful under) the Treaty, such conduct can only be the basis of an Article 4(2) claim if it is shown independently to be wrongful with respect to a different, protected investment (ALBA).

334. Having stated this finding, the Tribunal turns below to the specific conduct that LDA alleges violated Article 4(2), to determine if any of such conduct falls within its jurisdiction to evaluate on the merits.

2. Whether the Threshold Requirements Have Been Met

(a) Conduct Alleged to Violate the Standard

335. In support of its Article 4(2) claim, LDA invokes numerous different incidences of conduct that it alleges are attributable to India for purposes of the France-India BIT. These involve acts or omissions by several different actors. Many of the incidents involve conduct by KoPT, which LDA contends are attributable to India under either Articles 4, 5, or 8 of the International Law Commission's Draft Articles on Responsibility of States for Wrongful Acts ("**ILC Articles**");[745] India disputes the attributability of KoPT conduct to the State.[746] LDA also challenges conduct by the MoS,[747] and by various law enforcement authorities including the police, District Magistrate, and CISF;[748] there appears to be no dispute about attribution with regard to these actors.[749] Notably, LDA does not contend that actions by unions or individual workers are attributable to the State. Nor does LDA contend that India is internationally responsible for the actions of Mr. Adhikari, who was both a union representative and an individual Member of Parliament.[750] Finally, LDA does not contend that the actions of competing cargo handling companies and their owners (*e.g.*, Ripley and the Bose family) were taken under State instruction, direction or control or are otherwise attributable to India,[751] although it does argue that various State actions were motivated to assist Ripley, at LDA and ALBA's ultimate expense.

336. With regard to the actors whom LDA does contend were exercising governmental authority, it challenges a series of actions from 2008 to 2012 as an alleged violation of fair and equitable treatment, if not in

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[745] Further Amended Statement of Claim, ¶¶ 370, 372 (citing International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts with commentaries*, YILC Vol. II(2) (2001) (**CLA-43**); Reply, Section XII.D.

[746] *See* Counter-Memorial, Section III.C; Rejoinder, Section III.C.

[747] Further Amended Statement of Claim, ¶ 372; Reply, ¶¶ 737-738.

[748] Further Amended Statement of Claim, ¶ 375; Reply, ¶ 920(h).

[749] *See* Counter-Memorial, Section III.C ("The Conduct Of KoPT And The So-Called "Vested Interests" Is Not Attributable To The State Of India"); Rejoinder, Section III.C ("KoPT's Conduct Is Not Attributable To The Republic Of India As A Matter Of International Law").

[750] Further Amended Statement of Claim, ¶ 376; Reply, Section XII.D.3 ("The Claimant Does not Allege that Local Labour Unions, Mr. Adikhari, Mr. Bose or other Vested Interests were Under the Instruction, Direction or Control of the Respondent…").

[751] Reply, Section XII.D.3.

isolation then when taken as a whole.[752] First, LDA challenges the following both as arbitrary and as a violation of its legitimate expectations:

- KoPT's alleged delay in issuing the LoI, *pro forma* agreement, and Commissioning Certificate, and allowing HBT's operations to commence, which ultimately required the intervention of the Indian courts and the MoS, and which was said to be motivated to protect Ripley's ability to continue operations in the meantime;[753]

- KoPT's alleged decision not to maximize cargo allocation for the Berths, which LDA contends was motivated to help Ripley and by fears of violence;[754]

- KoPT's alleged decision to force HBT to recruit far more personnel than necessary and to engage the services of Five Star: KoPT allegedly did nothing to protect HBT from union demands and affirmatively directed HBT to submit to those demands;[755]

- "The overall failure" of KoPT and MoS to support HBT in resolving its contractual concerns and the law and order situation it faced, which is said to involve the following components: (a) KoPT allegedly ignored HBT's pleas for help, including with respect to the blockade on entry of HBT's dumpers between December 2009 and May 2010; (b) KoPT allegedly failed to address legitimate grievances about infrastructure constraints and under-allocation of cargo; (c) KoPT allegedly failed to intervene to resolve strikes by the cargo pool; (d) KoPT allegedly imposed penalties on HBT on baseless grounds; and (e) KoPT allegedly showed "utter apathy" to the law and order problems in September and October 2012, simply directing HBT to meet with Mr. Adkihari and insisting that HBT continue its operations rather than deploying the CISF and cancelling entry passes of retrenched workers;[756]

- KoPT's decision to claim an untenable lien on HBT's equipment;[757] and

- The alleged "inaction of the police and CISF," which is also alleged to violate India's separate obligations to provide "full and constant protection and security."[758]

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[752] Further Amended Statement of Claim, ¶ 410.

[753] Reply, ¶¶ 920(a), 920(b); *see also* Further Amended Statement of Claim, ¶ 414.

[754] Reply, ¶¶ 920(c), 920(d); *see also* Further Amended Statement of Claim, ¶ 415; LDA's Post-Hearing Brief, ¶ 30 ("KoPT acted arbitrarily by derogating from its contractual commitment to maximise cargo to HBT's Berths…").

[755] Reply, ¶ 920(e); *see also* Further Amended Statement of Claim, ¶ 416; LDA's Post-Hearing Brief, ¶ 69 (alleging both "knowledge and complicity" by KoPT "in the labour issues that HBT grappled with through the life of the Contract") and Sections IV.1 and IV.3 (alleging that "KoPT Induced HBT to Agree to Engaging a Large, Redundant Workforce on HBT" and thereafter "KoPT Failed to Assist HBT in respect of its Labour Issues").

[756] Reply, ¶¶ 920(f), 920(g); *see also* Further Amended Statement of Claim, ¶¶ 417-419.

[757] Further Amended Statement of Claim, ¶ 420.

[758] Further Amended Statement of Claim, ¶ 421; Reply, ¶ 920(h).

337. Second, LDA challenges the following actions as "not only arbitrary but in bad faith:"[759]

- KoPT allegedly denied there was a law and order situation from September 2012 preventing HBT from restarting its operations, and continued to allocate cargo to the Berths;[760]
- KoPT "knowingly lied" about the role of the CISF in maintaining law and order;[761]
- KoPT wrongly denied that it had played a role in HBT's recruitment of excess workers and engagement of Five Star;[762]
- The MoS wrongly claimed it had no supervisory role in relation to Port matters;[763] and
- KoPT and the Customs Authorities attempted in parallel to impose a lien on HBT's equipment following termination of the Contract, "acting in concert towards the same illegitimate purpose."[764]

338. Third, LDA challenges as discriminatory, in violation of Article 4(2), the same actions that it challenges under Articles 5(1) and 5(2);[765] these actions are discussed in Section VII.C below.

339. Fourth, LDA contends that the process adopted by the KoPT-appointed Enquiry Officer for purposes of the blacklisting proceedings violated LDA's due process rights.[766]

340. Fifth, LDA alleges a "pattern of systematic harassment of the various other concerns of HBT's group companies including LDA, ALBA and ABG Infra," including that KoPT recommended that the MoS consider extending the Blacklisting Order to HBT's affiliate companies and communicated its own Blacklisting Order to all major ports in India.[767] Subsequently, "there arose a number of disputes concerning other projects of ALBA and ABG Infra."[768] KoPT's attempted lien on HBT's equipment and

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[759] Reply, ¶ 921; *see also* Further Amended Statement of Claim, ¶ 422.

[760] Reply, ¶¶ 921(a), 921(b); *see also* Further Amended Statement of Claim, ¶¶ 423-424.

[761] Reply, ¶ 921(c); *see also* Further Amended Statement of Claim, ¶ 425.

[762] Reply, ¶ 921(d); *see also* Further Amended Statement of Claim, ¶¶ 426-427.

[763] Reply, ¶ 921(e); *see also* Further Amended Statement of Claim, ¶ 429.

[764] Further Amended Statement of Claim, ¶ 428; Reply, ¶ 921(f).

[765] Reply, ¶ 922; Further Amended Statement of Claim, ¶ 431.

[766] Reply, ¶ 923; Further Amended Statement of Claim, ¶¶ 436-446.

[767] Reply, ¶ 925.

[768] Reply, ¶ 926.

the proceedings by the Customs Authorities also "point clearly to a concerted harassment of the Claimant and its Investment," which impaired ALBA's ability to monetize HBT's equipment.[769]

(b) Conduct Taken Directly with Respect to ALBA

341. But for Article 2(1)'s exclusion of LDA's indirect investment in HBT – and subject to India's other jurisdictional objections not discussed here – the Tribunal might have had jurisdiction to consider each of these various contentions under the fair and equitable treatment clause of Article 4(2). However, as explained above, the Tribunal only has jurisdiction to evaluate the wrongfulness of any State conduct either (a) taken directly with respect to ALBA, or (b) taken with respect to HBT but with the intention of harming ALBA (or LDA itself by means of its ownership of ALBA). Addressing the first category first[770] – actions taken *directly with respect to ALBA* – the Tribunal concludes of the various episodes discussed above, the only one that is alleged to involve State conduct *towards ALBA itself* is the allegation that India engaged in a "pattern of systematic harassment of the various other concerns of HBT's group companies including LDA, ALBA and ABG Infra," by virtue of (a) KoPT's recommendation that the MoS consider extending the Blacklisting Order to HBT's affiliate companies, and its subsequent communication of the Blacklisting Order to all major ports in India,[771] and (b) whatever other State conduct is alleged to have contributed to "a number of disputes concerning other projects of ALBA and ABG Infra" that arose in the wake of the Contract's termination.[772]

342. The Tribunal considers that those particular allegations are not barred by the jurisdictional exclusion in Article 2(1), and addresses them further in Section VIII.A.3 below.

(c) Conduct Allegedly Targeting ALBA through HBT

343. The second category of State conduct allegedly violating Article 4(2) that the Tribunal has jurisdiction to consider involves actions directed at HBT, but which are alleged to have been taken in order to affect ALBA, or to affect LDA itself by means of its ownership of ALBA. The Tribunal has carefully examined the evidence relating to each of the incidents invoked by LDA, however, and sees no evidence to

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[769] Reply, ¶ 927.

[770] The second category, of actions allegedly taken towards HBT with the intention of harming its upstream owners, is addressed in the immediately following section.

[771] Reply, ¶ 925.

[772] Reply, ¶ 926.

substantiate LDA's assertion that State conduct was intentionally targeted to inflict harm on HBT's upstream owners, including either ALBA or LDA itself.

344. LDA's theory is that all of the measures it attributes to India "represent a targeted and concerted effort to harm the Claimant's protected [i]nvestment by destroying one of its key projects."[773] This is said to have been for the singular purpose of ensuring that LDA and ABG Infra would use their authority over ALBA to withdraw HBT from the Port, and so enable the Berths to be returned to Ripley for cargo handling operations.[774] LDA contends that the adverse "animus" towards the upstream investors became clearest after Contract termination, from (a) KoPT's suggestion that the Blacklisting Order might be extended to HBT affiliates; (b) various obstacles placed in the way of retrieval of HBT's equipment, including by the Customs Authority, which prevented such equipment from being used in other ALBA projects and resulted in a third party bank calling in ALBA's guarantee of an HBT loan used to purchase the equipment; and (c) "the Respondent's reaction to disputes that have arisen concerning various projects of ALBA's and ABG Infra's at other ports in India" following Contract termination. However, LDA contends that the same motivating factors also explain all of the earlier conduct as well.[775]

345. By contrast, India argues that the only possible target (if any) of the subject actions was HBT, and HBT alone.[776] India contends that most of LDA's "intentional targeting" evidence shows only that India was aware of the existence of LDA and ABG Infra, which is insufficient to infer an intention to harm those entities.[777] India states that LDA produced no evidence of targeting prior to Contract termination, and does not explain how its examples of supposed targeting *after* termination indicate "any pre-contract termination intent."[778] With respect to the post-termination events, India notes that even if ALBA may

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[773] Reply, ¶ 660.

[774] Further Amended Statement of Claim, ¶ 368AC ("The Respondent … understood that [LDA and ABG Infra] were the parties that had to be displaced in order for the Vested Interests to regain control of the port. Only LDA and ABG Infra could withdraw 'HBT' from the port …: that is why LDA and ABG Infra were the parties targeted by the actions in breach of the Treaty"); Reply ¶ 661.

[775] Reply, ¶ 665 ("it is the Claimants' case that LDA and ABG Infra were the true (and intended) targets of the Respondent's actions," and that "[t]his animus becomes even more visible" in these post-termination actions); *see also* Further Amended Statement of Claim, ¶ 368AC.f (alleging that after Contract termination, "HBT's parent entities LDA and ABG Infra were deliberately targeted by the Respondent as a result of multiple *mala fide* proceedings such as the black-listing proceedings and the proceedings instituted by the customs authorities").

[776] Counter-Memorial, ¶ 481.

[777] Counter-Memorial, ¶¶ 483-484; Rejoinder, ¶¶ 767-769 (accusing LDA of "attempting to blur the well-known distinction between intention and knowledge," and contending that "[i]n every case in which a State takes an adverse action against an entity, it has knowledge that it might thereby harm that entity's shareholders. It would be meaningless to say that, for that reason alone, such actions are always intentionally targeted to harm the shareholders") (emphasis in original).

[778] Rejoinder, ¶ 771 (emphasis omitted).

have been negatively affected by HBT's blacklisting, that would not mean that it was intentionally targeted by the Blacklisting Order,[779] particularly given that the Blacklisting Order in its final form restricted business dealings only with HBT,[780] and ALBA subsequently not only continued pre-existing projects but was awarded new projects at other major ports.[781] Similarly, the fact that ALBA may have been affected by KoPT's efforts to enforce a lien on HBT's equipment, by virtue of ALBA's loan guarantee being called by a private bank, does not mean that the lien proceedings intentionally targeted ALBA.[782] Nor, in India's view, has LDA proven that disputes involving ALBA and ABG Infra at other ports have arisen because of the companies' connection to HBT's Contract at HDC.[783]

346. On this issue of intentional targeting of ALBA and/or LDA, the Tribunal finds that LDA has not met its burden of proof. Without addressing for present purposes India's contention that LDA and ABG Infra initially tried to *disguise* certain aspects of the LDA-ABG transactions regarding ALBA (including that LDA was given effective joint control),[784] the Tribunal accepts that in due course the primary actors whose conduct LDA challenges did become aware that LDA had a significant indirect ownership stake in HBT. Among other things, this was a major basis of Ripley's challenge to the award of the Tender, and of KoPT's decision to seek legal advice (twice) from the Additional Solicitor General of India.[785] But as explained in Section VIII.A.1 above, *awareness* that an entity has owners – even foreign owners – is not sufficient to infer an *intent to harm* those owners from actions taken with respect to the entity itself. As for LDA's broader theory that Indian officials schemed to supplant LDA and ABG Infra at the Berths, in

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[779] Counter-Memorial, ¶ 487.

[780] Counter-Memorial, ¶ 491; Rejoinder, ¶¶ 776-777.

[781] Rejoinder, ¶¶ 778, 974-978; Reply ¶¶ 482, 665(d); Agarwal II, ¶ 40; Maire II, ¶ 13.

[782] Counter-Memorial, ¶ 487; Rejoinder, ¶ 781.

[783] Rejoinder, ¶ 782. India argues that any intentional targeting of ABG Infra is irrelevant to this arbitration as ABG Infra is neither a protected investor nor a protected investment; and this Tribunal is primarily concerned with the treatment of ALBA and LDA. Counter-Memorial, ¶ 494.

[784] *See* Counter-Memorial, ¶ 156; Rejoinder, ¶ 199.

[785] Because the Tribunal accepts that KoPT became aware early on of LDA's interest (through ALBA and HBT) in the Project, there is no need for the Tribunal to resolve LDA's request for an "adverse inference" that certain KoPT Board minutes, not disclosed by India, would "support [LDA's] case" by demonstrating that KoPT was aware of "LDA's participation in the Project …." LDA's Post-Hearing Brief, ¶ 6. Such awareness is demonstrated by other evidence and need not rest on an adverse inference.

order to restore Ripley or a Ripley-controlled company,[786] in the Tribunal's view the evidence ultimately does not support the assertion.

347. To elucidate this conclusion, the Tribunal addresses separately below LDA's allegations about each of the separate actors whose conduct LDA contends is attributable to India and that allegedly violated India's obligations to LDA under Article 4(2) of the BIT: (i) KoPT; (ii) MoS; (iii) the Customs Authority; and (iv) various law enforcement authorities. For each such actor, the Tribunal finds that LDA has not presented evidence substantiating its claim of "intentional targeting" in order to force LDA and ABG Infra to withdraw HBT from the Port and thus enable the restoration of Ripley's influence at the Berths.

i. KoPT

348. First, with respect to KoPT, there is an important threshold issue whether its actions are even attributable to India for purposes of the France-India BIT. LDA contends that *all* of KoPT's acts are attributable to the State because KoPT is a State organ pursuant to Indian law (ILC Article 4),[787] or alternatively that the *particular* acts challenged here are attributable to the State, either because KoPT was exercising governmental authority (ILC Article 5),[788] or because it was acting under State instruction, direction, or control (ILC Article 8).[789] India denies the assertion and argues that KoPT has independent personality under Indian law and is not a State organ,[790] nor was it empowered to exercise the governmental authority or did so with respect to the Contract, but rather acted in a purely commercial capacity[791] and not under State direction or control with respect to the challenged acts.[792]

349. If it were necessary to resolve the attribution issue, the Tribunal's general view is that KoPT is not a State organ whose acts are attributable to India for all purposes under ILC Article 4, but rather KoPT was granted certain elements of the governmental authority by the MoS, with respect to implementing certain policy-level decisions with respect to major ports. However, the Tribunal has serious doubt that the *particular* KoPT decisions at issue here – *e.g.*, whether HBT had achieved sufficient equipment delivery

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[786] *See, e.g.,* Further Amended Statement of Claim, Section V.AA.1 ("the real targets were the Claimant and ABG Infra"), ¶ 368AC ("the actions and inactions of the India instrumentalities … were very obviously intended to drive out the Claimant and ABG Infra … the Respondent … wanted the LDA/ABG Infra joint venture operation out of HDC").

[787] Further Amended Statement of Claim, ¶ 372; Reply, Section XII.D.1.

[788] Further Amended Statement of Claim, ¶ 372; Reply, Section XII.D.2.

[789] Further Amended Statement of Claim, ¶ 372; Reply, Section XII.D.3.b.

[790] Counter-Memorial, Section III.C.1; Rejoinder, Sections III.C.1, III.C.2.

[791] Counter-Memorial, Section III.C.2; Rejoinder, Section III.C.3.

[792] Counter-Memorial, Section III.C.3; Rejoinder, Section III.C.4.

milestones to justify a commissioning certificate, whether to allocate particular incoming vessels to HBT's Berths, and whether to claim invoice deductions or assess penalties against HBT based on performance metrics – were governmental rather than commercial in nature, as required under ILC Article 5. Likewise, the Tribunal sees no basis for an Article 8 conclusion that KoPT was acting pursuant to State instructions or directions, except insofar as the MoS ultimately (when required to do so by a court) directed KoPT to issue the Commissioning Certificate to HBT. Yet that was a decision that LDA applauds, rather than challenges, in this case. It was not a wrongful act which LDA sought to attribute to India for the purposes of establishing State responsibility.

350. But ultimately it is not necessary to resolve the attribution issue regarding KoPT. That is because even assuming *arguendo* that every challenged act of KoPT *could* be attributed to the State, LDA has not made out its case that KoPT's acts were aimed upstream from HBT, and taken for the intended purpose of driving ALBA (or LDA through ALBA) out of HDC. To the contrary, there is strong countervailing evidence that KoPT wished HBT to *remain* in operation at the Berths, and not abandon the Berths in favor of Ripley or otherwise. First, KoPT rejected a protest during the Tender process that the Tender's requirement of direct crane operating experience would restrict "[t]he experienced Stevedores and Handling Agents at … Haldia" from bidding on their own.[793] KoPT then awarded this first-of-its kind Project to the ABG Consortium and *not* to a competing consortium that included Ripley.[794] Subsequently, when the issue of HBT's change in shareholding pattern was brought to KoPT's attention (chiefly by Ripley), KoPT did not act precipitously to strip HBT of the Contract – as might have been expected if it was truly targeting ALBA and/or LDA to aid Ripley or other "Vested Interests" – but instead sought a legal opinion from the Additional Solicitor General of India.[795] KoPT sought further outside legal advice after Ripley brought to KoPT's attention additional information about the change in shareholding.[796] Ultimately, despite the Additional Solicitor General's conclusion on 26 June 2010 that the Consortium had committed a misrepresentation by not informing KoPT about the change in shareholding, but that any Contract termination on this basis should be considered in the context of KoPT's commercial best interests,[797] KoPT took no steps to terminate the Contract. Rather, as LDA itself highlights in its Post-Hearing Brief, KoPT *opposed* the writ proceedings launched by Ripley complaining of LDA's

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[793] Tender, **C-1**, § 2.3.1, Queries and Clarifications.

[794] Counter-Memorial, ¶ 65 (confirming Ripley's involvement in a competing bid).

[795] **AD-24**; **AD-25**.

[796] **C-546**; **AD-26**.

[797] **AD-26**, pp. 3-4.

involvement.[798] This is not the conduct of an actor seeking any excuse to drive either HBT or its upstream owners out of HDC, much less conspiring to do so out of animus towards LDA or ALBA or favoritism towards Ripley.

351. LDA's suggestion that KoPT was determined to drive ALBA out of HDC is also inconsistent with KoPT's actions in August 2012, when HBT issued its Notice of Suspension. KoPT insisted that HBT continue operations, and noted internally that it "was financially beneficial for KoPT" to place cargo at HBT's mechanized Berths.[799] KoPT later went to court seeking to enjoin HBT from suspending operations,[800] and ultimately agreed to the Consent Order – including its provisions regarding further cargo prioritization to the Berths – as a mechanism to maintain HBT in operations at the Port.[801] While these actions may not have reversed the overall economic challenges of the Project for HBT, they are hardly the actions of an entity seeking to oust an existing operator, much less for the purpose of harming its upstream shareholders.

352. As for LDA's argument that KoPT breached contractual obligations regarding cargo allocation, for the alleged purpose of helping Ripley, it is far from clear that the Tender clarification upon which LDA relies, about KoPT's having its "own policy for … maximizing cargo at these two berths,"[802] can be translated into any fixed rules regarding the allocation of individual vessels. The statement equally could be seen as referring to a policy to promote the Berths to end-users, by alerting them to the availability of Mobile Harbor Cranes at these Berths and thus the Berths' ability to accommodate gearless vessels. It appears that in September 2010, shortly after issuance of the Commissioning Certificate, KoPT did issue both a general circular and targeted letters advertising HBT's berths.[803]

353. In any event, India has advanced reasonable arguments that the general statement of policy in the Tender clarification cannot be taken to mean that KoPT would override end-user preferences, nor that it would ignore shore handling issues and labor disruptions that from time to time interfered with the Berths'

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[798] LDA's Post-Hearing Brief, ¶ 20 (contending that KoPT's Mr. Dutta "strenuously defended LDA's participation in the Project"); *see also* India's Post-Hearing Brief, ¶ 31 ("KoPT defended the Contract not only when the tender was being challenged on three different fronts after the Consortium was declared the lowest bidder, but also when Ripley & Co. challenged it in court after the LoI was issued to HBT.").

[799] **R-38**; **R-39**; **R-144**.

[800] **C-247**.

[801] Further Amended Statement of Claim, ¶¶ 246-247; Reply, ¶ 841.

[802] Tender, **C-1**, § 1.39, Clarification.

[803] **AM-10** (*bis*); **AM-11**.

efficiency or reliability. Nor can the clarification about a KoPT "policy" be taken as a mandate that KoPT ignore Port-wide issues, such as the value of maintaining a reasonable flow of cargo also to other berths, in an unexpected climate of overall declining usage of HDC. Indeed, in response to another Tender query about how KoPT would "divide vessels equitably," KoPT stated that "[t]his will be determined / governed by the policies of KoPT prevailing at the relevant point of time."[804] Nothing in these statements, nor in the Tender's MLP provision about the required efficiency levels of a bidder's equipment and workforce, can be taken as a guarantee of any particular level of cargo throughput, particularly in the context of the Tender's three separate disclaimers of any such guarantees.[805] Nor can they be seen as a guarantee that KoPT never would undertake mechanization of other berths at the Port, such as it eventually explored with Berth 4A. There is no provision in the Tender or Contract that the winning tenderer would enjoy exclusivity of mechanized operations.

354. This is not to say that the "policy" statements in the Tender clarifications carry no weight at all. Arguably, they may be viewed as an assurance that KoPT would make reasonable good faith efforts to allocate as much compatible cargo as possible to the Berths, to the extent not inconsistent with other policies adopted in good faith in the overall interests of the Port. While LDA may argue that KoPT did not always honor even such more modest assurances, any such possible Contract breach would not rise to the level of a *Treaty* breach unless KoPT's cargo allocation decisions (*arguendo* attributed to India) violated Treaty obligations with respect to an investment falling within the Treaty's scope. Given the exclusion from the Treaty of LDA's indirect investment in HBT flowing from Article 2(1), this would require a showing that KoPT's cargo allocation decisions were taken with an eye towards harming ALBA or LDA. There is no compelling evidence, however, that the allocation decisions KoPT made were a result of animus towards LDA as a foreign investor, or animus towards ALBA as a joint venture between LDA and ABG Infra.

355. The Tribunal acknowledges LDA's request for adverse inferences relating to cargo allocation issues, premised on the argument that certain documents India did not produce (KoPT Board minutes[806] and

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[804] Tender, **C-1**, "Clarification to Miscellaneous Queries (Not Specific to Any Particular Clause), p. 111.

[805] Tender, **C-1**, §§ 1.39, 7.6 Queries & Clarification, and "Clarification to Miscellaneous Queries (Not Specific to Any Particular Clause), p. 112.

[806] LDA contends that India "failed to produce" KoPT Board minutes from April 2009 to September 2012, "despite such minutes (very obviously) falling within the scope of multiple disclosure orders." LDA's Post-Hearing Brief, ¶ 6 & n.4. To be precise, the disclosure orders LDA cites did not order production of the Board minutes *as such,* but Board minutes would fall within the scope of production to the extent they addressed *certain topics within certain dates*. This includes documents: (a) between January and September 2010, relating to "the issuance of the Commissioning Certificate to HBT and the commencement of cargo allocation" (**CLA-257**, Annex 1 to PO7, Request No. 15(a)); (b) between July 2009 and September 2010, "regarding the Claimant's interest in ALBA or HBT" (*id.*, Request No. 20(c)); (c) relating to "HBT's requests to commence cargo allocation" (*id.*, Request No. 21); (d) in the possession of any of six named individuals, that

minutes of daily berthing meetings[807]) "would certainly shed light on the merits of KoPT's defence that … operational issues and end-user preferences prevented it from allocating more cargo to HBT."[808] For the reasons stated above, however, the Tribunal sees no need to resolve this issue. Even if additional documents might demonstrate that KoPT could have allocated more cargo to HBT's Berths consistent with operational considerations and end user preferences, this still would not suffice for LDA to overcome the additional jurisdictional hurdle created by the Treaty's exclusion of HBT as a protected investment. At most, such additional documents might demonstrate a failure by KoPT to honor Contract obligations to HBT (derived from the "policy" statements in the Tender); they would not give rise to an actionable Treaty claim by LDA, absent compelling evidence that KoPT's cargo allocation decisions (*arguendo* attributable to India) were made with the intent to drive HBT's upstream owners (ALBA and LDA) out of HDC. As for that more fundamental issue, it would be too great a leap to infer upstream *animus* from non-production of the documents at issue, particularly in the absence of any other corroborating evidence of an intent by KoPT to displace HBT's owners from an interest at the Port. Indeed, as noted above, there is substantial other evidence suggesting that KoPT did *not* wish to drive HBT (much less its owners) out of HDC, including both KoPT's resistance to Ripley's court petition to invalidate the Tender – which was premised specifically on criticism of LDA and ALBA's involvement with HBT – and KoPT's opposition to HBT's eventual Notice of Suspension.

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discuss HBT communications regarding, *inter alia*, "[u]nder-allocation of cargo" (*id.*, Request No. 23(a)); (e) in the possession of any of six named individuals, "supporting Respondent's assertion that … 'KoPT did seek to market and persuade end users to use HBT's berths" (*id.*, Request No. 30); (f) "relating to the decline in cargo volumes in HDC" as a whole and "the reasons for the decline …, the consequences of the same, and action, if any taken in that regard" (*id.*, Request No. 32); (g) between 23 August 2012 and 12 September 2012, regarding the Notice of Suspension dated 23 August 2012 (*id.*, Request No. 33); and (h) between 23 August 2012 and 12 September 2012, "regarding the negotiations/ meetings that resulted in the Consent Order of 12 September 2012" (*id.*, Request No. 34). India has not explained why no KoPT Board minutes were produced in response to these orders (*e.g.*, whether it contends they did not exist for certain periods, could not be located, did not address the specified topics, or otherwise). India's witness Mr Dutta confirmed that there were monthly Board meetings at least from July 2010 onwards. Hearing Transcript, 30 November 2017, p. 889.

[807] LDA contends that "not a single record of the daily *berthing* meetings … have been produced, despite the same being responsive to a document request." (emphasis in original) LDA's Post-Hearing Brief, ¶ 59 & n. 148. The specific document production order on which LDA relies required India to produce "minutes or reports of the daily berthing meetings," to the extent KoPT "in the ordinary course of business produces" such documents. **CLA-257**, Annex 1 to PO7, Request No. 29. LDA requests an inference that "had these documents been produced they would demonstrate that end-users were not asking for their vessels to be allocated at a berth other than Berths 2 and 8," but rather that "end-user preferences in favour of Berths 2 and 8 were being overridden." LDA's Post-Hearing Brief, ¶ 59. India does not explain why no records were produced, but it does take the position that the berthing meetings would not reveal anything about end-user preferences, as the meetings are "only a forum for KoPT to announce the berthing decisions that have already been made by that point," not a forum for discussion of end-user preferences, which are "typically convey[ed] … through the vessel declaration form … prior to the berthing meetings." Mahapatra II, ¶ 6.

[808] LDA's Post-Hearing Brief, ¶ 6; *see also id.*, ¶ 59.

356. With respect to KoPT's involvement in discussions about union demands for greater employment, the documentary evidence suggests that in January 2010 HBT decided of its own volition to agree to CITU's demands, well before it informed KoPT that it had already "agreed to a demand of the local union to recruit all those who were presently working" at the Berths.[809] This predated the disputed February 2010 conversation in which, according to LDA, KoPT advised HBT that agreeing to CITU's demands was "the only way in which HBT would be able to resolve the situation …."[810] The greater difficulty was that HBT later became caught in an apparent turf war between CITU and the rival INTTUC union, represented by the local Member of Parliament, Mr. Adhikari. The Tribunal accepts that KoPT participated as an intermediary in one or more meetings between HBT and Mr. Adhikari, including one at which the Five Star cargo pool agency also participated, but the evidence suggests that this was part of KoPT's effort to broker a solution to rising labor tensions that were interfering with operation of the Berths, in the context of extremely aggressive unions over which KoPT itself had little control. In the context of that reality, KoPT's purported statement to HBT that "if [it] intended to operate smoothly in the long term, it would not be possible to do so without engaging the services of the cargo pool,"[811] may be seen as an expression of the realities of union power, not as a KoPT order to HBT, much less one *designed to undermine* LDA's protected interest in ALBA.[812] To the contrary, at most, KoPT's efforts to broker some form of agreement between HBT and union leaders may be seen as effort to find a path through the large-scale social disruption at the Port that was triggered by mechanization.

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[809] *See* **C-121** (emphasis omitted); *see also* **C-125**, **C-126**.

[810] Malhi I, ¶ 17; Dutta I, ¶ 67.

[811] Malhi I, ¶¶ 44; *see also* Malhi I, ¶¶ 45-46.

[812] The Tribunal notes LDA's request for an adverse inference that certain documents not produced in this case likely would demonstrate that KoPT "direct[ed] HBT to take on more labour." LDA's Post-Hearing Brief, ¶¶ 6, 73, 76. The specific document production order to which LDA refers required India to produce any "correspondence, minutes of meetings and opinions" in the possession of three named individuals, "reflecting any suggestions by KoPT of a particular course of action" with respect to either (a) "[r]ecruitment and engagement of labour by HBT" between January and October 2010, or (b) "[r]etrenchment of additional labour by HBT" between August and October 2012. **CLA-257**, Annex 1 to PO7, Request No. 25. An adverse inference would require the Tribunal to find that the three named individuals would be expected to have documents addressing these topics, and therefore that non-production implies content harmful to India's position – specifically, that the documents "would be consistent with the Claimant's case that KoPT *knew about* the pressure on HBT and in fact *directed* it to take on these extra workers." LDA's Post-Hearing Brief, ¶ 73 (emphasis added). As to the former contention – that KoPT *knew* about union pressure on HBT – there is no need for an adverse inference, given the Tribunal's findings above that KoPT participated as an intermediary to try to broker a solution. With respect to the latter requested inference, even if KoPT were presumed to have leaned heavily upon HBT to appease union demands, in an effort to avoid large-scale social disruption at the Port, this would not suffice to overcome the jurisdictional hurdle to LDA's case, which requires it to demonstrate not just KoPT conduct that increased HBT's costs, but also conduct that was *designed to harm* LDA and its Treaty-protected interest in ALBA, for example to restore Ripley in control of the Berths.

357. In that context, while KoPT may have hoped that mechanization could be introduced without large-scale social disruption, nothing in the Tender or the Contract guaranteed that KoPT would (much less effectively could) interpose itself between HBT and any unions or workers, to prevent the latter from protesting the potential large-scale job dislocation resulting from technological advancement. In any event, nothing about KoPT's ineffectiveness in resisting the unions, or its effort to broker some form of agreement between HBT and union leaders, reflects an evident intent for HBT to fail, much less a broader intent to harm ALBA or its owners through the convenient vehicle of their shareholding in HBT.

358. Finally, as to LDA's complaint that KoPT allegedly "ignor[ed]" HBT's pleas for help with regard either to the dumper blockade in late 2009 and early 2010, or the later law and order problems in September and October 2012,[813] this is not entirely accurate. KoPT may have been slow to acknowledge the dumper problem in November and December 2009, simply inquiring whether HBT had filed any police reports about the matter.[814] But in early January 2010, after HBT filed such reports, KoPT asked the District Magistrate and local police to "pass necessary instructions" to enable the dumpers to enter the Port, because it "is in the interests of all concerned to ensure that the [Contract] commences at the earliest,"[815] and KoPT followed up with another request to the District Magistrate a few days later.[816] While this intervention did not resolve the issue and HBT ultimately sought a court order of police assistance with regard to the dumpers, KoPT's conduct does not reflect the actions of a party seeking to prevent HBT (much less ALBA) from proceeding with the Project.

359. As for the law and order problems in September-October 2012, it seems clear that the large and highly volatile labor protests at that time were beyond KoPT's own ability to control, and indeed in many instances were aimed at KoPT itself and not just HBT, as evidenced by KoPT's own numerous pleas to local authorities for help.[817] Moreover, LDA itself contends that "KoPT continued to protest and implore" law enforcement authorities for assistance even after the demonstrations spilled over from its own offices to HBT's Berths,[818] and argues that KoPT affirmatively "supported" HBT's writ petition for police protection[819] Both of these arguments are wholly inconsistent with LDA's contention that KoPT was

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[813] Reply, ¶¶ 920(f), 920 (g).

[814] **C-107**.

[815] **C-109**.

[816] **R-374**.

[817] *See* Section VI.G.3 above.

[818] LDA's Post-Hearing Brief, ¶ 94.

[819] LDA's Post-Hearing Brief, ¶ 115.

complicit in a broader conspiracy to force HBT's owners to withdraw by withholding necessary police protection for their investment. Indeed, there is no evidence that KoPT withheld or blocked any requests to local authorities to try to stem the rising unrest, much less that it did so because of who owned HBT, as part of a nefarious plan to return the Berths to Ripley's control.

360. Finally, with respect to KoPT's post-termination effort to enforce a lien on HBT's equipment, there is no evidence to support LDA's assertion that this was "deliberately targeted" at LDA and ABG Infra to prevent them from using the equipment (or the cash value of the equipment) on other projects.[820] Rather, the evidence suggests that KoPT sought the lien as security for its pending damages claim for HBT's termination of the Contract. While KoPT's entitlement to a lien for this purpose may have been uncertain under the Contract and Indian law, the Tribunal is unable to accept LDA's contention that the proceedings were initiated in bad faith, for the "*mala fide*" purpose of harming "HBT's *parent entities*."[821]

361. For these reasons, the Tribunal has concluded that LDA has not met its burden of demonstrating intentional targeting of ALBA (or LDA) by KoPT, even if KoPT's conduct was assumed *arguendo* to be attributable to India.

ii. MoS

362. With respect to the MoS, LDA's only allegation against it under the rubric of fair and equitable treatment[822] is that LDA legitimately expected the MoS "would exercise its supervisory role over KoPT to ensure that KoPT did not fail in any of its duties,"[823] yet the MoS did not intervene sufficiently with KoPT. According to LDA, the MoS intervened only with respect to the Commissioning Certificate (and then only "reluctant[ly]" after court intervention required that the MoS take a position),[824] and MoS

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[820] Further Amended Statement of Claim, ¶ 368AC.f.

[821] Further Amended Statement of Claim, ¶ 368AC.f (emphasis added). Indeed, as India notes in its Post-Hearing Brief, HBT contended in the domestic arbitration in October 2013 that the Mobile Harbor Cranes deployed at HDC were made to "exact [technical] specifications," so that "for all practical purposes it … would be impossible to deploy them for some other project." India's Post-Hearing Brief, ¶ 114 (quoting **R-312**, pp. 46-47).

[822] LDA also references the MoS in connection with a letter sent to the PCA in July 2014, asking it to hold in abeyance LDA's request for appointment of the second arbitrator in these proceedings in light of the Calcutta High Court's pending consideration of an injunction application filed by KoPT. *See* Further Amended Statement of Claim, ¶¶ 350-351; Reply, ¶¶ 528-529. However, this episode is not invoked in the merits section of LDA's memorials as a purported violation of any particular substantive treaty obligation. As a practical matter, no real harm flowed to LDA from the MoS letter, other than at most some minor delay in completing the constitution of this Tribunal.

[823] Further Amended Statement of Claim, ¶ 411(f).

[824] Further Amended Statement of Claim, ¶ 414.

claimed in "bad faith" in December 2011, in response to HBT's complaints about invoice penalties and deductions, that it had no supervisory role over KoPT in relation to commercial matters.[825] LDA suggests that the MoS's "fail[ure] in its duty properly to supervise KoPT's ruinous mishandling of the Project" was due to the "considerable influence" wielded at the MoS by the TMC political party, which used that influence "in order to favour Ripley."[826] India's position, by contrast, is that the MoS has statutory authority to issue directions to major ports only on "questions of policy," and not with respect to ordinary commercial disputes arising under contracts between major ports and their various contractors.[827] In India's view, that is why the MoS in this case addressed the Commissioning Certificate issue only when it was affirmatively ordered to do so by a court of law.[828]

363. The Tribunal considers India's interpretation of the MoS's statutory authority to be reasonable, in light of the express language of the Major Ports Trust Act of 1963, which provides – in a section entitled "Power of Central Government to issue directions to Board," that "the Authority and every Board shall … be bound by such directions on questions of policy as the Central Government may give in writing from time to time."[829] LDA has not shown that in other instances the MoS has interpreted its statutory authority differently, or taken a more proactive approach to assist contractors in resolving disputes with their Port trustee counterparties. Yet such a customary practice would seem to be a predicate for LDA to demonstrate that the MoS departed from its duty and practice in this instance, refusing to intervene with KoPT on HBT's behalf when it otherwise should have done so.

364. As for LDA's contention that the MoS's disclaimer of responsibilities was attributable to TMC's political influence and a desire to help Ripley's politically connected owners at the expense of HBT's owners,[830] the contention makes little sense in light of other evidence. First, if the MoS *had* been motivated to favor TMC-affiliated contractors at the expense of HBT's non-politically connected owners, one might have expected it ultimately to direct KoPT *not* to issue the Commissioning Certificate to HBT, rather than

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[825] Further Amended Statement of Claim, ¶ 429 (citing **C-223**); Reply, ¶ 921(e); *see also* Reply, ¶ 920(f) (contending generally that "[t]he overall failure of the KoPT *and MoS* to support HBT and help it resolve contractual concerns and the disruptive and dangerous law and order situation it faced, was irrational and violated the Claimant's legitimate expectations") (emphasis added).

[826] Further Amended Statement of Claim, ¶ 144; *see also* Reply, ¶ 22 (contending that "[t]his political power base was used by Ripley … to prevail upon the MoS to exercise control over KoPT and the Project").

[827] Counter-Memorial, ¶¶ 249, 659 (citing **CLA-104**)

[828] Counter-Memorial, ¶¶ 249, 659.

[829] **CLA-104**, Article 111(1).

[830] Further Amended Statement of Claim, ¶ 144.

ordering KoPT to do so "immediately."[831] This is particularly so as the Calcutta High Court did not instruct the MoS *how* to rule on the question of the Commissioning Certificate, but simply directed it to decide the issue within seven days.[832] The fact that the MoS sided with HBT when it was finally ordered to take a position, and did so notwithstanding its clear knowledge that Ripley *opposed* issuance of the Commissioning Certificate,[833] is strong evidence that the MoS's "hands off" approach with respect to subsequent HBT appeals for intervention was not motivated by a surreptitious desire to favor Ripley's interests over those of HBT's upstream owners.

365. Second, LDA's broader suggestion of an MoS agenda to assist the "Vested Interests" at LDA and ABG Infra's expense is also belied by the MoS's *rejection* in 2014 of KoPT's suggestion of a blacklist that would bar HBT's "group companies," and not just HBT itself, from further contracts with major ports.[834] Had the MoS truly been motivated by an animus towards HBT's upstream owners, one might have expected it to accept (rather than reject) KoPT's suggestion that the Blacklisting Order be crafted in such a way as to prevent ABG Infra and LDA from pursuing other projects through ALBA or otherwise.

iii. Customs Authority

366. With respect to the Customs Authority, the Tribunal sees no support for LDA's assertion that the proceedings it instituted after HBT's termination of the Contract were "deliberately targeted" at "HBT's parent entities," as LDA contends.[835] While the Customs Authority ultimately concluded that HBT had complied with its obligations under the EPCG license under which it had imported the equipment, its effort to prevent removal of the equipment from the Port pending resolution of this issue – like KoPT's effort to enforce a lien on the equipment – suggests nothing more than an effort to secure assets to support a potential claim against HBT itself. The Tribunal sees no evidence of a broader conspiracy to harm HBT's upstream owners, and thus LDA's protected investment in ALBA.

iv. Law Enforcement Authorities

367. Finally, with respect to the actions of various law enforcement authorities, the Tribunal acknowledges that the most troubling aspects of this story involve the apparent inability of local law enforcement to

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831 **C-163**.

832 Agreed Chronology of Events, #77 (citing **C-158**).

833 **C-548**.

834 **C-604** (KoPT suggestion); **C-605** (MoS response).

835 Further Amended Statement of Claim, ¶ 368AC.f.

effectively manage large scale labor protests and sporadic threats of violence both in and outside the Port, which appeared to be triggered whenever workers perceived the possibility of job dislocation either by HBT or at competing berths. But as discussed further in Section VIII.B.2(b) in the context of India's obligation regarding "full and complete protection and safety," whatever one may think of the effectiveness of the authorities – in responding either to reports of specific incidents or to calls for more proactive deployment of resources to forestall future incidents – there is no evidence that deployment decisions turned on the authorities' knowledge that HBT was owned by ALBA and indirectly in part by LDA, or that resources were deliberately withheld from HBT in order to drive its owners from the Port and replace them with Ripley. Indeed, while LDA contends that the police withheld protection because "it was politically impossible to be seen to intervene in favour of HBT and against the Vested Interests,"[836] the conduct of local law enforcement authorities appeared to be roughly similar (including of similar limited effectiveness) in response to *KoPT's own calls for protection* against major labor demonstrations blocking *its* facilities. As examined further in Section VIII.B.2(b), this suggests that whatever the shortcomings in the authorities' ability to manage large-scale protests, the Tribunal is not persuaded that there was "intentional targeting" of HBT (much less of ALBA or LDA) through concerted police inaction. Given that LDA's indirect investment in HBT falls outside the scope of Treaty protection, the absence of evidence that law enforcement decisions with respect to HBT were influenced by HBT's upstream ownership chain is ultimately fatal to LDA's assertion of Treaty jurisdiction over these activities.

3. Whether Any Conduct Meeting the Threshold Requirements Violates India's Substantive Obligations

368. For the reasons outlined above, the Tribunal considers that of the various episodes LDA invokes in connection with its claim that India violated its obligation of fair and equitable treatment, the only ones that may be seen as involving a *protected* investment under the Treaty (ALBA), as opposed to LDA's unprotected investment in HBT, are the allegations about (a) KoPT's recommendation that the MoS consider extending the Blacklisting Order to HBT's affiliate companies,[837] and that (b) State action allegedly contributed to "a number of disputes concerning other projects of ALBA and ABG Infra."[838] Assuming *arguendo* that none of India's other jurisdictional objections would bar these claims, the

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[836] LDA's Post-Hearing Brief, ¶ 99.

[837] Reply, ¶ 925.

[838] Reply, ¶ 926.

Tribunal finds that on the merits, they do not come close to establishing a violation by India of its obligations under Article 4(2) of the France-India BIT.

369. For this conclusion, it is not necessary to resolve the Parties' considerable debate about the scope of the "fair and equitable" treatment obligation in Article 4(2). The Tribunal acknowledges India's position that the obligation is no broader than the customary international law minimum standard of treatment,[839] and in any event imposes a high threshold for a claimant to demonstrate a violation.[840] LDA argues by contrast that the provision is an autonomous one,[841] and in any event encompasses, *inter alia*, protection of an investor's legitimate expectations and rights to due process, transparency, a stable and predictable legal framework, and the absence of arbitrary or discriminatory treatment, harassment, or abuse.[842] The Tribunal sees no need to resolve that doctrinal debate here, as even if it were to accept *arguendo* LDA's broad framing of the standard, LDA still has not met its burden of proof with respect to the limited instances of State conduct directed at ALBA rather than HBT.

370. First, with respect to KoPT's communication with MoS regarding the Blacklisting Order, it is true that KoPT suggested that "[t]he Ministry may also consider banning of business dealing" by major ports not only with HBT, but also with "*its group companies*…"[843] But even if this KoPT communication could be attributed to India, the fact remains that the suggestion was almost immediately *rejected* by the MoS, which clearly was the superior entity and unquestionably was exercising State authority. The MoS responded that "the subject matter of the Enquiry … are specific to a particular project" involving HBT, and that KoPT should take "necessary action … to ban business dealings *of HBT*."[844] Subsequently, KoPT did inform other major ports of the Blacklisting Order it had entered *with respect to HBT*, but that communication made *no reference* to ALBA or to any other affiliated entity.[845] Moreover, even after the Blacklisting Order of 16 June 2014, ALBA was declared the leading bidder for projects run by other Port Trusts.[846] In other words, the entire allegedly "wrongful" conduct boils down to one alleged State entity offering a suggestion to a superior State body, which apparently was *not adopted* and which *did not*

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[839] Counter-Memorial, ¶¶ 640, 644, 651-652; Rejoinder, ¶¶ 937-955.

[840] Counter-Memorial, ¶¶ 653-658; Rejoinder, ¶¶ 956-961.

[841] Reply, ¶¶ 891-906.

[842] Further Amended Statement of Claim, ¶¶ 405-409; Reply, ¶¶ 911-918.

[843] **C-604** (emphasis added).

[844] **C-605** (emphasis added).

[845] **C-427**.

[846] *See* Reply, ¶ 482 (referencing 2016 tenders issued by the Mormugao Port Trust and the New Mangalore Port Trust).

preclude ALBA (as opposed to HBT) thereafter from pursuing other projects. Whatever the contours of the State's obligation under Article 4(2) of the France-India BIT, it is not transgressed simply by an expression of views or by a debate among State officials that does not materialize into any concrete State action being taken against an investment protected by the Treaty.

371. As for LDA's separate suggestion that India was somehow responsible for "a number of disputes concerning other projects of ALBA and ABG Infra,"[847] it is of course only projects of *ALBA* (in which LDA had a protected investment) that are subject to the Tribunal's jurisdiction. Notwithstanding LDA's allegations that the Blacklisting Order caused "irreparable damage" also to ABG Infra subsidiaries (such as ABG Ports Ltd. and ABG Kolkata Container Pvt. Ltd.),[848] the Tribunal has no authority to consider actions by India with respect to projects of the ABG Group that were not structured through ALBA, in which LDA had a Treaty-protected investment. Yet the evidentiary citations LDA lists, in support of its allegation of harm to other projects, *all* involve projects (or potential projects) by ABG Group companies in which neither LDA nor ALBA have any shareholding.[849] The fact that, had these projects moved forward to fruition, the ABG Group might eventually have sought to involve ALBA in some fashion does not alter the fact that the State conduct at issue, at the time it occurred, was not "treatment … extended … to" any investment by LDA that was covered by the Treaty.

B. FULL AND COMPLETE PROTECTION AND SAFETY

1. The Jurisdictional Requirements for a Claim

372. Article 4(1) of the France-India BIT states:

> The investments made by investors of one Contracting Party shall enjoy full and complete protection and safety in the area of the other Contracting Party.

373. In light of Article 2(1)'s overall exclusion of treaty protection to certain indirect investments, the scope of Article 4(1) must be read as extending the stated right to "enjoy full and complete protection and safety"

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[847] Reply, ¶ 926 (citing Maire II, ¶ 13 and Agarwal II, ¶ 37).

[848] Further Amended Statement of Claim, ¶ 328 (citing Agarwal I, ¶¶ 150-151); *see also* Reply, ¶ 484 (alleging that the Blacklisting Proceedings "have resulted in entities distinct from HBT, *such as ABG Ports Limited*, losing business opportunities," and citing Further Amended Statement of Claim, ¶¶ 336-328) (emphasis added).

[849] *See* Agarwal I, ¶¶ 150-151 (discussing impact of the Blacklisting Order on a potential ABG Ports Limited project at N.S. Docks, and alleging other unspecified damage to "the future business prospects … [of] ABG Kolkata, ABG Infralogistics, and ABG Ports" and to "the reputation [of] ABG Infra"); Maire II, ¶ 13 and Agarwal II, ¶ 37 (both cross-referencing Counter-Memorial ¶ 71, which refers to a dispute at Kandla Port with an "ABG project company" known as ABG-KCTL, and a dispute at Jawaharlal Nehru Port involving ABG Ports).

only to "[t]he [*protected*] investments made by investor," but not necessarily to their other investments excluded from the treaty's overall coverage. Consistent with the analysis in Section VIII.A.1 regarding fair and equitable treatment under Article 4(2), this means that to succeed under Article 4(1), LDA must show *something more* than a State failure to afford requisite "protection and safety" to HBT. It must demonstrate either: (a) a failure to afford the required protection to ALBA itself (or to LDA's shareholding interest in ALBA) or (b) a *causal link* between ALBA's ownership of HBT and the State's conduct towards HBT, namely that the State withheld protective services towards HBT *on account* of its being owned by ALBA (and/or in part by LDA), *i.e.*, that the State *intentionally targeted* LDA's protected investment in ALBA by withholding protection to its constituent holding in HBT.

2. Whether the Threshold Requirements Have Been Met

(a) Conduct Alleged to Violate the Standard

374. LDA alleges that the following conduct violated India's obligations under Article 4(1).

375. First, India – *through its police, District Magistrate, and CISF*, "failed to secure HBT and its personnel from physical threats and harm"; HBT's repeated requests and complaints over the two years of HBT's operations "were ignored and it had to seek the intervention of the Court, who condemned the inaction set out above."[850] "Most egregiously, the authorities … did nothing to prevent the abduction of HBT employees."[851] This "systematic police inaction"[852] is said to violate Article 4(1), which LDA contends is an autonomous treaty standard independent of the international minimum standard,[853] and which requires a State to take "reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances."[854] Contrary to India's arguments, LDA contends that this standard does not require an exceptional showing of substantial neglect or outright indifference or connivance by the State, but rather envisages even simple negligence being sufficient to violate the

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[850] Reply, ¶ 976.

[851] Reply, ¶ 980.

[852] LDA's Post-Hearing Brief, ¶ 101; *see also id.*, ¶ 111 (contending that "[t]here is, in sum, a pattern of inaction and delay, which may be explained only as deliberate").

[853] Reply, Section XVI.A.1.

[854] Reply, ¶ 942; Further Amended Statement of Claim, ¶ 460. LDA contends that even if India is correct to link Article 4(1) to the international minimum standard of treatment, that still requires India to adopt "an obligation of 'due diligence to 'take reasonable actions within its powers to avoid injury'." Reply ¶ 943 (citing Counter-Memorial, ¶ 686).

standard.[855] LDA observes that "[t]he classical instances of breach of FPS concern a failure by the state to protect investments from security threats, threats of violence and actual physical harm,"[856] which includes threats also to the personnel attached to its investment.[857] It is thus "trite law that the inaction of Indian police, the district magistrate … and the CISF, in the face of threats of harm and actual physical harm to the investment and the investor's personnel, constitutes a violation of India's FPS obligation in the Treaty."[858]

376. Second, LDA contends that India also violated Article 4(1) when it "*failed to insulate HBT from KoPT's and MoS's* excesses and arbitrary and discriminatory behavior," including when:

(a) "KoPT consciously choked HBT's revenue" through cargo allocation;

(b) KoPT "allowed the Vested Interests to interfere in HBT's contractual, labour and law and order issues," when KoPT and MoS could have intervened;

(c) KoPT failed to "take effective steps to assist with inaction of the police and district magistrate in the face of violence and hostilities," by simply writing letters to authorities without moving the courts for police protection;

(d) KoPT failed to "take effective mitigating steps in response to the violence at the docks," for example by cancelling dock entry passes and deploying the CISF;

(e) KoPT failed "to adopt a cooperative approach in order to ensure the success (and safety) of the relationship with KoPT";

(f) KoPT and the Customs Authorities sought to take "revenge" for HBT's termination of the Contract, through their various blacklisting, lien, and customs proceedings, when India "should have ensured that such retailiatory and vindictive proceedings were not taken"; and

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[855] Reply, ¶¶ 946-947.

[856] Further Amended Statement of Claim, ¶ 466.

[857] Further Amended Statement of Claim, ¶ 468.

[858] Further Amended Statement of Claim, ¶ 471.

(g) the "MoS was an inadequate supervisor of the KoPT," responding to problems by "idly st[anding] by and den[ying] that it had the power to intervene."[859]

377. LDA contends that this conduct violated Article 4(1) because it "threatened the legal and commercial security of [LDA's] investment," when a "well administered government should have intervened to stop the KoPT and MoS from the types of harmful, arbitrary and discriminatory [conduct] set out above."[860] According to LDA, Article 4(1) requires a State to exercise due diligence to protect investors from the actions of State organs and not just private third parties.[861] Moreover, in LDA's view, the standard in Article 4(1) "protects the economic value of an investment," by protecting its "legal and commercial security … in addition to its physical integrity."[862]

378. India disagrees both on the legal standard governing Article 4(1) and on the application of that standard to this case. With respect to the legal standard, India contends that Article 4(1) reflects the international minimum standard of treatment under customary international law,[863] and as such requires only that India have exercised "due diligence" to "utilize[] reasonable measures of protection from or investigation of physical harm caused by third parties."[864] India emphasizes that the standard regulates State conduct only in the limited context of *physical* harm caused by *third parties*;[865] it rejects LDA's assertion that the standard also applies to "legal and commercial security,"[866] or that it establishes further obligations to "'insulate' investors from alleged administrative 'excesses of power.'"[867] According to India, the "due diligence" obligation that Article 4(1) does impose carries with it an "elevated evidentiary burden," requiring a showing, "[i]n the case of localized riots and mob violence," of "substantial neglect … and inattention amounting to outright indifference or connivance on the part of responsible officials …."[868] In

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[859] Reply, ¶ 983 (emphasis added).

[860] Reply, ¶ 984.

[861] Reply, Section XVI.B and ¶ 956; Further Amended Statement of Claim, ¶¶ 464, 482.

[862] Reply, Section XVI.B.1 and ¶ 965; Further Amended Statement of Claim, ¶¶ 462-464, 482.

[863] Counter-Memorial, Section IV.C.1.a; Rejoinder, Section IV.C.1.

[864] Counter-Memorial, Section IV.C.1 (caption, capitalization omitted), and ¶ 686; Rejoinder, Section IV.C.3.

[865] Counter-Memorial, Section IV.C.1.b (caption, capitalization omitted).

[866] Counter-Memorial, ¶ 697 Rejoinder, Section IV.C.2.

[867] Counter-Memorial, ¶¶ 682, 690, 697.

[868] Counter-Memorial, ¶ 703 (quoting J. Crawford, Brownlie's Principles of Public International Law (2012), p. 551 (**RLA-461**)); Rejoinder, ¶ 993 (contending that "State liability under the FCPS standard can be considered only if the State acted outrageously or in bad faith, or if it displayed willful negligence").

evaluating the State's conduct, moreover, a tribunal must also take into account "the particular circumstances of the host State, including its level of resources."[869]

379. With respect to the facts, India argues that "[f]irst – and fatally," LDA has "fail[ed] to identify a single wrongful action or omission directed toward[s] Claimant's alleged investment in ALBA; all of Claimant's FPS claims are based on alleged acts or omissions directed at HBT and its personnel."[870] In any event, India contends, HBT faced few if any incidents of violence for the more than two years between April 2010 and June of 2012,[871] and with respect to the incidents prior to commencement of operations or following HBT's termination of Five Star's services, the police and CISF did take adequate steps to respond to reports, open investigation, and pursue charges where appropriate,[872] and the District Magistrate met with HBT and offered to mediate with union leaders.[873] In India's view, its authorities "acted professionally and appropriately, and certainly well within the bounds of what was reasonable 'in the circumstances and with the resources of the state in question.'"[874] As for KoPT and MoS, India contends that "*none* of the so-called 'excesses' for which Claimant alleges that India 'failed to insulate HBT' have any basis in fact."[875]

(b) The Tribunal's Analysis

380. There is no need to opine in this case about the precise content of the Article 4(1) standard, because however "full and complete protection and safety" is construed, the France-India BIT does not extend this protection to LDA's indirect investment in HBT, by virtue of the express exclusion in Article 2(1). After a close examination of the evidence, the Tribunal concludes that LDA has presented nothing other than a dispute about the adequacy of India's protection of HBT itself. In particular, LDA has failed to show any challenged action or inaction of State authorities involving the protection of ALBA, or involving decisions by State authorities with respect to HBT's protection that were motivated by identity of its upstream owners, or by a desire to inflict harm on them by withholding protection to HBT (the "intentional targeting" theory LDA earlier advanced).

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869 Counter-Memorial, ¶ 708.

870 Counter-Memorial, ¶ 682; Rejoinder, ¶ 984.

871 Counter-Memorial, ¶ 714.

872 Counter-Memorial, ¶ 715; Rejoinder, ¶ 1024.

873 Rejoinder, ¶ 1023.

874 Counter-Memorial, ¶ 719.

875 Rejoinder, ¶ 1036 (emphasis in original).

381. This is not to say that the Tribunal is not troubled by the persistent law and order problems that HBT experienced. The Tribunal finds that HBT and its personnel were subjected to numerous demonstrations and work blockages, which were largely attributable to worker anxiety about potential layoffs due to mechanization (indeed, there was relatively little unrest at the Berths during the period in which HBT reluctantly acceded to demands for full employment). The Tribunal accepts that the worker protests may not have been entirely spontaneous, but rather may have been organized or encouraged by union leaders, and certainly were aggravated by their rhetoric designed to put maximum pressure on HBT for full employment. In addition, the Tribunal accepts that some incidents went well beyond the bounds of peaceful protest, to include both verbal threats and physical assaults against HBT personnel. The Tribunal in no way discounts the very real fear that this intimidatory environment engendered among the HBT officers, and particularly those who were subjected to the final "abduction" incident in late October of 2012.

382. At the same time, the evidence does not support LDA's theory that law enforcement authorities deliberately refrained from responding to reported incidents, much less that they did so as part of a conspiracy to drive HBT's owners to withdraw it from the Berths and so make way for the return of Ripley. To the contrary, it appears that the limited effectiveness of the law enforcement response was more attributable to the size, mobility, and reach of the protesting groups, and more precisely, their tactics. The protesters could disperse from one location (or at least settle down to peaceful protest) when police or CISF officers appeared, only to resume more threatening activities elsewhere a short time later, or in the same location after officers departed. This pattern does generate the question whether police could or should have responded more quickly or in greater force to each reported incident, or have been more proactive in trying to predict the location of further unrest in order to post officers there in advance, to try to forestall permissible labor demonstrations from becoming impermissibly violent. The Tribunal considers such questions about the proper deployment of law enforcement resources to be generally judgment calls, to be made by a State acting in good faith to protect individuals and local businesses from intimidation and violence, and exercising the degree of due diligence required by international law, based on the foreseeability of unrest in a particular area, the extent of available resources, and competing demands for allocation of those resources among other areas potentially also in need of law enforcement protection. In general, tribunals should be wary of second-guessing these judgment calls, except where the evidence suggests bad faith, improper intent, or a serious lack of due diligence in response to a reasonably foreseeable and otherwise manageable threat. Nonetheless, in appropriate cases, tribunals must wade into the delicate assessment of this due diligence question.

383. Here, however, the Tribunal need not do so. That is because the incidents LDA invokes entirely concerned the protection of HBT and its officials (and indeed KoPT and its officials), and LDA's indirect investment in HBT falls outside the coverage of the France-India BIT. The Tribunal sees no evidence whatsoever that the decisions made by India's law enforcement authorities in respect of the HBT situation were due to the fact of ALBA's ownership of HBT, or LDA's partial ownership of ALBA. There is no evidence, for example, that the police deliberately withheld deploying officers to the Berths because the individuals calling for protection were associated with an upstream entity that was in part foreign owned. Nor is there any evidence that deployment decisions were attributable to a desire by senior police management to drive "outsiders" out of the Port and replace them with Ripley as a favored "insider." In short, there is no evidence at all that the police had any awareness, much less were *motivated* by such awareness, either of HBT's direct shareholders (ALBA and various ABG entities) or of LDA's upstream shareholding interest in ALBA.

384. Indeed, whatever one may think of the effectiveness of law enforcement in the situations that HBT faced, it is notable that KoPT faced similar problems in the wake of the Consent Order, in response to major labor demonstrations blocking its premises and reportedly threatening its staff with personal harm. LDA itself acknowledges that "KoPT was in this way the first direct victim," and that "[a]t this initial stage the primary targets of this violence were KoPT officials."[876] Yet LDA also acknowledges that "[t]he Police ignored KoPT's Complaints as to Break-down in Law and Order," with the result that "the KoPT was not getting the necessary protection," even when the threats were primarily to KoPT's own employees.[877] In other words, while the Tribunal accepts LDA's contention that "the state authorities were failing to maintain peace"[878] with the desired effectiveness, the very fact that KoPT experienced the *same* shortcomings with the response to its entreaties supports a finding that, whatever the limits to the authorities' ability to manage large-scale protests, this was not unique to HBT, and there was no "intentional targeting" of ALBA or LDA through police inaction or failure to act effectively or responsibly in response to HBT's calls for assistance.

385. In these circumstances, where LDA's indirect investment in HBT is excluded from Treaty protection, the absence of evidence of anything more than a debate over the sufficiency of State actions vis-à-vis HBT is fatal to LDA's claim under Article 4(1). The same is true with respect to LDA's complaints that India

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[876] LDA's Post-Hearing Brief, ¶¶ 90, 91.

[877] LDA's Post-Hearing Brief, Section V.2 and ¶ 93.

[878] LDA's Post-Hearing Brief, ¶ 93.

failed to protect HBT from KoPT's or MoS's conduct, even if *arguendo* this type of claim (not associated with physical protection) could be construed as possibly encompassed by Article 4(1).[879] LDA simply has not shown State conduct with respect to its direct investment in ALBA that is "analytically distinct" from the original claims it propounded on behalf of HBT, and which the Tribunal previously found to fall outside the scope of its jurisdiction by virtue of Article 2(1).[880]

C. TREATMENT NOT LESS FAVORABLE (DISCRIMINATION)

1. The Jurisdictional Requirements for a Claim

386. Articles 5(1) and 5(2) of the France-India BIT state:

> Each Contracting Party shall accord to investments of investors of the other Contracting Party, including their operation, management, maintenance, use, enjoyment or disposal by such investors, treatment which shall not be less favourable than that accorded to investments of its investors, or than the most favourable treatment accorded to investors of any third country, whichever is more favourable.
>
> In addition each Contracting Party shall accord to investors of the other Contracting Party, including in respect of returns on their investments, treatment which shall not be less favourable than that accorded to investors of any third State.

387. Consistent with the distinction between protected and non-protected investments that flows from Article 2(1), the references to "investments" in Articles 5(1) and 5(2) must be read as limited to investments that fall within the scope of the Treaty's protection. For purposes of this case, where LDA's direct investment in ALBA is protected under the Treaty but its indirect investment in HBT is not, that means that Article 5(1) requires India to "*accord to [ALBA*] … treatment" that is no less favorable than that accorded to the investments of Indian or third country investors. Similarly, for purposes of Article 5(2), India is required to accord non-discriminatory treatment *to LDA* (the qualifying French investor), but this must be read – for the reasons discussed elsewhere in this Award – as meaning with respect to a *protected investment* (here, in ALBA). The Tribunal considers the notion of "accord[ing] treatment" to be analogous to that of "extending" treatment, discussed in Section VIII.A.1 above in the context of Article 4(2). The notion would capture either actions taken directly with respect to ALBA, or taken through another entity such as

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[879] With respect to the conduct that LDA alleges violated Article 4(1) under a broad interpretation involving "legal and commercial security" – *e.g.,* conduct related to cargo allocation, hiring of workers, or the post-termination blacklisting, lien or customs proceedings – the Tribunal refers to its discussion of the evidence in Section VIII.A, and its conclusion therein that these events do not present an analytically distinct claim focused on LDA's protected interest in ALBA, but only one about its unprotected interest in HBT.

[880] Decision on Jurisdiction, ¶ 151.

HBT but in order to affect ALBA. One way or the other, however, a connection to ALBA must be demonstrated, because LDA has no Treaty-protected interest in HBT itself.

2. Whether the Threshold Requirements Have Been Met

388. LDA alleges that India "treated HBT less favourably than the local port operators in the following way[s]."[881]

389. First, India (through KoPT) is said to have "allocated more dry bulk cargo to other operators (specifically Ripley) even though they were less efficient and less profitable for the Port."[882] Following India's response that HBT actually was allocated more compatible dry bulk cargo than any other operator,[883] LDA replies that "a case on discriminatory cargo allocation … would not be based on a bald analysis of comparative volumes of cargo handled by each of the operators," but instead must take into context "the[ir] relative advantages and capabilities."[884] According to LDA, "as HBT was significantly more efficient than other cargo operators, it would and should naturally have been allocated cargo commensurate to its operational efficiency."[885] India responds, *inter alia*, that there were various appropriate reasons why HBT could not have been allocated further cargo.[886]

390. Second, LDA asserts that "[t]he police did act to protect the security of other port operators like Ripley but not HBT."[887] In response to India's observation that LDA does not present any account of an occasion when Ripley or another operator was provided with security,[888] LDA observes that other operators did not face blockades of equipment or "coercive and violent labour" conditions.[889] LDA contends that "[t]he success of these [other] operations was because of the support of the KoPT; support that HBT did not

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[881] Further Amended Statement of Claim, ¶ 491.

[882] Further Amended Statement of Claim, ¶ 491(a).

[883] Counter-Memorial, ¶¶ 728-732.

[884] Reply, ¶ 998.

[885] Reply, ¶ 998.

[886] Counter-Memorial, ¶¶ 730-731; Rejoinder, ¶¶ 1062-1064.

[887] Further Amended Statement of Claim, ¶ 491(b).

[888] Counter-Memorial, ¶ 733; *see also* Rejoinder, ¶ 1054 ("there is no evidence that the police discriminated against HBT"). India also contends that HBT was never denied a reasonable request for security protection by either the police or CISF. Counter-Memorial, ¶¶ 733-735.

[889] Reply, ¶¶ 992-993.

enjoy."[890] India responds that KoPT likewise "openly supported the cause" of HBT on numerous occasions, and HBT "faced no disruption in operations for the more than two years between April of 2010 and June of 2012."[891]

391. Third, LDA contends that "India did not force other port operators to take on workers, retrenched or otherwise."[892] India responds that "neither KoPT, nor the Central or the West Bengal Government had anything to do with hiring decisions made by HBT."[893]

392. In the view of the Tribunal, these allegations fail to meet the threshold jurisdictional requirement that flows from Article 2(1), namely that LDA presents a claim for an Article 5(1) or 5(2) violation with respect to its protected direct investment in ALBA, and not simply the indirect investment in HBT that is excluded from the Treaty's scope. LDA itself describes its discrimination allegations as about India's allegedly "treat[ing] HBT less favourably" than local port operators;[894] it makes no allegations regarding conduct directed either towards LDA's shareholding in ALBA or towards ALBA itself.[895] Nor has LDA demonstrated that any of the conduct allegedly challenged vis-à-vis HBT – KoPT's cargo allocation decisions, the police response to security requests, or any alleged State conduct relating to hiring – was motivated by a desire to inflict harm on LDA or ALBA, consistent with LDA's "intentional targeting" theory. In reality, LDA's discrimination claims are focused entirely on alleged mistreatment of HBT. For the reasons explored at length above, such claims do not fall within the scope of this Treaty, and accordingly are outside this Tribunal's jurisdiction.

D. EXPROPRIATION

1. The Jurisdictional Requirements for a Claim

393. As noted in Section III.A, Article 6(1) of the France-India BIT provides as follows:

> Neither Contracting Party shall take any measure of expropriation or nationalisation or any other measures having the effect of dispossession, direct or indirect, of investors of the other Contracting Party of their investments in its area, except in the public interest

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[890] Reply, ¶ 992.

[891] Rejoinder, ¶ 1055.

[892] Further Amended Statement of Claim, ¶ 491(c).

[893] Counter-Memorial, ¶¶ 736-740; Rejoinder, ¶ 1054.

[894] Further Amended Statement of Claim, ¶ 491.

[895] Counter-Memorial, ¶ 727.

and provided that these measures are not discriminatory or contrary to a specific obligation entered into by Contracting Party not to take a measure of dispossession.

394. Article 6(2) goes on to address the State's obligations regarding compensation even for expropriations that are otherwise lawful under Article 6(1),[896] and Article 6(3) addresses the State's obligation to provide suitable avenues for judicial review.[897]

395. Given the implications of Article 2(1) as discussed above, the word "investments" in Article 6(1) must be read as meaning "protected investments," as distinguished from "unprotected investments" excluded from the scope of the Treaty as a whole. Accordingly, jurisdiction will lie for a claim under Article 6(1) only if it alleges expropriation or other measures having the effect of dispossessing LDA of its "protected investment."

396. Unlike certain of the other Treaty standards LDA invokes, Article 6(1) does not require any parsing of the word "treatment" or of the concept of "extend[ing]" or "accord[ing]" treatment to a protected investment. The protection against unlawful expropriation under Article 6(1) begins with the stated concept of "effect," and makes no reference to the issue of intent, *i.e.*, whether the challenged State conduct was directed to, targeted at, or intended to harm a protected investment. Moreover, Article 6(1) makes clear that the requisite effect may be accomplished both directly and indirectly: an expropriation occurs through State measures "*having the effect* of dispossession*, direct or indirect*," on a protected investment.[898] If such an expropriation is demonstrated, the analysis would turn to the merits to assess compliance with Article 6's other stated requirements for lawfulness.[899]

397. The Tribunal acknowledges that this purely textual reading of Article 6(1) could result, in certain factual circumstances, in the curious outcome of a protected direct investment in an upstream vehicle being expropriated in violation of Article 6(1), even where the constituent acts resulting in that dispossession

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[896] Article 6(2) provides as follows: "Any measure of dispossession which might be taken shall give rise to adequate and reasonably prompt compensation, the amount of which shall be equal to the real value of the investments concerned and shall be set, indicating conditions of payment, in accordance with the normal economic situation prevailing prior to any threat of dispossession. This compensation shall be effectively realisable, and shall then be paid without delay. Until the date of payment, it shall produce interest calculated at the appropriate market rate of interest."

[897] Article 6(3) provides as follows: "The investor affected shall have a right, under the law of the Contracting Party taking the measure of dispossession, to review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph. The Contracting Party taking the measure of dispossession shall make every endeavour to ensure that such review is carried out promptly."

[898] France-India BIT, Article 6(1) (emphasis added).

[899] The merits analysis would examine whether the dispossession of a protected investment was "in the public interest" and "not discriminatory or contrary to a specific obligation" as required by Article 6(1), and whether the State had abided by its duties in Article 6(2) concerning compensation and Article 6(3) concerning available avenues for judicial review.

involved conduct that was proximately directed against an unprotected indirect investment. That could be the case, for example, where the upstream direct investment had no assets other than its interest in the downstream indirect investment, so destruction of the indirect investment (otherwise not actionable under the Treaty) could – at least textually – meet Article 6(1)'s requirement of a State measure having the *effect* of dispossession of the protected upstream investment. In such circumstances, a tribunal might have to grapple with the apparent discordance between the plain wording of Article 6(1) – evaluating the existence of an expropriation by virtue of the "effect" ("direct or indirect") of State conduct on a protected investment – and the implications of Article 2(1), excluding treaty protection to certain indirect investments.

398. In this case, however, the Tribunal need not resolve any possible discordance between these propositions, because, as discussed below, LDA has not met the threshold requirement of establishing an "effect of dispossession" of its protected direct investment in ALBA.

2. Whether the Threshold Requirements Have Been Met

399. As discussed above, the only protected investment LDA has invoked for the purposes of this case is its direct investment in ALBA. While LDA's original Statement of Claim alleged expropriation of "HBT's (and therefore the Claimant's) 'economic use and enjoyment' of its rights under the Contract,"[900] LDA subsequently revised this pleading in the wake of the Tribunal's finding that LDA had no protected investment in HBT. A threshold issue nonetheless arises because on LDA's reformulated case, it does not allege the "dispossession" either of its shareholder rights in ALBA,[901] or of the full value of its ALBA shares. Rather, it contends that "the value of Claimant's shareholding in ALBA *connected to HBT* [has been] totally destroyed."[902] Essentially, as discussed further below, LDA identifies a particular revenue stream that was expected to contribute to ALBA's overall value, alleges that this revenue stream may be segregated from others, and contends that the segregated element is capable of independent expropriation.

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[900] Statement of Claim, ¶ 399.

[901] The Tribunal acknowledges, as it did at the outset of Section VII.A above, India's broader argument that the reflective loss doctrine improperly conflates impairment of a shareholder's rights as such (*e.g.*, a right to vote or to collect dividends) with an impairment of the value of its shares, which should not be separately actionable. It is not clear if India pursues this distinction with respect to expropriation claims, which essentially are about the taking of value (the required "effect" on an investor). In any event, as noted above, the Tribunal need not decide this broader argument about reflective loss theory, because of its conclusion that LDA has not sustained its claims even on its own framing of the reflective loss doctrine.

[902] Further Amended Statement of Claim, ¶ 399B.

400. Whether this is so as a matter of law conceivably could be seen as an *issue of jurisdiction*: has LDA presented an expropriation claim with regard to an "investment" that is protected as such by the France-India BIT? Alternatively, the question could be described as a matter of *prima facie proof*: has LDA met the threshold hurdle of showing that it was "dispossessed" of a protected investment, as opposed to that investment simply declining in value to a degree that falls short of the requirement for proving expropriation? However the question is framed, it is clear that it presents a primary issue for resolution, before there can be any discussion either about causation – was LDA's termination of the Contract due to State action (as it contends) or to its own business miscalculations (as India contends)? – or about the lawfulness of State conduct. The Tribunal addresses the threshold issue below.

(a) LDA's Position

401. In its Further Amended Statement of Claim, LDA contends that HBT essentially was forced by India to terminate the Contract.[903] LDA characterizes India's acts leading to this outcome as not only "expropriatory … towards HBT," but also "expropriatory of the Claimant's 'economic use and enjoyment' of a right to dividends and other rights it enjoyed in HBT as a result of its Investment in ALBA, in violation of Article 6(1) of the Treaty."[904] As otherwise stated by LDA, there was an "indirect expropriation of HBT's rights under the Contract and therefore the benefits of the Contract enjoyed up the corporate chain by the Claimant as a result of its shareholding in ALBA."[905]

402. LDA summarizes its theory further in its Reply, as follows:

> (1) the destruction of HBT and its operations was expropriatory; (2) that HBT provided a consistent revenue stream to ALBA that is severable from those provided from ALBA's other subsidiaries; (3) consequently, the value of ALBA's shareholding that evaporated as a consequence of HBT's expropriation, as reflected in the foregone revenue stream, was also expropriated entirely; and (4) that total destruction of the value of the Claimant's shareholding in ALBA that is referable to HBT is logically consistent with the more conventional claim where the unapportionable investment is destroyed in its entirety.[906]

403. In response to India's objections, LDA acknowledges that "there is some division between authorities as to whether an expropriation can take place with respect to part of an investment," but contends that "the

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[903] Further Amended Statement of Claim, ¶ 399.

[904] Further Amended Statement of Claim, ¶ 399C.

[905] Further Amended Statement of Claim, ¶ 400.

[906] Reply, ¶ 879.

better view is that it can …."[907] LDA relies in particular on *Middle East Cement v. Egypt* for the proposition that it is possible to expropriate specific rights enjoyed by an investor regardless of control over the overall investment, and *Eureko v. Poland* for the proposition that where basic control over the investment remains unaffected, the taking of specific rights relating to the investment may amount to expropriation.[908] LDA advocates assessing each situation according to its own unique circumstances, and in this circumstance, it suggests the theory about expropriation of specific *rights* logically also should cover the taking of specific elements of *value*. It asks, rhetorically, "[w]here an investment's profitability is divided into five clear inputs, and one of those inputs is clearly and unambiguously destroyed, is an expropriation to be held not to have occurred because the other four remain standing?"[909]

404. LDA answers its own question, concluding that "[g]iven that the claim for partial expropriation is … correct as a matter of principle and common sense …," then "where the value of a shareholding (here, in ALBA) is reduced by a specified percentage owing to the complete destruction of one of the assets of the company in which the shareholding is held (here, HBT), that specified percentage can be said to be expropriated."[910] As support for this proposition, LDA cites *GAMI v. Mexico*, where two of five sugar mills owned by a company in which the claimant held a stake were allegedly expropriated. In *GAMI*, the claimant argued that this rendered its entire stake in the entity worthless, an assertion the tribunal found "untenable" and dismissed for lack of evidence. However, the tribunal did note, without resolving the issue, "the proposition that a *partial* destruction of the value [of a shareholding] may be tantamount to expropriation."[911] According to LDA, the tribunal in *GAMI* "considered the argument sufficiently

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[907] Reply, ¶ 865; *see also id.*, ¶¶ 867-871 (citing *SD Myers In v. Government of Canada*, UNCITRAL/NAFTA, First Partial Award, 13 November 2000, ¶ 283 (**CLA-82**); *Waste Management Inc v. United Mexican States*, UNCITRAL/NAFTA, Award, 30 April 2004, ¶ 141 (**RLA-428**) ("***Waste Management***"); *Middle East Cement Shipping and Handling Co SA v. Arab Republic of Egypt*, ICSID Case No ARB/99/6, Award, 12 April 2002, ¶¶ 105, 107 (**CLA-121**) ("***Middle East Cement***"); *Eureko BV v. Republic of Poland*, UNCITRAL, Partial Award, 19 August 2005, ¶¶ 230–241 (**CLA-32**) ("***Eureko***"); *EnCana Corporation v. Republic of Ecuador*, LCIA Case No UN3481, Award, 3 February 2006, ¶¶ 182–183 (**RLA-119**) ("***EnCana***").

[908] Reply, ¶ 871 (citing R. Dolzer & C. Schreuer, *Principles of International Investment Law*, p. 119 (2nd edn: OUP 2012) (**CLA-236**)).

[909] Reply, ¶ 872.

[910] Reply, ¶ 874.

[911] Reply, ¶ 875 (citing *GAMI Investment Inc v. Government of the United Mexican States*, UNCITRAL/NAFTA, Final Award, 15 November 2004, ¶ 131 (**CLA-185**) ("**GAMI**") (emphasis in original).

arguable that it was not excluded on a *prima facie* basis."[912] Since "the question has yet to be properly determined by any investment tribunal, [it] deserves a full airing in the present case."[913]

405. LDA acknowledges that most authorities supporting the notion of partial expropriation still require the right in respect of which expropriation is claimed to be "free-standing," meaning "capable of independent identification from the remainder of the investment." It argues that this can be satisfied by "consider[ing] how the value of [a share]holding is determined as a matter of *reality*: namely, by isolating and determining the value of each of the independent revenue streams that make up the whole."[914] In the present case, LDA submits that HBT's revenue stream can be separately identified from the other revenue streams into ALBA, and indeed was treated as a separate revenue stream by ALBA.[915]

(b) India's Position

406. India emphasizes that LDA does not contend that its shares in ALBA were rendered worthless on account of HBT's allegedly forced termination of the Contract.[916] To the contrary, ALBA's assets and operations were never limited to its holding of HBT.[917] According to ALBA's own annual reports and website, its assets included mechanized operations in four other Indian ports, through at least four other joint ventures and subsidiaries in addition to HBT.[918] India thus maintains that LDA's claim is one of "partial expropriation," rather than even attempting to show that its investment in ALBA was deprived of all, or nearly all, of its economic value.[919] Indeed, LDA does not allege that India expropriated the overall value of LDA's shareholding in ALBA, but only that *portion* of the value that is *attributable to ALBA's interest in HBT*.[920] India characterizes this as depending on a theory that a partial expropriation of ALBA

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[912] Reply, ¶ 875.

[913] Reply, ¶ 875.

[914] Reply, ¶ 877.

[915] Reply, ¶ 878.

[916] Counter-Memorial, ¶ 605.

[917] Counter-Memorial, ¶ 606 (citing Agarwal I, ¶¶ 39-40).

[918] Counter-Memorial, ¶ 607 (citing **R-119**, p. 1; **R-140**, p. 1; **R-174**, p. 11; **R-141**, pp. 12-18; **R-140**, p. 2; and **R-202**).

[919] Counter-Memorial, ¶ 608.

[920] Counter-Memorial, ¶ 593; Rejoinder, ¶¶ 913-914.

becomes "'total' when its focus is restricted to the part of ALBA's value attributable to ALBA's shareholding in HBT."[921]

407. India argues that in these circumstances, LDA's expropriation claim fails as a matter of law, because the France-India BIT and international law do not recognize partial expropriation. Rather, international law demands that an investment must be deprived of "all or nearly all of its economic value' to be considered expropriated.[922] The same standard applies to proving indirect expropriation, *i.e.*, the investment must have been rendered "substantially without value."[923] In the case of shareholding, therefore, a claimant must prove "the total or near total destruction of the economic value of [its] shareholding in order to establish even a *prima facie* claim of expropriation."[924] According to India, "[i]t follows that a reduction in value, even when significant," does not necessarily equate to an expropriation: "[t]he primary consideration is to determine how much value remained after the alleged taking, *not* how much value was allegedly taken. As long as a 'sufficiently positive' value remains, no expropriation has occurred."[925] India argues that the authorities cited by LDA in fact support India's position that partial expropriation claims are not permissible under international law.

408. At best, India argues, the notion of partial expropriation requires that "parts of the whole qualify as protected investments in their own right."[926] Where tribunals have accepted partial expropriation claims, India submits, they have done so based on such findings, *i.e.*, that the partial investment was itself a protected investment under the applicable definition.[927] India contends that this concept cannot be

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[921] Counter-Memorial, ¶ 593.

[922] Counter-Memorial, ¶ 597 (citing *Compañía de Aguas del Aconquija S.A. & Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, ¶ 7.5.11 (**CLA-22**); Rejoinder, ¶¶ 915, 917-919.

[923] Counter-Memorial, ¶¶ 598-600 (citing *Glamis Gold, Ltd. v. United States of America*, UNCITRAL (NAFTA), Award, 8 June 2009, ¶¶ 355-357 (**RLA-446**) ("***Glamis Gold***") (emphasis added); *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 115 (**RLA-94**) ("***Tecmed***"); *Antoine Goetz & Consorts et S.A. Affinage des Métaux v. Republic of Burundi*, ICSID Case No. ARB/01/2, Award, 21 June 2012 ¶ 194 (**RLA-464**); *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007, ¶¶ 240, 241 (**CLA-6**); *LG&E Corp., LG&E Capital Corp. and LG&E International Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 191 (**RLA-432**) ("**LG&E**"); *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 Sept. 2017, ¶ 285 (**CLA-145**) ("***Sempra***"); and *Enkev Beheer B.V. v. The Republic of Poland*, PCA Case No. 2013-01, First Partial Award. 29 Apr. 2014 ¶ 344 (**RLA-473**)).

[924] Counter-Memorial, ¶¶ 601-603 (citing *GAMI*, ¶¶ 132, 129 (**CLA-185**); *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, ¶ 196 (**RLA-186**)).

[925] Counter-Memorial, ¶ 604 (emphasis in original) (citing *Glamis Gold*, ¶¶ 365-366).

[926] Rejoinder, ¶ 915, 918-920.

[927] Rejoinder, ¶ 920 (citing *Waste Management*, ¶¶ 77-85, 163, 175 (**RLA-428**); *Middle East Cement*, ¶¶ 98, 107, 144 (**CLA-121**); *Eureko*, ¶¶ 145, 160, 238-243 (**CLA-32**); and *Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil*

extended as LDA seeks here, "to segregate one particular, non-detachable facet" of investment in ALBA in order to engineer a claim for expropriation relating solely to that facet. That is because LDA has not established that the "specified percentage of value" of its shareholding in ALBA that was the subject of the alleged expropriation is both (i) a free-standing asset qualifying as an investment under the France-India BIT; and (ii) capable of exploitation independent of LDA's shareholding in ALBA.[928]

409. India submits that "[i]nvestment arbitration tribunals have routinely rejected analogous attempts to artificially carve investments into such fine slices in the context of indirect expropriation claims."[929] India also points out that LDA has been unable to cite an example of partial expropriation being utilized in the context of the value of a shareholding.[930] In response to LDA's reliance on *GAMI v. Mexico*, India counters that the case in fact supports India's proposition that it is necessary to assess the value of the shareholdings remaining at the time of the expropriation. India considers that this assessment would be fatal to LDA's expropriation claim.[931]

410. Finally, India argues that allowing LDA to predicate its claim solely on that *portion* of ALBA's value that is referable to HBT would render Article 2(1) of the France-India BIT redundant. Indeed, in India's view, Article 2(1) was intended to prevent claims of the nature that is now being brought by LDA.[932]

Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd. & Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Award, 9 October 2014, ¶ 285 (**RLA-474**) ("***Mobil Cerro Negro***")).

[928] Rejoinder, ¶ 922.

[929] Counter-Memorial, ¶¶ 610-614 (citing, *inter alia*, *Mobil Cerro Negro*, ¶¶ 283, 286-287 (**RLA-474**); *Burlington Resources Inc. v. Republic of Ecuador and Empresa Estatas Petróleos del Ecuador (PetroEcuador)*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, ¶¶ 257-258, 260, 358, 456 (**CLA-120**); *CMS Gas Transmission Co. v. Argentine Republic,* ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶¶ 256-257, 263-264 (**CLA-20**) ("***CMS Gas***"); *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Award, 1 July 2004, ¶¶ 2-3, 79, 80, 81 (**RLA-474**) ("***Occidental***"); *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006, ¶¶ 23, 35, 37, 80 (**RLA-366**) ("***Telenor***"); *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶¶ 109, 111 (**CLA-34**) ("***Feldman***"); *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 (formerly *FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*), Award, 8 July 2016, ¶¶ 279, 283, 284-286 (**RLA-484**).

[930] Rejoinder, ¶ 915.

[931] Rejoinder, ¶ 923.

[932] Rejoinder, ¶ 914.

(c) The Tribunal's Analysis

411. This is an instance where LDA's attempt to reformulate its case as being about its direct investment in ALBA, while still predicated on the same underlying facts as its original case about the indirect investment in HBT, leads to arguments that are strained as a matter of prevailing expropriation doctrine and, more importantly, cannot be squared with the ordinary meaning of the Treaty's terms.

412. First, LDA propounds a test for expropriation that would be satisfied by showing "significant depreciation" of value,[933] or deprivation of a "significant part" of value,[934] rather than a classical requirement of total or near-total extinguishment of value. While LDA correctly quotes the language used in its source authorities, such a standard bears little relationship to the Treaty text in this case, which necessarily should be the start of any analysis.

413. Article 6(1) is framed as a prohibition subject to an exception: "Neither Contracting Party shall …, except …" The particular conduct that is proscribed, absent application of the exception, is "tak[ing] any measure of expropriation or nationalisation or any other measures having the effect of dispossession, direct or indirect, of investors of the other Contracting Party of their investments in its area …." The provision thus addresses three possible types of conduct: expropriation, nationalisation, and "any other measures having the effect of dispossession … of … investments." The use of the phrase "any *other* measures having the effect of dispossession" (emphasis added) reflects an understanding that classical expropriation and nationalization likewise have such an effect, but the objective clearly was to expand the provision's reach beyond such well recognized measures, to capture *all* possible measures (whatever their form) with the same ultimate effect on the investment. But this focus on substance rather than form does not remove the need to show the qualifying *effect* of dispossession, which is required at the threshold to bring a measure within the scope of Article 6(1).

414. The ordinary meaning of "dispossession" is a loss of possession, such that after the relevant State measure, the investor *in effect* (regardless of legal formalities) no longer possesses the investment that it did before. The word "dispossession" thus limits Article 6(1) to circumstances where the State conduct has the same functional effect on the investor as a traditional direct expropriation or nationalization. This

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[933] Further Amended Statement of Claim, ¶ 379 (quoting *Biwater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶ 452 (**CLA-16**) and UNCTAD, "Taking of Property," *Series on Issues in International Investment Agreements*, UNCTAD/ITE/IIT/15 (Vol. III) (2000), p. 2 (**CLA-97**)).

[934] Further Amended Statement of Claim, ¶ 382 (quoting *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, 30 August 2000, ¶ 103 (**CLA-56**)).

in turn requires the challenged State conduct, in the words of the *CME* tribunal, to have "effectively neutralize[d] the benefit" of the investment for the investor.[935] That conclusion is of course consistent with numerous other cases finding that similar treaty language required the severity of harm to an investment to reach total or near-total levels. The *Electrabel v. Hungary* tribunal, for example, referenced "the accumulated mass of international legal materials, comprising both arbitral decisions and doctrinal writings," in explaining "the requirement under international law for the investor to establish the substantial, radical, severe, devastating or fundamental deprivation of its rights or the virtual annihilation, effective neutralization or factual destruction of its investment, its value or enjoyment."[936] Accordingly, so long as an investment continues to have some value, or create some benefit, there can be no finding of expropriation.[937]

415. The second step of any Article 6(1) analysis is to focus on the *object* of the effective dispossession – namely, the investor's "investments in the area." But these cannot be just *any* investments; they are only those investments that the Contracting Parties chose to bring within the scope of the Treaty. Given Article 2(1)'s clear exclusion of protection for indirect investments structured like LDA's investment in HBT, the Article 6(1) analysis cannot be satisfied simply by showing an effective dispossession of its interest in HBT. Rather, Articles 2(1) and 6(1) taken together require LDA to demonstrate that it has been "dispossessed" of a *protected* investment.

416. LDA's direct investment in ALBA is such a protected investment. But LDA does not attempt to show that State conduct at HDC "dispossessed" it of the whole value of its investment in ALBA, presumably

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[935] *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, ¶¶ 150, 604 (**CLA-19)**.

[936] *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ¶ 6.62 ("***Electrabel***") (**RLA-466**); *see also Toto Costruzioni Generali S.p.A. v. Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009, ¶ 183 (**RLA-530**) (the government measures at issue must cause "substantial effects of an intensity that reduces and/or removes the legitimate benefits . . . to an extent that they render their further possession useless"); *Sempra*, ¶ 285 (the investment must have been "virtually annihilated") (**CLA-145**); *EnCana*, ¶ 174 (**RLA-119**) (requiring government acts to have "brought the companies to a standstill or rendered the value to be derived from their activities so marginal or unprofitable as effectively to deprive them of their character as investments"); *Tecmed,* ¶¶ 115-116 (**RLA-94**) (to satisfy this test, a claimant must demonstrate that it "was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto – such as the income or benefits related to the [investment] or its exploitation – had ceased to exist" or "the economic value of the use, enjoyment or disposition of the assets or rights affected by the administrative action or decision have been neutralized or destroyed"); *Pope & Talbot v. Canada*, NAFTA, Interim Award, 26 June 2000, ¶ 102 (**RLA-421**) (for an indirect expropriation, "the test is whether the [government] interference is sufficiently restrictive to support a conclusion that the property has been 'taken' from the owner").

[937] *See, e.g., LG&E,* ¶ 191 (**RLA-432**) ("Interference with the investment's ability to carry on its business is not satisfied where the investment continues to operate, even if profits are diminished").

because ALBA was involved in projects other than at HDC. The evidence is that ALBA remains a going concern, with various surviving operations throughout India that LDA does not contend have been rendered valueless by the conduct at HDC that LDA challenges in this case. This effectively undermines the claim; had measures been taken that substantially deprived LDA of its investment in ALBA, a dispossession could be made out. But the mere diminution in value of LDA's investment in ALBA, by virtue of the loss of its indirect investment in HBT, does not amount to the same thing as a dispossession of the ALBA investment.

417. This dilemma leads LDA to attempt to demonstrate expropriation instead by isolating a particular *revenue stream* contributing to ALBA's overall value, namely that attributable to HBT's operations.[938] But however creative this theory may be, it runs counter to the text of Article 6(1). Article 6(1) does not prohibit "measures having the effect of dispossession … of [*a part of an*] investment," or "the effect of dispossession … of [*a distinct revenue strand of an*] investment." It requires a showing that the *investment itself* suffered an impact equivalent in effect to complete dispossession. The prohibition on uncompensated dispossession thus serves to bar dispossession by the host State of an investment writ large, not just interference with isolated rights or benefits relating to such investment.

418. LDA's next attempt to reformulate its expropriation case is to redefine the subject investment for Article 6(1) purposes *not* as its shareholding in ALBA as such, but rather as the "value of Claimant's shareholding in ALBA *connected to HBT*."[939] Essentially, LDA argues that this particular strand of value in ALBA derives from the value of HBT's Contract, and in these circumstances qualifies as an investment in its own right, since the definition of investment in Article 1(1)(c) of the Treaty includes "claims to money or any other claim under contract having economic value."[940] Thus, according to LDA, if rights stemming from a contract are protected property, then they are capable of being expropriated separately from other elements of an overall investment.[941] The natural corollary of LDA's argument is that if the investment is defined only as the *specific right* impacted by State conduct, then the severity of harm

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[938] *See* Reply, ¶¶ 877-879 (observing that the value of a shareholding "is determined as a matter of *reality* … by isolating and determining the value of each of the independent revenue streams that make up the whole"; explaining that its expert calculated "HBT's revenue stream … separately identifiable and treated as such by ALBA"; and contending that "the destruction of HBT and its operations was expropriatory" of the "consistent revenue stream to ALBA" from HBT, "severable from those provided by ALBA's other subsidiaries").

[939] Further Amended Statement of Claim, ¶ 399B (emphasis added).

[940] Further Amended Statement of Claim, ¶ 385 (citing Article 1(1)(c) of the Treaty).

[941] Reply, ¶ 871.

requirement in the Treaty – that the investment be dispossessed, and not just incrementally harmed – is *ipso facto* satisfied.

419. This argument is equally unavailing. Even putting aside the implications of Article 2(1) – that LDA has no protected investment in HBT, much less a protected right stemming from HBT's Contract – the false assumption underlying LDA's argument is that every interest, asset, or right of an investor may be expropriated separately from the investment enterprise as a whole, even when the enterprise has not itself been expropriated. But the logical consequence of LDA's theory would be that almost any impact of State conduct on an investment could be deemed to be an expropriation, provided the investor simply identified as the relevant "investment" only the category of interests, assets or rights impacted by the government act. The Tribunal agrees with other tribunals that have rejected such attempts at redefinition and concluded that, for purposes of an expropriation inquiry, "the business of the investor has to be considered *as a whole* and not necessarily with respect to an individual or separate aspect, particularly if this aspect does not have a stand-alone character."[942] Indeed, in a number of cases, the test for expropriation has been "applied to the relevant investment as a whole, *even if* different parts may separately qualify as investments for jurisdictional purposes."[943] As the *Electrabel* tribunal explained, "[i]f it were possible so easily to parse an investment into several constituent parts each forming a separate investment … it would render meaningless … [the] approach to indirect expropriation based on 'radical deprivation' and 'deprivation of any real substance' as being similar in effect to a direct expropriation or nationalization. It would also mean, absurdly, that an investor could always meet the [magnitude of deprivation] test for indirect expropriation by slicing its investment as finely as the particular circumstances required, without that investment as a whole ever meeting that same test."[944] The Tribunal agrees.

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[942] *Merrill & Ring Forestry L. P. v. Canada*, NAFTA, Award, 31 March 2010, ¶ 144 (emphasis added) (**RLA-455**); *see also Telenor*, ¶ 67 (**RLA-366**) (rejecting an argument that the investor had suffered a total expropriation of the *portion* of its overall revenue that it was required to pay into a central fund, and holding that for an expropriation to occur, "the investment must be viewed as a whole and that the test the Tribunal has to apply is whether, viewed as a whole, the investment has suffered substantial erosion of value"); *Mobil Cerro Negro*, ¶ 286 (**RLA-474**) ("[U]nder international law, a measure . . . may be equivalent to an expropriation if it gives rise to an effective deprivation of the investment as a whole").

[943] *Electrabel*, ¶ 6.58 (**RLA-466**) (emphasis added); *see also CMS Gas*, ¶¶ 256, 263-264 (**CLA-20**) (rejecting the notion that an investment could be disassembled into a number of discrete rights, each of which is capable of being expropriated independently of the overall investment); *Occidental*, ¶¶ 86–89 (**CLA-63**) (finding that the respondent's withdrawal of the claimant's right to a refund of a value-added tax, even assuming the right constituted an "investment" under the BIT, did not amount to an indirect expropriation because there had been "no deprivation of the use or reasonably expected economic benefit of the investment, let alone measures affecting a significant part of the investment"); *Feldman*, ¶ 111 (**CLA-34**) (finding that, although the claimant, who owned a cigarette-exporting business in addition to other businesses in Mexico, was deprived of his ability to export cigarettes due to a Mexican State measure, there was no expropriation, because claimant was not deprived and remained in control of his other lines of business).

[944] *Electrabel*, ¶ 6.57 (**RLA-466**).

420. Thus, even if proven, interference with a single component of LDA's investment in ALBA, such as the value derived from an alleged indirect right to benefit from HBT's Contract, could not constitute expropriation. Here, however, the point is even more stark than in other cases, because accepting LDA's attempt to subdivide its investment in ALBA into distinct constituent rights – each supposedly qualifying as its own investment – would completely circumvent the express exclusion from Treaty coverage of LDA's indirect investment in HBT. One cannot exclude the HBT investment from the scope of the Treaty, and then find expropriation, in the absence of an "effect of dispossession" of the ALBA investment, simply by pointing to ALBA's loss of a particular revenue stream that was solely attributable to its investment in HBT. To accept this chain of argument would be to engage in bootstrapping of the most cynical sort, in which a particular investment that is *excluded* from Treaty coverage nonetheless becomes the sole basis for an expropriation finding about a different investment, whose value has not been destroyed but simply partially reduced, in precise proportion to the first investment which did not qualify for Treaty protection. The Tribunal is unable to accept this strained logic to bypass the clear implications of both Articles 2(1) and 6(1).

421. Because LDA has not shown even a *prima facie* dispossession of its protected investment in ALBA, there is no need to move on to a merits assessment of (a) whether India's conduct was the principal cause of that dispossession (*e.g.*, was responsible for HBT's termination of the Contract and the ensuing losses), and (b) whether that State conduct was unlawful under the standard set out in the balance of Articles 6(1), 6(2), and 6(3).

E. CONCLUSION OF ARTICLE 2(1) ANALYSIS

422. The Tribunal has devoted significant attention to LDA's evidence, to determine whether LDA has demonstrated any conduct attributable to India that could form the foundation of a claim properly falling within its jurisdiction, as opposed to a claim that falls outside its jurisdiction. This assessment was necessitated both by the unusual nature of Article 2(1), which excludes Treaty protection for LDA's indirect investment in HBT, and by LDA's insistence that it could demonstrate something more than State conduct vis-à-vis HBT, namely either conduct directed at LDA's investment in ALBA or, as LDA pleaded in its Further Amended Statement of Claim, "specific and conscious actions directed at HBT but ultimately specifically targeting the Claimant and ABG Infra."[945] The Tribunal considered that these allegations, if ultimately substantiated, had the potential to distinguish the case from *HICEE*, where the tribunal dismissed claims on jurisdictional grounds in the absence of any real suggestion of an alternative

[945] Further Amended Statement of Claim, ¶ 368AE.

case focused on a protected rather than an unprotected investment. Accordingly, the Tribunal provided LDA every opportunity to make such a showing, since it was "common ground" that LDA would have standing to pursue a "properly framed claim for improper treatment of and injury to" its direct investment in ALBA.[946]

423. At the end of the day, however, LDA has not presented an "*analytically distinct* claim, focused on alleged wrongdoing by the Respondent" with respect to ALBA rather than to HBT.[947] At most, LDA has demonstrated (a) an *awareness* by India that HBT was owned by ALBA and (in part) indirectly by LDA, and (b) that LDA and ALBA experienced an *economic impact* from various developments involving HBT. But as the Tribunal explained in Section VII.D, tracing economic impact is not the same thing as demonstrating wrongdoing in the first place, and State conduct taken entirely towards an entity specifically excluded from protection under an investment treaty cannot be wrongful under that treaty simply because that non-wrongful conduct may have an economic ripple effect on other protected entities. Most actions have ripple effects, but that does not make the actions themselves unlawful, if those actions in no way are proscribed by the relevant legal instrument. Otherwise, it would be all too easy to circumvent the Contracting Parties' deliberate exclusion of treaty obligations with respect to particular investments, simply by demonstrating that actions taken towards those investments had some impact on entities that were not the intended targets of the State action in question.

424. The Tribunal emphasizes that nothing in this analysis is intended to address the applicability of investment treaties to indirect investments as such, where is no specific exclusion of Treaty protection for those investments. The Tribunal does not reach (because it does not have to reach) India's additional jurisdictional objections to reflective loss claims *per se*. Nor does the Tribunal purport to make any findings regarding the Contract rights of either HBT or KoPT, both of whom fully retain the remedies available to them under the Contract's dispute resolution provision. The Tribunal simply finds that LDA has not met is burden of demonstrating this Tribunal's jurisdiction to evaluate the merits of its Treaty claims against India, in light of the Treaty's unusual exclusion of protection for indirect investments structured in the specific manner that LDA chose for its investment in HBT. As the Tribunal noted in its Decision on Jurisdiction, had LDA negotiated a different arrangement with ABG Infra, so that LDA owned 51% rather than 49% of the ALBA shares, "then the investment structure would not have fallen

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[946] Decision on Jurisdiction, ¶ 149.

[947] Decision on Jurisdiction, ¶ 151.

afoul of the restriction in Article 2(1),"[948] and LDA would not have had the burden of demonstrating an "*analytically distinct* claim" focused on wrongdoing by India with respect to ALBA rather than HBT.

IX. INDIA'S CONDITIONAL COUNTERCLAIMS

425. India has expressly characterized its counterclaims as "conditional in nature."[949] It explains that "[t]hey are asserted only in the event that the Tribunal finds: (i) that [KoPT's] conduct is attributable to India, (ii) that LDA is entitled to assert claims and seek recovery associated with [HBT's] alleged losses under the Contract, (iii) that LDA and KoPT are not precluded from asserting claims and rights by the 12 September 2012 Consent Order, and in the event, finally, that the Tribunal (iv) does not dismiss or suspend LDA's claims under the Treaty related to alleged breaches of Contract by KoPT on grounds of *lis pendens*." [950] India's subsequent submissions reiterate that it asserts counterclaims against LDA only in these limited circumstances.[951]

426. The Tribunal has not made the findings on which India conditioned its assertion of counterclaims. Accordingly, the Tribunal understands that the counterclaims are not asserted in these circumstances, and/or treats them as effectively withdrawn. Accordingly, no further analysis is required regarding either the Tribunal's jurisdiction to entertain counterclaims or the merits of any such counterclaims.

X. COSTS

A. THE PARTIES' SUBMISSIONS

427. LDA contends that "in the event that it succeeds in the present arbitration, all of its arbitration costs … ought to be borne in their entirely by the Respondent," in accordance with "the well-established principle that costs follow the event" and given that LDA's "legal and other costs were clearly reasonable and commensurate with the size, importance and complexity of the present case."[952] By contrast, LDA criticizes India for a "kitchen sink approach" to pleadings and a "profligate approach that needlessly increased the costs of these proceedings," as well as for alleged "suppression and/or untimely and belated"

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[948] Decision on Jurisdiction, ¶ 147.

[949] Counter-Memorial, ¶ 860.

[950] Counter-Memorial, ¶ 860.

[951] Rejoinder, ¶ 1259; India's Post-Hearing Brief, ¶ 199.

[952] LDA's Cost Submission, ¶ 2.

production of documents and other delaying tactics.[953] LDA also contends that the additional evidentiary hearing on 29 January 2018 was "necessitated solely on account of the conduct" of India.[954] Accordingly, LDA contends that "even if the Respondent were to prevail in this arbitration," the Tribunal should "award costs against the Respondent on account of its wasteful conduct" and "excessive litigation tactics."[955] LDA suggests that India "should pay the Claimant 40% of its costs" of legal and expert fees even if India prevails.[956]

428. LDA submits a cost schedule with the following elements:[957]

a) Deposits to the PCA for tribunal and hearing expenses	USD 710,000
b) Legal representation fees and expenses (outside counsel)	€ 2,051,245.39 + £ 668,713.35
c) In-house legal services and witness expenses	€ 250,777
d) Expert witness costs	£ 155,695

429. India requests that the Tribunal order LDA to bear India's costs "in their entirety," together with "interest from the date at which such costs were incurred."[958] In India's view, an award of costs in its favor is warranted "independent of its success (or rate thereof) in this proceeding."[959] India emphasizes that LDA "knowingly initiated and maintained costly arbitration proceedings based on alleged treatment meted out … to its investment in HBT," which is not entitled to protection under the France-India BIT, and that LDA "had to reformulate its claims *twice*, and even resort to a theory of 'intentional targeting' of LDA and ABG Infra, which it effectively abandoned at the London Hearing."[960] These tactics "required India to constantly adjust its case-in-chief on jurisdiction as well as the underlying factual defenses, which resulted in significant costs and unnecessary delays."[961] India also contends that LDA further increased its

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[953] LDA's Cost Submission, ¶¶ 3-10.

[954] LDA's Cost Submission, ¶ 12.

[955] LDA's Cost Submission, ¶ 3.

[956] LDA's Cost Submission, ¶ 3.

[957] LDA's Cost Submission, Schedule, p. 5 (as adjusted to reflect an additional deposit after submission of the cost schedule).

[958] India's Cost Submission, ¶ 1.

[959] India's Cost Submission, ¶ 6.

[960] India's Cost Submission, ¶¶ 7-8 (emphasis in original).

[961] India's Cost Submission, ¶ 8.

costs "by leveling against it a myriad of allegations, no matter how untenable and even absurd," including for example the allegation that "KoPT deliberately conspired with the so-called 'vested interests' to delay the operationalization of the HBT Project …."[962]

430. India submits cost schedules with the following elements:[963]

a)	Deposits to the PCA for tribunal and hearing expenses	USD 710,000
b)	Legal representation fees and expenses	USD 9,133,229.21
c)	Expert witness costs	USD 333,873.44

B. RELEVANT RULES ON COSTS

431. Article 38 of the UNCITRAL Rules provides for the following categories of costs to be fixed in the award:

> (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator …;
>
> (b) The travel and other expenses incurred by the arbitrators;
>
> (c) The costs of expert advice and of other assistance required by the arbitral tribunal;
>
> (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
>
> (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
>
> (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at the Hague.

432. Article 40(1) of the UNCITRAL Rules provides that with the exception of the "costs of legal representation and assistance" referred to in Article 38(e), "the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the

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[962] India's Cost Submission, ¶ 9.

[963] India's Cost Submission, Schedules, p. 5 (as adjusted to reflect an additional deposit after submission of the cost schedule).

case." The Tribunal agrees that this provision can be read as establishing a costs-follow-the-event presumption, albeit one from which tribunals have discretion to depart in appropriate cases.[964]

433. No similar presumption is stated with respect to the parties' own "costs for legal representation and assistance" under Article 38(e), which are expressly carved out of scope of Article 40(1). Rather, with respect to these costs, the UNCITRAL Rules provide in Article 40(2) that "the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable." Nonetheless, tribunals applying this provision frequently take into account the success (or relative success) of the parties, in addition to other factors including party conduct.[965]

C. FIXING THE COSTS OF THE ARBITRATION

434. The Parties deposited with the PCA a total of USD 1,420,000 (USD 710,000 by LDA and USD 710,000 by India) to cover the costs of arbitration.

435. The fees of Prof. Julian D.M. Lew QC, the arbitrator appointed by LDA, amount to USD 204,334.83, and his expenses amount to USD 1,179.33. The fees of Mr. J. Christopher Thomas QC, the arbitrator appointed by India, amount to USD 208,923.65, and his expenses amount to USD 33,423.93. The fees of Ms. Jean E. Kalicki, the presiding arbitrator, amount to USD 456,332.50, and her expenses amount to USD 45,049.57.

436. Pursuant to the Terms of Appointment and the agreement of the Parties, the International Bureau of the PCA was designated to act as Registry and to administer the proceedings in this arbitration. The PCA's fee for services amounts to USD 248,905.08. Other PCA costs, including court reporters, hearing rooms, travel, and all other expenses relating to the arbitration proceedings, amount to USD 154,064.36.

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[964] *See, e.g., Eli Lilly and Company v. Government of Canada*, ICSID Case No. UNCT/14/2, Final Award, 16 Mar. 2017, ¶ 454 (**RLA-559**) ("***Eli Lilly***"); *WNC Factoring Ltd. (United Kingdom) v. The Czech Republic*, PCA Case No. 2014-34, UNICTRAL, Award, 22 Feb. 2017, ¶ 417 (**RLA-557**) ("***WNC Factoring***"); *Khan Resources Inc., Khan Resources BV. And CAUC Holding Company Ltd. v. The Government of Mongolia*, PCA Case No. 2011-09, UNCITRAL, Award on the Merits, 2 Mar. 2015, ¶ 431 (**RLA-555**); *European American Investment Bank AG (Austria) v. The Slovak Republic*, PCA Case No. 2010-17, UNCITRAL, Award on Costs, 20 Aug. 2014, ¶ 40 (**RLA-553**) ("***European American Investment Bank***").

[965] *See, e.g., Eli Lilly*, ¶ 455 (RLA-559); *WNC Factoring*, ¶ 420 (**RLA-557**); *British Caribbean Bank Ltd. (Turks & Caicos) v. The Government of Belize*, PCA Case No. 2010-18, UNCITRAL, Award, 19 Dec. 2014, ¶ 325 (**RLA-554**); *European American Investment Bank* (**RLA-553**), ¶ 41.

437. Based on the above figures, the combined Tribunal and PCA costs, including the categories described in Articles 38(a), (b), and (f), are fixed at a total of USD 1,352,213.25. These costs have been deducted from the deposit, with the unexpended balance to be returned to the Parties.

438. With respect to party costs, India is the "successful party" and its total claimed costs (other than deposits to the PCA) are USD 9,467,102.65, including the categories described in Articles 38(c), (d), and (e). As discussed below, this is more than 2-1/2 times LDA's claimed costs, an issue that the Tribunal considers in the context of India's request that LDA bear India's costs in their entirety.

D. ALLOCATION OF COSTS

439. With respect to allocation under Article 40(1) and 40(2), Tribunal considers that India is entitled to recovery of a substantial portion of its costs. India has prevailed entirely, in demonstrating an absence of jurisdiction under the France-India BIT for LDA to pursue its claims. Moreover, the fact that LDA's case might face considerable jurisdictional obstacles if it was predicated on the indirect investment in HBT was not a hidden defect, but should have been clear to LDA from the Article 2(1)'s statement that it applied to "an indirect investment made through another company, wherever located, which is owned *to an extent of at least 51 percent* …." (emphasis added). As discussed in Section VII.B, LDA nonetheless presented an initial Statement of Claim which was premised directly on an asserted 49% interest in the value of HBT's Contract with KoPT, and on the assertion that "the Claimant's indirect shareholding of, and rights in the Contract held by, HBT qualify as a protected investment in India."[966] It was only after India pointed out that the asserted "indirect shareholding of … HBT" fell below the Article 2(1) threshold that LDA asserted an alternative theory of jurisdiction, based on its direct investment in ALBA. The Tribunal allowed LDA to reformulate its claim, while indicating that it expected any reformulation to be "analytically distinct."[967] LDA nonetheless chose in its Amended Statement of Claim largely to repeat its original framing of treaty violations, re-pleading only those passages addressing the tracing of injury from HBT up through ALBA to LDA. It was only following India's *renewed* jurisdictional objections under Article 2(1) that LDA alleged conduct by India targeted at LDA's protected investment in ALBA, by claiming that "the actions and inactions of the Indian instrumentalities … were very obviously intended to drive out the Claimant and ABG Infra" and that HBT "was no more than a proxy for the real targets: the

[966] Statement of Claim, ¶ 360.

[967] Decision on Jurisdiction, ¶¶ 151, 156.

Claimant and ABG Infra, through ALBA."[968] The Tribunal determined that this new theory involved "important embedded issues of fact" that required a merits hearing, since it put at issue "*inter alia* the Respondent's knowledge and intentions with respect to the Claimant and ALBA, separate from HBT."[969] LDA therefore was afforded a final opportunity to formally plead and thereafter try to prove its case on both jurisdiction and the merits. This final formulation focused heavily on a conspiracy by various State actors to assist certain "Vested Interests" by driving LDA and ALBA (through HBT) out of the Port.[970]

440. This history has necessary consequences for the issue of costs, particularly now that it has become clear LDA was unable to substantiate its final theory of the case. LDA ran a risk in repeatedly reformulating its claims to try to avoid the implications of Article 2(1) of the Treaty; that risk was that its efforts, however creative at the level of theory, ultimately would not be supported by evidence. LDA's decision imposed additional costs on India, including the costs of a full merits phase. It also required the Tribunal to sift extremely carefully through the evidentiary record, to determine not only *what* likely occurred at HDC over a several year period, but *why*, and in relation to which investment: LDA's Treaty-protected investment in ALBA, or its indirect investment in HBT which was expressly excluded from Treaty protection. In the end, the Tribunal has found that while the evidence tells an unfortunate story about HBT's experiences at HDC, LDA's 49% (rather than 51%) shareholding in ALBA precludes this story from being actionable, without proof of the additional required element of State conduct towards (or with the intention of harming) ALBA or LDA itself. For these reasons, the Tribunal considers it appropriate to apply in general a costs-follow-the-event approach to all categories of costs encompassed by Article 38 of the UNCITRAL Rules.

441. Notwithstanding this conclusion, the Tribunal sees justification for reducing the quantum of India's cost recovery to a certain (limited) extent. First, India bears sole responsibility for the events that ultimately required the Tribunal to hold the merits hearing open in early December 2017 rather than completing it as originally planned. This required the Tribunal and the PCA to incur additional costs associated with reconvening in London in late January 2018 to complete witness examination following the Additional Document Verification exercise. This additional unexpected development also presumably contributed in various ways to India's total claimed costs, including additional fees and expenses for the collection of

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[968] PO5, ¶ 37 (quoting LDA's Second Bifurcation Response).

[969] PO5, ¶ 49.

[970] *See, e.g.,* Further Amended Statement of Claim, ¶ 368AC ("The Respondent … understood that [LDA and ABG Infra] were the parties that had to be displaced in order for the Vested Interests to regain control of the port. Only LDA and ABG Infra could withdraw 'HBT' from the port …: that is why LDA and ABG Infra were the parties targeted by the actions in breach of the Treaty").

relevant documents referred to by India's witness but not previously collected or produced, and additional fees and expenses for the extra hearing in London. The Tribunal considers that some discount to India's claimed Article 38 costs should be applied so as not to shift to LDA the consequences of this extra step in the proceedings.

442. Second, the Tribunal cannot help but observe that excluding the Parties' equal deposits to the PCA, India's claimed costs (USD 9,467,102.65) were more than 2-1/2 times LDA's claimed costs (€2,302,022.39 plus £824,408.35, which equates to roughly USD 3.7 million, depending on exchange rates). While there can be numerous legitimate reasons for discrepancies in parties' overall costs, and such discrepancies do not render the higher costs unreasonable as such, the parties' overall cost levels do reflect to some extent their voluntary choices, and it is fair to consider this element of choice in determining whether the unsuccessful party should bear the full amount of the successful party's fees and expenses.[971] In this case, India appears to have decided to pursue every possible argument, including propounding and seeking bifurcation of eleven separate jurisdictional objections, some of which sought to revisit even relatively well established principles of investment treaty jurisprudence.[972] More generally, India's submissions were regularly much longer than LDA's, with a Counter-Memorial running to almost 400 pages and a Rejoinder running to roughly 550 pages. While every party is entitled to its own legal strategy regarding the number of arguments to run and the depth of briefing to accord each argument, this strategy necessarily represents a choice, and the choice impacts the level of costs incurred. In this case, "taking into account the circumstances of the case" as indicated by Article 40(2), the Tribunal considers that it would be unfair and unduly harsh to require LDA to cover the full extent of India's costs which so greatly surpassed the level of LDA's own.

443. Bearing each of these considerations in mind, and exercising the discretion that is provided by the UNCITRAL Rules, the Tribunal apportions the costs of the proceedings as follows:

444. With respect to the total Tribunal and PCA costs of USD 1,352,213.25, the Tribunal apportions 90%, or USD 1,216,991.92, to LDA, and 10%, or USD 135,221.33, to India. LDA therefore shall reimburse India for USD 540,885.30, representing the excess portion of these costs borne by India in the first instance.

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[971] *Cf. European American Investment Bank*, ¶¶ 44, 61 (noting that "unlike those costs governed by the first paragraph of Article 40, the costs of each party's legal assistance and representation are determined by the choices made by that party, and are not controlled by the tribunal," and considering the "magnitude of the difference" between the parties' claimed costs as a factor relevant to allocation determinations).

[972] Bifurcation Request, pp. 6-17.

445. With respect to India's own claimed costs of USD 9,467,102.65 for legal representation, experts, and associated assistance, the Tribunal apportions 70%, or USD 6,626,971.85, to LDA, and 30%, or USD 2,840,130.80, to India. LDA accordingly shall reimburse India for USD 6,626,971.85 towards India's claimed costs.

446. India requests an award of interest on apportioned costs, running "from the date at which such costs were incurred."[973] At the same time, it provides no information regarding the schedule or pace at which it incurred costs, from which the Tribunal could make any such calculation. Nor does it make any submissions regarding an applicate interest rate. In these circumstances, the Tribunal declines the request of an award of interest on costs.

XI. AWARD

447. For the reasons stated above, the Tribunal unanimously decides as follows:

448. Article 2(1) of the France-India BIT excludes from the scope of protection indirect investments in which an investor owns less than 51% of an intermediate investment vehicle, wherever located;

449. As a result, LDA's indirect investment in HBT, which was structured in such a fashion, is not entitled to protection under the France-India BIT, and claims regarding alleged State conduct with respect to that indirect investment fall outside this Tribunal's jurisdiction to resolve;

450. While LDA's direct investment in ALBA is entitled to Treaty protection, the specific claims LDA has presented (with a few very minor exceptions) do not involve conduct which, even if attributable *arguendo* to India, was taken with respect to ALBA, or which was taken with respect to HBT but for the purpose of affecting ALBA or LDA's interest in ALBA; LDA thus has not presented analytically distinct claims about a *protected* investment that fall within the Tribunal's jurisdiction;

451. To the very limited extent that LDA states any claims about conduct towards ALBA itself, such (essentially incidental) claims do not establish a violation by India of the France-India BIT;

452. LDA's claims accordingly are dismissed in their entirety;

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[973] India's Cost Submission, ¶ 1.

453. India's counterclaims were expressly conditional, asserted only in the event the Tribunal ultimately made findings which the Tribunal has not made, and therefore are considered not to be asserted (or to be effectively withdrawn) in these circumstances; and

454. LDA is ordered to pay India: (a) USD 540,885.30, towards India's share of the Tribunal and PCA costs of arbitration, and (b) USD 6,626,971.85, towards India's costs and expenses of legal representation and assistance.

PLACE OF ARBITRATION: London, United Kingdom

DATED: 11 September 2018

Prof. Julian D.M. Lew QC

Mr. J. Christopher Thomas QC

Ms. Jean E. Kalicki
(Presiding Arbitrator)