EXCERPTS

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

ALOIS SCHÖNBERGER

Claimant

and

REPUBLIC OF TAJIKISTAN

Respondent

ICSID CASE NO. ARB(AF)/19/1

AWARD

Members of the Tribunal
Prof. Stanimir Alexandrov, President of the Tribunal
Mr. Thomas Webster, Arbitrator
Mr. Salim Moollan KC, Arbitrator

Secretary of the Tribunal
Ms. Aurélia Antonietti

Date of dispatch to the Parties: December 8, 2023

REPRESENTATION OF THE PARTIES

Representing Mr. Alois Schönberger:

Dr. Phillip Landolt
Landolt & Koch
rue du Mont-Blanc 17
CH-1201 Geneva
Switzerland

Representing the Republic of Tajikistan:

No designation was made

TABLE OF CONTENTS

TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS

[redacted]	[redacted]
[redacted]	[redacted]
[redacted] Contract	[redacted]
[redacted] Guarantee	[redacted]
Arbitration (AF) Rules	Arbitration (Additional Facility) Rules – Schedule C in force as of April 10, 2006
Application	Claimant's Application to submit new evidence, dated July 1, 2022
[redacted]	[redacted]
Austria	Republic of Austria
BIT	Agreement for Promotion and Protection of Investment between the Republic of Austria and the Republic of Tajikistan (entered into force on February 1, 2012)
C-[#]	Claimant's Exhibit
Cl. Mem.	Claimant's Memorial on the Merits dated October 19, 2021
CL-[#]	Claimant's Legal Authority
GD	General Director of the Local Company

[redacted]	[redacted]
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[redacted]	[redacted]
[redacted]	[redacted]
[redacted] Guarantee [redacted] and [redacted] Guarantee [redacted]	[redacted]

[redacted]

[redacted]	[redacted]
[redacted]	[redacted]
Request	Claimant's request to the Tribunal under Article 48 of the ICSID Additional Facility Rules to deal with the questions submitted to it and to render an award, dated February 24, 2022
Request for Arbitration	Request for Arbitration of Mr. Schönberger against Tajikistan, dated February 8, 2019
[redacted] Guarantee [redacted]	[redacted]
[redacted]	[redacted]
Tr. Day [#] [Speaker(s)] [page:line]	Transcript of the Hearing (June 21 and June 22, 2022)
Tajikistan	Republic of Tajikistan or the Respondent
Tribunal	Tribunal constituted on April 13, 2022
VCLT	Vienna Convention of the Law of Treaties

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Agreement for Promotion and Protection of Investment between the Republic of Austria and the Republic of Tajikistan concluded on December 10, 2015 and which entered into force on February 1, 2012 (the "**BIT**" or "**Treaty**") and the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (the "**ICSID Additional Facility Rules**").

2. The Claimant is Mr. Alois Schönberger ("**Mr. Schönberger**" or the "**Claimant**"), a natural person having the nationality of the Republic of Austria ("**Austria**").[1]

3. The Respondent is the Republic of Tajikistan ("**Tajikistan**" or the "**Respondent**"). As explained below, the Respondent failed to appear in the proceeding.

4. The Claimant and the Respondent are collectively referred to as the "**Parties**." The Parties' representatives and their addresses are listed above on page (i).

II. PROCEDURAL HISTORY

5. On October 4, 2018, Mr. Schönberger and [redacted] submitted a request for access to dispute resolution under the ICSID Additional Facility pursuant to Article 4 of the ICSID Additional Facility Rules, together with Appendices 1 through 5 (the "**Application for Approval**").[2]

[1] Exhibit C-0003, Austrian passport of Mr. Schönberger.

[2] Letter of Mr. Schönberger and [redacted] to ICSID, October 4, 2018. Letter of ICSID to Mr. Schönberger and [redacted], October 5, 2018.

6. On October 12, 2018, ICSID requested additional information from Mr. Schönberger and [redacted] in relation to their Application for Approval.[3] ICSID received the requested information on October 26, 2018, along with Appendices 6 through 9.[4]

7. On October 26, 2018, [redacted] further informed ICSID that it was withdrawing its Application for Approval.[5]

8. On October 30, 2018, the Secretary-General of ICSID approved access to the Additional Facility in accordance with Article 4 of the ICSID Additional Facility Rules in respect of Mr. Schönberger's request.[6]

9. On February 8, 2019, ICSID received a request for arbitration dated February 8, 2019, from Mr. Schönberger against Tajikistan (the "**Request for Arbitration**").[7]

10. On February 15, 2019, the Secretary-General of ICSID registered the Request for Arbitration in accordance with Article 4 of the Arbitration (Additional Facility) Rules ("**Arbitration (AF) Rules**") and notified the Parties of the registration.[8] In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Chapter III of the Arbitration (AF) Rules.[9]

[redacted]

[3] Letter of ICSID to Mr. Schönberger and [redacted], October 12, 2018.

[4] Letter of Mr. Schönberger and [redacted] to ICSID, October 26, 2018. Letter of ICSID to Mr. Schönberger and [redacted], October 26, 2018. Additional documents filed on October 28, 2018, and acknowledged by ICSID on October 29, 2018.

[5] Letter of Mr. Schönberger and [redacted] to ICSID, October 26, 2018.

[6] Letter of ICSID to the Parties, October 30, 2018.

[7] Letter of Mr. Schönberger, February 8, 2019, and letters from ICSID acknowledging the Request and transmitting it to the Republic of Tajikistan, February 8, 2019.

[8] Letter of ICSID to the Parties, February 8, 2019.

[9] Letter of ICSID to the Parties, February 15, 2019; Notice of Registration, February 15, 2019.

[redacted]

12. On May 6, 2019, the Claimant requested that the Tribunal in this case be constituted pursuant to the formula provided by Article 6(1) and Article 9(1) of the Arbitration (AF) Rules.[11] In accordance with these provisions, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the President of the Tribunal, appointed by agreement of the Parties.[12] On the same date, the Claimant appointed Mr. Thomas Webster, a national of Canada, as arbitrator in this case.[13] Mr. Webster accepted his appointment on the following day.[14]

13. On June 13, 2019, the Claimant requested that the Chairman of the ICSID Administrative Council (the "**Chairman**") appoint the arbitrator not yet appointed and designate an arbitrator to be the President of the Tribunal, pursuant to Articles 6(4) and 10 of the Arbitration (AF) Rules.[15]

14. On June 26, 2019, ICSID informed the Parties of its intention to propose to the Chairman the appointment of Mr. Salim Moollan QC, a national of France, Mauritius and the United Kingdom, as co-arbitrator in this case.[16]

15. On July 2, 2019, the Secretary General of the ICSID received a letter from the Ministry of Finance of Tajikistan requesting that the Centre dismiss the arbitral proceeding as (i) the current dispute had no relation to Tajikistan, and (ii) the Centre did not have the competency to consider a dispute arising from contractual obligations unrelated to

[10] Letter of the Ambassador of Tajikistan to the United States of America to ICSID, April 4, 2019. Email of ICSID to the Parties, April 4, 2019.

[11] Letter of Claimant to ICSID, May 6, 2019.

[12] *Ibid*.

[13] *Ibid*. Letter of ICSID to the Parties acknowledging the Claimant's letter, taking note of the method of constitution, and informing it will seek the acceptance of Mr. Webster, May 6, 2019.

[14] Letter of ICSID to the Parties, May 7, 2019.

[15] Letter of Claimant to ICSID, June 13, 2019. Letter of ICSID to the Parties, June 13, 2019.

[16] Letter of ICSID to the Parties, June 26, 2019.

investment activities in the territory of Tajikistan.[17] On July 3, 2019, ICSID acknowledged its receipt and transmitted the Ministry's letter to the Claimant.[18] In the same email, ICSID invited the Parties to respond to its June 26th letter regarding the appointment of Mr. Moollan as a co-arbitrator.[19]

16. By letter of July 3, 2019, Tajikistan requested a three-month extension to consider the appointment of the missing co-arbitrator.[20]

17. On July 5, 2019, the Claimant noted that it was agreeable to a one month-extension, until August 2, 2019, for the Respondent to appoint a co-arbitrator, and for the Parties to appoint a presiding arbitrator.[21]

18. On August 2, 2019, the Claimant informed ICSID that given the progress made in the settlement negotiations between the Parties, the Claimant agreed to a further extension of one month, until September 2, 2019.[22] ICSID took note of the extension on the same date.[23]

19. On September 2, 2019, the Claimant advised ICSID that he agreed to a further extension of one-month, until October 2, 2019, in light of the progress made in the settlement negotiations between the Parties and of the receipt of partial payment of the Claimant's claim from Tajikistan.[24] On September 3, 2019, ICSID took note of the extension.[25]

20. On October 2, 2019, the Claimant informed ICSID of his agreement to further extend the time for the appointment of the missing co-arbitrator, and for the appointment of the

[17] Email of the Ministry of Finance of the Republic of Tajikistan to ICSID and World Bank Group regarding the dismissal of Alois Schönberger v. Republic of Tajikistan, July 2, 2019.

[18] Email of ICSID to the Parties, July 3, 2019.

[19] Email of ICSID to the Parties, July 3, 2019.

[20] Letter of Respondent, July 3, 2019. Email of ICSID to the Parties, July 3, 2019.

[21] Email of Claimant to ICSID, July 5, 2019. Email of ICSID to the Parties, July 5, 2019.

[22] Email of Claimant to ICSID, August 2, 2019.

[23] Email of ICSID to the Parties, August 2, 2019.

[24] Email of Claimant to ICSID, September 2, 2019.

[25] Email of ICSID to the Parties, September 3, 2019.

presiding arbitrator until November 4, 2019, while reserving his rights.[26] ICSID acknowledged this request on October 3, 2019.[27]

21. The Claimant advised the Centre of two more one-month requests for extension, one on November 4[28] and the other on December 6, 2019[29], ultimately extending the period for Respondent to appoint a co-arbitrator and the Claimant to appoint the presiding arbitrator to February 6, 2020.[30]

22. On February 10, 2020, ICSID invited the Parties to provide an update on the status of the proceeding.[31]

23. On July 9, 2020, ICSID renewed its invitation to the Parties to provide an update on the status of the proceeding, while reminding the parties of the suspension of Mr. Salim Moollan's appointment as an arbitrator and that until completion of the appointment process under Article 6(4) of the Arbitration (AF) Rules, it remained possible for the Respondent to appoint an arbitrator and for the Parties to agree on a President of the Tribunal in accordance with Articles 6(1) and 9 of the Arbitration (AF) Rules.[32]

24. On July 28, 2020, the Claimant requested a further two-month extension until September 28, 2020.[33] ICSID acknowledged his request on July 29, 2020.[34]

25. On January 14, 2021, ICSID invited the Parties to provide an update on the status of the proceeding.[35]

[26] Email of Claimant to ICSID, October 2, 2019.

[27] Email of ICSID to the Parties, October 3, 2019.

[28] Email of Claimant to ICSID, November 4, 2019. Email of ICSID to the Parties, November 4, 2019.

[29] Email of Claimant to ICSID, December 6, 2019. Email of ICSID to the Parties, December 6, 2019.

[30] Email of ICSID to the Parties, December 6, 2019.

[31] Email of ICSID to the Parties, February 10, 2020.

[32] Email of ICSID to the Parties, July 9, 2020.

[33] Email of Claimant to ICSID, July 28, 2020.

[34] Email of ICSID to the Parties, July 29, 2020.

[35] Email of ICSID to the Parties, January 14, 2021.

26. On January 19, 2021, the Claimant informed ICSID that the settlement negotiations were advancing and that he would be able to provide more information regarding the status of the case by February 15, 2021.[36] ICSID took note of the Claimant's communication.[37]

27. On February 23, 2021, the Claimant informed ICSID that the "settlement negotiations between the Parties ha[d] stalled." The Claimant requested that ICSID resume the arbitration proceeding and complete the constitution of the tribunal. [38]

28. By letter of the same date, ICSID informed the Parties that it was ready to proceed with the proposal to appoint Mr. Salim Moollan as an arbitrator and invited the Parties to submit observations, if any, by March 12, 2021.[39]

29. By letter of March 16, 2021, the Secretary General noted that in the absence of observations on the appointment of Mr. Moollan as co-arbitrator, the Chairman would proceed to appoint Mr. Moollan.[40]

30. On March 18, 2021, ICSID informed the Parties that Mr. Moollan had accepted his appointment as an arbitrator.[41] The Centre then invited the Parties to indicate, by March 24, 2021, if they wished for the Centre to conduct a ballot to assist the Parties in selecting a mutually agreeable presiding arbitrator. ICSID stated that "[f]ailing any agreement or any answer by that date, the Chairman of the Administrative Council will directly appoint the President of the Tribunal from the ICSID Panel of Arbitrators following consultations with the Parties."[42]

[36] Email of Claimant to ICSID, January 19, 2021.

[37] Email of ICSID to the Parties, January 19, 2021.

[38] Email of Claimant to ICSID, February 23, 2021.

[39] Letter of ICSID to the Parties, February 23, 2021.

[40] Letter of ICSID to the Parties, March 16, 2021.

[41] Letter of ICSID to the Parties, March 18, 2021.

[42] Email of ICSID to the Parties, March 18, 2021.

31. On March 24, 2021, the Claimant shared his preference that ICSID conduct a ballot, indicating, however, that if the Respondent failed to agree on a ballot, the Claimant would be agreeable to have the Chairman appoint the presiding arbitrator.[43]

32. On March 25, 2021, in the absence of a response from the Respondent, ICSID informed the Parties that the Chairman would proceed with the appointment of the presiding arbitrator.[44]

33. On March 29, 2021, ICSID advised the Parties of its intention to propose the appointment of Prof. Stanimir A. Alexandrov, a national of Bulgaria, as the presiding arbitrator.[45]

34. On April 5, 2021, the Claimant shared concerns about Prof. Alexandrov residing outside of Europe, as this could have a potential impact on the place of arbitration, and on the costs and time of the arbitration.[46]

35. On April 8, 2021, ICSID informed the Parties that "the place of arbitration is not dependent upon the residence of an arbitrator.[47] In any event, even though Mr. Stanimir Alexandrov is based in Washington, D.C., he travels frequently to Europe for other matters and a hearing could be organized to take place during one of his travels or remotely as needed."[48] ICSID also informed the Parties that it would proceed with the appointment of Prof. Alexandrov.[49]

36. Thus, the Tribunal was composed of Prof. Stanimir A. Alexandrov, a national of Bulgaria, President, appointed by the Chairman in accordance with Article 6(4) of the Arbitration (AF) Rules; Mr. Thomas Webster, a national of Canada, appointed by the Claimant; and

[43] Letter of Claimant to ICSID, March 24, 2021. Email of ICSID to the Parties, March 24, 2021.

[44] Letter of ICSID to the Parties, March 25, 2021.

[45] Letter of ICSID to the Parties, March 29, 2021.

[46] Letter of Claimant to ICSID, April 5, 2021. Email of ICSID to the Parties, April 5, 2021.

[47] Letter of ICSID to the Parties, April 8, 2021.

[48] *Ibid.*

[49] *Ibid.*

Mr. Salim Moollan QC, a national of France, Mauritius and the United-Kingdom, appointed by the Chairman in accordance with Article 6(4) of the Arbitration (AF) Rules.

37. On April 13, 2021, the Secretary-General, in accordance with Article 13(1) of the Arbitration (AF) Rules, notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Aurélia Antonietti, Senior Legal Counsel at ICSID, was designated to serve as Secretary of the Tribunal.[50]

38. In accordance with Article 21 of the Arbitration (AF) Rules, the Tribunal held a first session with the Claimant on June 3, 2021, by videoconference. The Respondent was not represented at this first session.

39. Following the first session, on June 18, 2021, the Tribunal issued Procedural Order No. 1 concerning procedural matters.[51] Procedural Order No. 1 also sets out a schedule for the proceeding ("**Procedural Calendar**").[52]

40. In accordance with Procedural Order No. 1, on October 19, 2021, the Claimant filed his Memorial on the Merits (the "**Memorial**"), together with the Witness Statements of [redacted] Alois Schönberger, factual exhibits C-1 through C-55 and legal authorities CL-0001 through CL-0046.

41. On February 24, 2022, the Claimant noted that the Respondent had failed to file its Counter-Memorial, which was due on February 18, 2022, in accordance with the Procedural Calendar. The Claimant requested the Tribunal "in pursuance of its powers under Article 48 of the ICSID Additional Facility Rules to deal with the questions submitted to it and to render an award" (the "**Request**").[53]

[50] Letter of ICSID to the Parties, April 13, 2021.

[51] Procedural Order No. 1, June 18, 2021.

[52] Procedural Order No. 1, June 18, 2021.

[53] Letter of Claimant to ICSID, February 24, 2022. Email from ICSID to the Parties, February 24, 2022.

42. On February 25, 2022, the Tribunal took note of the Claimant's Request and granted the Respondent a grace period of 60 days, *i.e.*, until April 26, 22, to file its Counter-Memorial "[g]iven the circumstances and lack of participation of the Respondent in this proceeding to this date, pursuant to Article 48(2) of the Arbitration (AF) Rules." It added that upon the expiration of the grace period and should the Respondent still not have filed its Counter-Memorial, the Tribunal would proceed with the arbitration in accordance with Article 48(3) of the Arbitration (AF) Rules.[54]

43. On April 27, 2022, the Tribunal noted that it had not received the Respondent's Counter-Memorial on April 26, 2022. The Tribunal therefore decided that, given the Claimant's Request and the expiration of the grace period granted on February 25, 2022, the Tribunal would proceed with the arbitration in accordance with Article 48(3) of the Arbitration (AF) Rules. In addition, the Tribunal invited the Claimant to confirm whether it would be agreeable to a two-day remote hearing.[55]

44. On April 28, 2022, the Claimant confirmed his agreement with a two-day remote hearing. No answer was given by the Respondent.[56]

45. On May 17, 2022, the Tribunal confirmed that the hearing would take place remotely on June 21 and June 22, 2022 ("**Hearing"**). The Tribunal invited the Parties (i) to comment on the draft procedural order concerning the organization of the hearing by May 27, 2022, (ii) to indicate whether they required a pre-hearing organizational meeting, and (iii) to provide the documents listed at paragraph 20.6 of Procedural Order No. 1, as well as Articles 220, 221, and 226 of the Tajik Economic Procedure Code. In addition, the Tribunal indicated that it wished to have access to the Witness Statement of [redacted] (mentioned in the Claimant's Memorial).[57]

[54] Letter of ICSID to the Parties, February 25, 2022.

[55] Letter of ICSID to the Parties, April 27, 2022.

[56] Email of Claimant to the Tribunal, April 28, 2022. Email of ICSID to the Parties, April 28, 2022.

[57] Letter of ICSID to the Parties, May 17, 2022.

46. On May 27, 2022, the Claimant confirmed that it would like a pre-hearing organizational meeting. The Tribunal did not receive any response from the Respondent.

47. On June 3, 2022, as requested in the Tribunal's letter of May 17, 2022, the Claimant submitted Articles 220, 221, 223 and 226 of the Tajik Economic Procedure Code, a chronology of relevant facts, a dramatis personae, a list of substantive issues to be determined by the Tribunal, and a witness statement [redacted] which had been filed in an arbitration brought by [redacted] before the Secretariat of the Swiss Chamber's Arbitration Institution in 2014 pursuant to arbitration agreements contained in certain contracts of guarantees [redacted] ("the **Swiss Chambers Arbitration**").[58] The Swiss Chambers Arbitration led to an award ("the **Swiss Chambers Award**") and is discussed below. In addition, the Claimant submitted a corrected Memorial, in clean and red-line versions, and resubmitted his factual exhibits and legal authorities. The Claimant also indicated that he had been unable to secure the participation of his local legal counsel, [redacted], for examination as a witness at the Hearing.

48. On June 6, 2022, the President of the Tribunal held a pre-hearing organizational meeting with the Claimant. The recording was made available to both Parties.

49. On June 7, 2022, the Tribunal issued Procedural Order No. 2 concerning the organization of the Hearing. The Tribunal indicated *inter alia* that it would decide on the weight to give to [redacted] Witness Statements at a later stage.[59]

50. On June 12, 2022, the Claimant applied for permission to submit two new documents, *i.e.*, the decision of January 19, 2022, of the Court of the City of Dushanbe and additional articles of the Tajik Criminal Code.[60] On the next day, ICSID invited the Respondent to provide its comments on the Claimant's request to submit new documents.

[58] Letter of Claimant to ICSID, June 3, 2022. Email of ICSID to the Parties, June 3, 2022.

[59] Procedural Order No. 2, June 7, 2022.

[60] Email of Claimant to ICSID, June 12, 2022. Email of ICSID to the Parties, June 13, 2022.

51. On June 20, 2022, the Tribunal noted that it did not receive any comments from the Respondent on the Claimant's request of June 12, 2022, and granted the Claimant's request to submit new documents, which it did on the same day.[61]

52. The Hearing on Jurisdiction and the Merits was held by videoconference on June 21, 2022, and June 22, 2022. The following persons were present at the Hearing:

Tribunal:

Prof. Stanimir Alexandrov	President
Mr. Salim Moollan QC	Arbitrator
Mr. Thomas Webster	Arbitrator

ICSID Secretariat:

Ms. Aurélia Antonietti	Secretary of the Tribunal
Ms. Maria-Rosa Rinne	Paralegal

For the Claimant:

Mr. Phillip Landolt	Landolt & Koch, Geneva
Ms. Fadoua Souissi	Paralegal; Landolt & Koch, Geneva
Mr. Alois Schönberger	Claimant

For the Respondent:
N/A

53. During the Hearing, the following persons were examined:

On behalf of the Claimant:

Mr. Alois Schönberger	Claimant
[redacted]	[redacted]

On behalf of the Respondent:
N/A

[61] Email of ICSID to the Parties, June 20, 2022. Email of Claimant to ICSID, June 20, 2022. Email of ICSID to the Parties, June 20, 2022.

54. As discussed at the closing of the Hearing, on July 1, 2022, the Claimant filed an application for permission "to submit further evidence in support of his qualifying investment within the meaning of Article 1(2) of the BIT," [redacted] (the "**Application**"). [redacted] In addition, the Claimant requested permission to submit versions of these documents redacting the name of the Company and the individuals involved in it.[63] On July 1, 2022, the Tribunal invited the Respondent to submit its comments by July 11, 2022.[64]

55. On July 18, 2022, having received no comments from the Respondent, the Tribunal informed the Parties of its decision to grant the Claimant's Application with the requested redactions.[65]

56. In response to the Tribunal's Procedural Order of July 18, the Claimant submitted a Supplemental Witness Statement by Mr. Schönberger and Exhibits C-0058 to C-0061 on August 10, 2022.

57. On April 5, 2023, the Claimant sent a letter to the Tribunal seeking leave to submit a new document into the record and offering to provide additional arguments and evidence on

[62] Letter of Claimant to ICSID, July 1, 2022; Transcript, Day 2, 100:20-101:10. Email of ICSID to the Parties, July 1, 2022.

[63] Letter of Claimant to ICSID, July 1, 2022.

[64] Email from ICSID to the Parties, July 1, 2022.

[65] Letter of ICSID to the Parties, July 18, 2022.

two legal questions discussed at the Hearing. In that letter, the Claimant also inquired whether it should file a costs submission.[66]

58. On April 11, 2023, ICSID informed the Claimant that the Tribunal invited him to submit the new document into the record with the appropriate exhibit number; that the Tribunal did not need, at that stage, to hear additional arguments; and that the Tribunal would invite the Parties to make costs submissions at the closure of the proceeding. The Tribunal also advised the Claimant that if he wished to submit additional evidence, the Claimant should make an application explaining the specific evidence he sought to submit, its relevance, and the reason why that evidence had not been submitted earlier.[67]

59. By email of May 3, 2023, the Claimant submitted its new exhibits, C-0062 to C-0064, as per the Tribunal's directions of April 11, 2023.[68]

60. By email of May 4, 2023, the Respondent was invited to comments on the newly submitted evidence.[69] No answer was received from the Respondent.

61. By email of May 22, 2023, the Tribunal informed the Parties that:

> *The Tribunal has reviewed carefully the new exhibits submitted by Claimant on May 3, 2023 (Exhibits C-62-64). The Tribunal understands that those exhibits are relevant exclusively to the matter of attribution. Having studied extensively the materials on attribution in the existing record, the Tribunal believes that it is sufficiently equipped to rule on the matter and does not need to hear further arguments.*[70]

62. By letter of August 2, 2023, the Tribunal invited the Parties to file their submissions on costs by August 25, 2023. [71]

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[66] Letter of Claimant to the Tribunal, April 5, 2023. Email of ICSID to the Parties, April 5, 2023.

[67] Email of ICSID to the Parties, April 11, 2023.

[68] Letter of Claimant to the Tribunal, May 3, 2023.

[69] Email of ICSID to the Parties, May 4, 2023

[70] Email of ICSID to the Parties, May 22, 2023.

[71] Letter of ICSID to the Parties, August 2, 2023.

63. On August 25, 2023, the Claimant filed his submission on costs, along with legal authorities CL-0050 through CL-0054.[72] No submission was filed by the Respondent.

64. The Tribunal closed the proceedings on August 29, 2023.[73]

65. On October 2, 2023, the Tribunal wrote to the Parties that the Award had been prepared and that one of the arbitrators had indicated that he would prepare a dissent by mid-November or very shortly thereafter. The Parties were invited to state, by no later than October 5, whether they wished to (i) receive the Award together with the dissent after mid-November, or (ii) receive the Award without the dissent, with the dissent and an annex on the costs of the arbitration, to follow.

66. On October 5, 2023, the Claimant indicated that he preferred to receive the Award with the Dissent.

67. The Respondent, the Republic of Tajikistan, did not participate in this proceeding. The Tribunal and the ICSID Secretariat made every effort to reach out to the Respondent and to keep it informed of all procedural steps, including all of the Tribunal's orders, rulings and deadlines. ICSID initially used the email addresses provided by the Claimant in its Request for arbitration as per Arbitration Rule 5(b). It then addressed its emails to the addresses used by Tajikistan in its correspondence of July 2 and 3, 2019. Tajikistan stopped answering after that date. As of March 2021, ICSID copied on its emails the World Bank Country Office in Dushanbe which was tasked to relay physically the correspondence. ICSID understands that translations into Russian were made and delivered to the Office of the President. As of June 2022, ICSID relied solely on direct emails with the Parties. The Embassy in Washington, DC, was copied at all times on all the outgoing emails. A copy of the correspondence regarding the Hearing was sent by courier to the Office of the President, as well as the correspondence regarding the Award.

[72] Email of Claimant to ICSID, August 25, 2023. Email of ICSID to the Parties, August 25, 2023.

[73] Letter of ICSID to the Parties, August 29, 2023.

III. FACTUAL BACKGROUND

[redacted]

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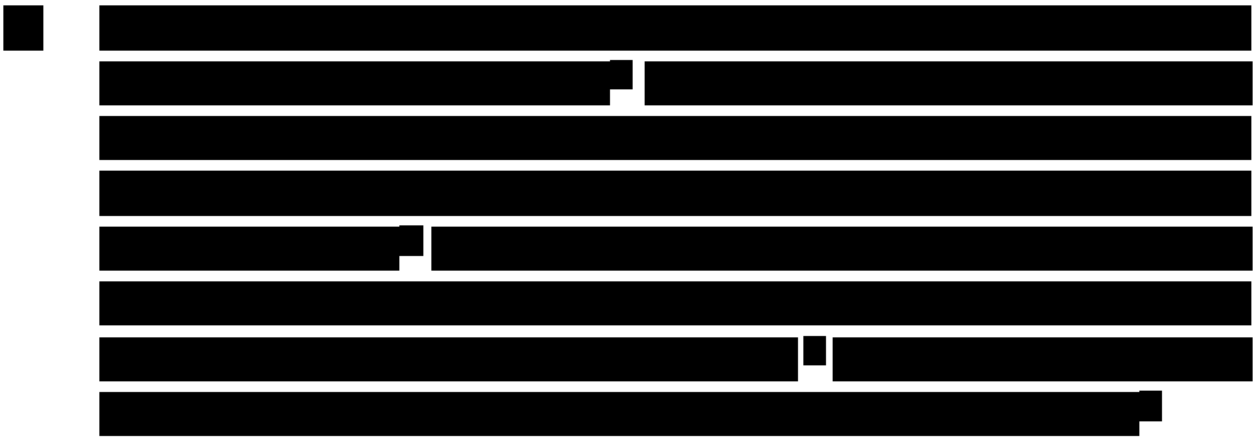

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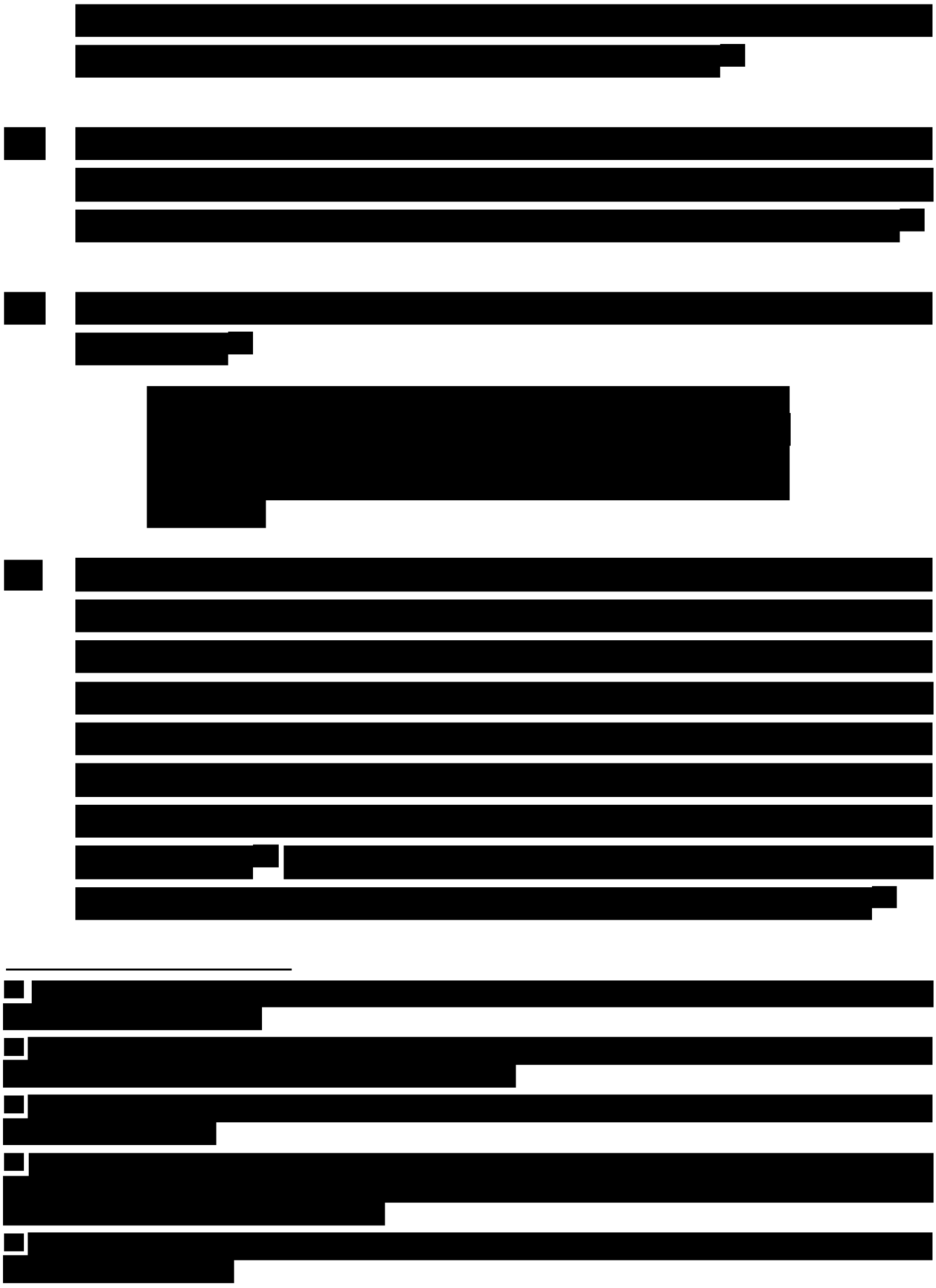

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[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

IV. THE PARTIES' POSITIONS

[redacted]

A. CLAIMANT'S POSITION ON JURISDICTION

[redacted]

(1) Jurisdiction *Ratione Personae*

[redacted]

[redacted]

[redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

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[redacted] [redacted]

[redacted] [redacted]

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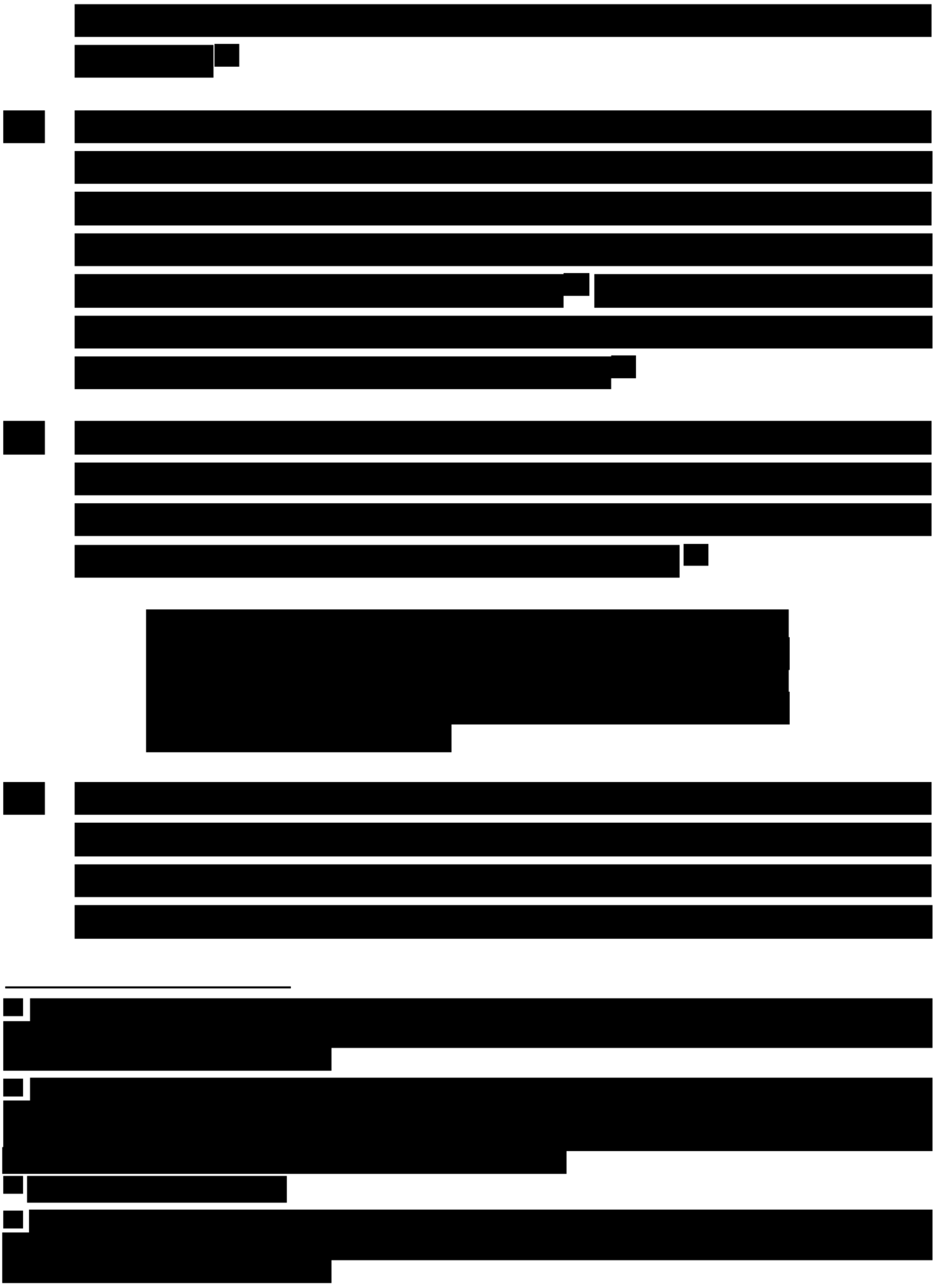
(2) Jurisdiction *Ratione Materiae*

[redacted]

[redacted]



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[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(3) Jurisdiction *Ratione Temporis*

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

B. LIABILITY

[redacted]

(1) Applicable Law

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(2) Fair and Equitable Treatment (FET)

[redacted]

[redacted]

237 [redacted]

[redacted]

[redacted]

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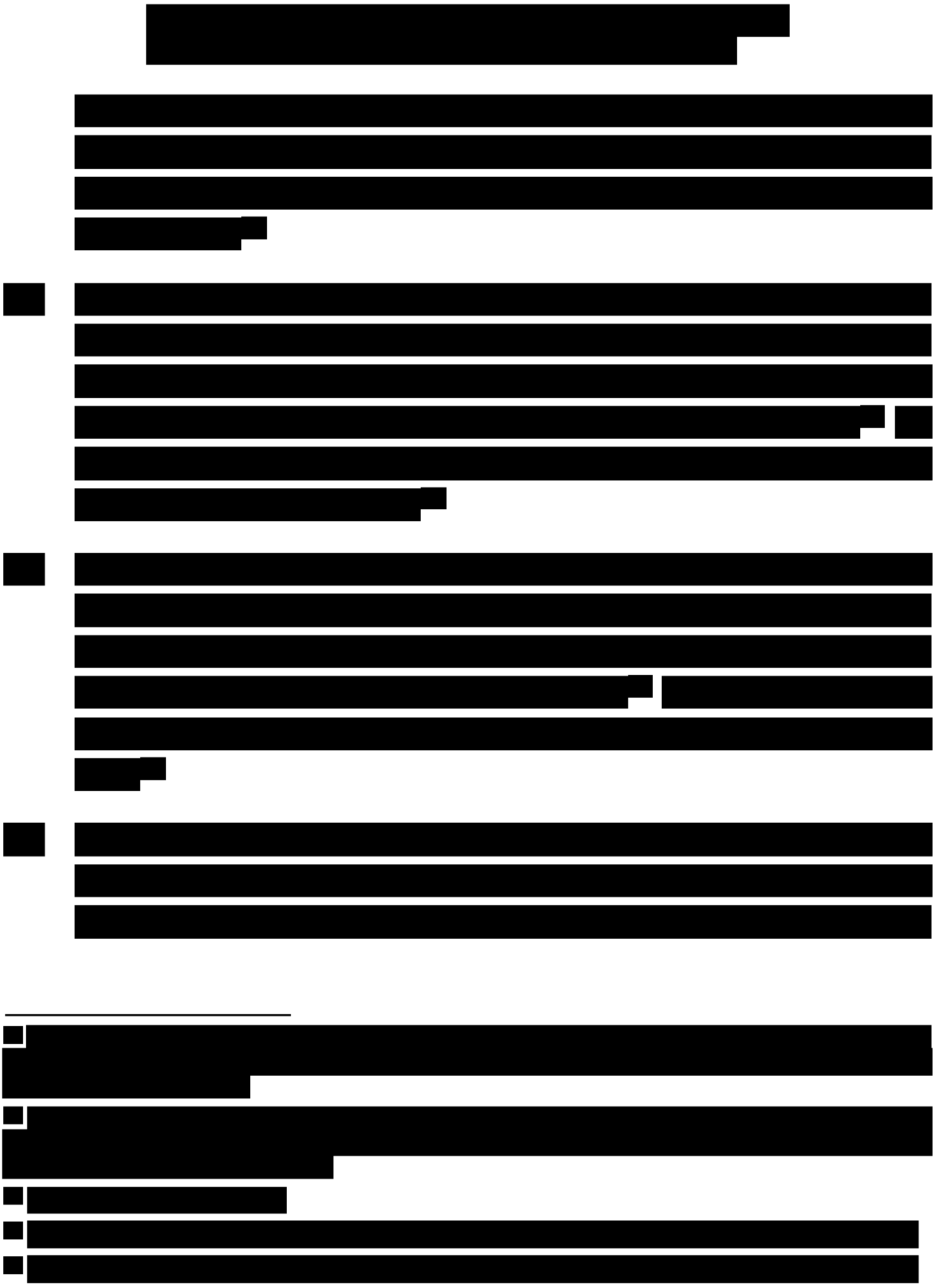

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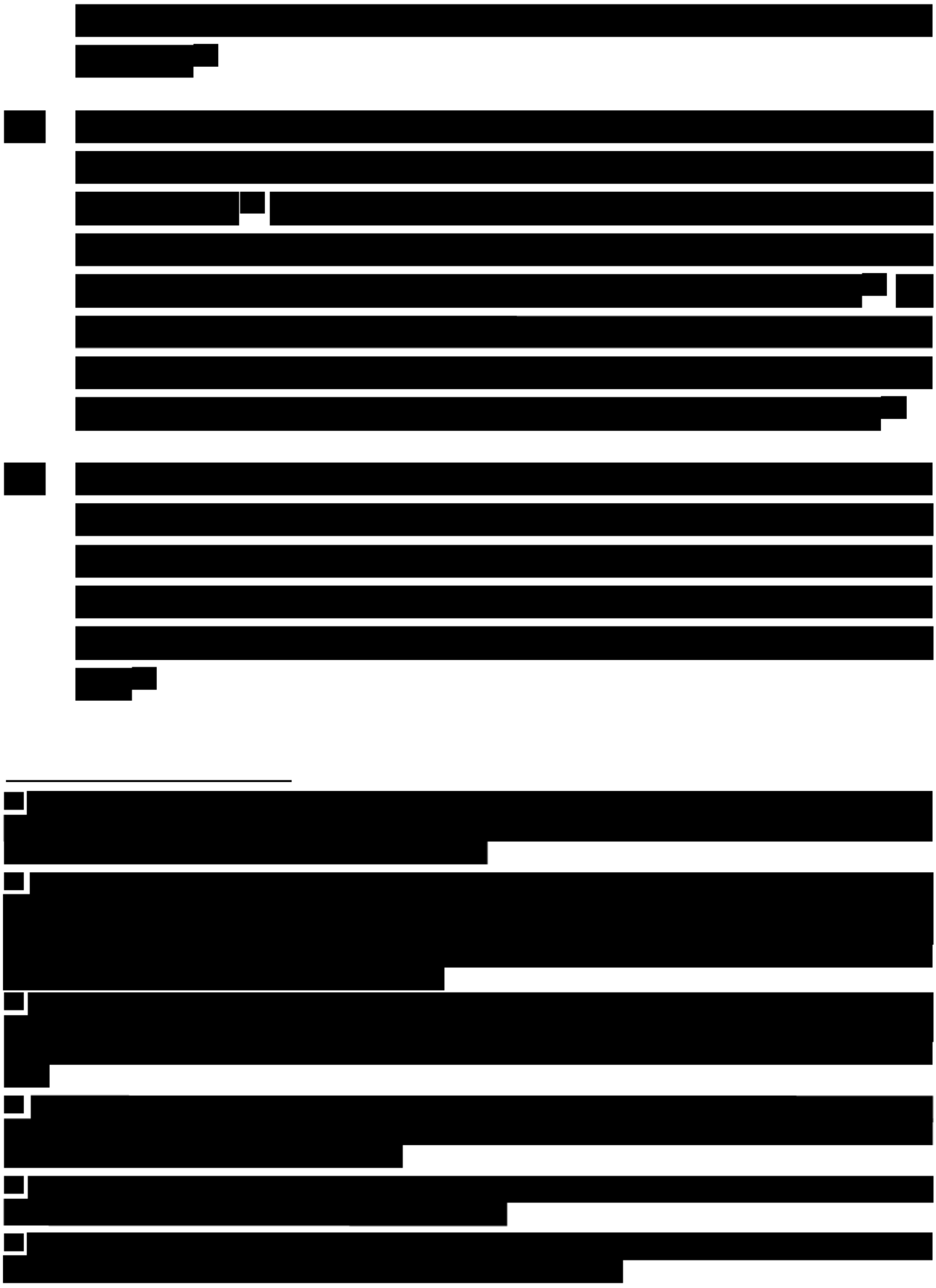
[redacted] [redacted].



[redacted]

[redacted]

(3) The Umbrella Clause

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(4) Full Protection and Security (FPS)

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(5) Expropriation

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(6) Undue or Discriminatory Impairment

[redacted]

[redacted]

[redacted]

C. DAMAGES

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

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[redacted]

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[redacted]

V. THE TRIBUNAL'S ANALYSIS

197. The analysis and conclusions that follow are adopted by majority. Arbitrator Webster has stated his views and conclusions in a dissenting opinion. The Tribunal begins its analysis by addressing the matter of its jurisdiction. [redacted] Further, the Respondent has not appeared in the proceeding. Nonetheless, in accordance with Article 48(3) of the Arbitration (AF) Rules, and to comply with the requirements of the BIT, the Tribunal must satisfy itself that it has jurisdiction to hear the case. The Tribunal has carefully analyzed the relevant factual background, including the witness testimony, the documentary evidence, the relevant authorities, and the Claimant's arguments, to make its determination.

198. The Claimant has addressed the Tribunal's jurisdiction *ratione personae*, *ratione materiae*, and *ratione temporis*. The Tribunal has no doubt that it has jurisdiction *ratione temporis* and *ratione personae*. [redacted] The Tribunal is not convinced that attribution relates to its jurisdiction; it is rather a matter of admissibility or merits. Regardless, the Tribunal has no doubt that the acts and omissions complained of are attributable to the Respondent. [redacted]. The key question is therefore that of

[redacted]

jurisdiction *ratione materiae*, *i.e.*, whether the Claimant has made an investment in the territory of Tajikistan; and the Tribunal now turns to analyze that issue.

199. [redacted] The Tribunal will begin its analysis with the BIT.

200. Article 13 of the BIT, which defines the scope of dispute settlement between an investor and the host State, provides:[291]

> *This Part [dealing with investor-State dispute settlement] applies to disputes between a Contracting Party and an investor of the other Contracting Party concerning an alleged breach of an obligation of the former under this Agreement which causes loss or damage to the investor or his investment.*

201. Article 1(2) defines the term "investment" as follows:[292]

> *(2) investment by an investor of a Contracting Party" means every kind of asset in the territory of one Contracting Party, owned or controlled, directly or indirectly, by an investor of the other Contracting Party. Investments are understood to have specific characteristics such as the commitment of capital or other resources, or the expectation of gain or profit, or the assumption of risk, and include:*
>
> *(a) an enterprise as defined in paragraph (3);*
>
> *(b) shares, stocks and other forms of equity participation in an enterprise as referred to in subparagraph (a), and rights derived there from;*
>
> *(c) bonds, debentures, loans and other forms of debt instruments and rights derived there from;*
>
> *(d) any right or claim to money or performance whether conferred by law or contract, including turnkey construction, management or*

[redacted]

[291] Exhibit CL-0001, BIT, Article 13.

[292] Exhibit CL-0001, BIT, Article 1(2).

revenue-sharing contracts, and concessions, licences, authorisations or permits to undertake an economic activity;

(e) intellectual property rights and intangible assets having an economic value, including industrial property rights, copyright, trademarks, trade dresses; patents, geographical indications, industrial designs and technical processes, trade secrets, trade names, know-how and goodwill;

(f) any other tangible or intangible, movable or immovable property, or any related property rights, such as leases, mortgages, liens, pledges or usufructs.

202. For the Tribunal to have jurisdiction under the BIT, the Claimant must have an investment as defined in Article 1(2) and the alleged breach must have caused loss or damage to the investor who made that investment or to the investment itself. Therefore, the key question the Tribunal must resolve is whether the Claimant has an investment in Tajikistan which has been harmed by the alleged breaching measures.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

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[redacted]

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210. Tribunals have ruled consistently that rights and claims under a contract may constitute a protected investment under a BIT.[304] But tribunals have also ruled consistently that not every type of contract constitutes a protected investment.[305] In particular, tribunals have declined to extend the definition of the term "investment" to cover sale of goods transactions.[306]

[redacted]

[304] *See, e.g.,* Exhibit CL-0014, *Saipem SpA v. the People's Republic of Bangladesh*; Exhibit CL-0018, *White Industries Australia Ltd. v. Republic of India*, UNCITRAL, Final Award, November 30, 2011; Claimant's Memorial, para. 210.

[305] *See, e.g.,* Exhibit CL-0015, *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award; Claimant's Memorial, para. 213.

[306] *See, e.g.,* Exhibit CL-0017, *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award, November 26, 2009. In that case, which has been much discussed in this proceeding, the tribunal appears to be proposing a hard distinction between "investments" and "purely commercial transactions" (at para. 185). The Tribunal is not persuaded by such a distinction, as investments are very much a part of international commerce.

[redacted]

[redacted]

213. In the view of the Tribunal, whether or not a transaction constitutes an investment cannot be determined by consideration of whether that transaction meets the requirements of duration, commitment of capital, expectation of profit and assumption of risk, independently of its true nature. Some ordinary sale of goods contracts can meet the criteria of duration (*e.g.*, a run-of-the-mill long-term purchase contract), commitment of capital (*e.g.*, pre-payments or advance payments for goods), expectation of profit (an attribute of any commercial transaction), and the assumption risk (*e.g.*, the risk of the other party breaching the contract). Therefore, the fact that a transaction may meet those criteria does not automatically make it an investment transaction, *i.e.*, an investment under the BIT.

[redacted]

215. The Tribunal has also considered the overall circumstances of the transaction, its context, [redacted]

[redacted]

[redacted]

216. In the view of the Tribunal, however, it is not unusual in the context of sale of goods transactions that a seller requires advance payments to finance the production of the goods in exchange for a price discount; that it might not be in a position to produce the goods without such advance payments; that it would commit to supply goods of a certain quality and quantity from specific production units; and that it would use the funds received to improve its production processes and equipment. [redacted]

217. In other words, to the extent that the Claimant committed capital, it was for the purpose of purchasing goods; to the extent that he expected profits, it was largely based on the price discount for the goods that he obtained in exchange for the pre-payment; and to the extent that he assumed risk, it was the risk that the [redacted] would not be delivered and that he would not be reimbursed for that non-delivery as provided in the Contracts and the Guarantees.

218. In sum, having carefully considered the nature of the [redacted] Contracts, the Tribunal concludes that they constitute an ordinary purchase of goods transaction and therefore do not qualify as protected investments under Article 1(2) of the BIT. It follows that the [redacted] Guarantees, which guarantee payments under those Contracts, do not qualify as protected investments under Article 1(2) of the BIT either – guaranteeing payments pursuant to a sale of goods contract does not constitute an investment. It further follows that any ownership rights over the goods subject to the sale of goods transaction [redacted] do not qualify as investments pursuant to Article 1(2) – because mere

[redacted]

ownership of goods in the territory of the host State, without more, does not constitute an investment.[315]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

223. To read Article 1(2)(d) as permitting "*any* right or claim to money or performance" (emphasis added) to qualify as an investment under the BIT is to read that provision out of context. Article 1(2)(d) must be read in the context of Article 1(2), and in particular the chapeau of that Article. Since the Tribunal has already established that the Guarantees do not qualify as an "investment" under the chapeau of Article 1(2), they cannot fall within the scope of item (d).

224. The Tribunal must consider one further question raised by the Claimant: whether the Swiss Chambers Award constitutes an investment. [redacted]

225. This argument does not help the Claimant. Taking the *Saipem* decision at face value, the tribunal in that case stated:[321]

> *This said, the rights embodied in the ICC Award were not created by the Award, but arise out of the Contract. The ICC Award crystallized the parties' rights and obligations under the original contract. It can thus be left open whether the Award itself qualifies as an investment, since the contract rights which are crystallized by*

[318] Exhibit CL-0001, BIT, Article 1(2)(d); Transcript, Day 2, pp. 43-45.

[redacted]

[321] Exhibit CL-0014, *Saipem SpA v the People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, March 21, 2007.

the Award constitute an investment within Article 1 (1) (c) of the BIT.

226. Thus, the Saipem tribunal itself accepted that an arbitral award would constitute an investment only if the rights and obligations pursuant to the underlying contract themselves qualified as an investment. The Tribunal has determined that the [redacted] Contracts and the [redacted] Guarantees do not constitute an investment. Therefore, the Swiss Chambers Award, which – in the words of the *Saipem* tribunal – "crystallized the parties' rights and obligations under the original contract," does not qualify as an investment either.

227. The conclusion of the Tribunal's analysis is that there is no qualifying investment and, therefore, the Tribunal lacks jurisdiction *ratione materiae* under the BIT.

228. [redacted]

229. The Tribunal does not find that the *Salini* criteria are of much assistance, particularly given the express requirement in the chapeau of Article 1(2) of the BIT that "[i]nvestments are understood to have specific characteristics such as the commitment of capital or other resources, or the expectation of gain or profit, or the assumption of risk." Where, as here, the contracting states to the BIT have expressly articulated such criteria, there can be no basis for the implication of further criteria – whether in the form of the *Salini* criteria or otherwise.

230. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

234. [redacted]

[redacted]

236. Thus, the additional evidence provided by the Claimant after the Hearing does not affect the Tribunal's conclusion that there is no qualifying investment under the BIT that has been harmed by the Respondent's acts or omissions.

237. Having concluded that it lacks jurisdiction *ratione materiae* under the BIT, the Tribunal does not need to address the Claimant's arguments that the Tribunal has jurisdiction pursuant to the ICSID Additional Facility Rules. Whether or not the transaction at issue in this case falls within the scope of Article 4 of the ICSID Additional Facility Rules, the Tribunal must have jurisdiction under the BIT to proceed to the merits of the dispute.

238. The Tribunal is thus compelled to dismiss the Claimant's claims on the basis of lack of jurisdiction under the BIT. Nevertheless, the Tribunal must address one additional matter.

239. The Tribunal wishes to note that, having reviewed the evidence carefully, it is of the view that, had it not declined to exercise jurisdiction over this dispute, it would have concluded that the Respondent breached the BIT. Indeed, the Swiss Chambers Award already determined that [redacted] wrongfully declined to honor the Guarantees. The Tribunal is of the view that the failure to honor the Guarantees was pretextual and arbitrary. Further, the refusal of the Respondent's courts to enforce the Swiss Chambers Award was also arbitrary and unreasonable.

240. To hold the Respondent liable under the BIT, the Tribunal must have jurisdiction over the dispute. The Tribunal's conclusion that it lacks jurisdiction under the BIT, however, should not be interpreted as justifying what the Tribunal believes was reprehensible conduct on the part of the Respondent.

[redacted]

VI. COSTS

[redacted]

A. CLAIMANT'S COST SUBMISSIONS

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

B. THE TRIBUNAL'S DECISION ON COSTS

246. Article 58 of the Arbitration (AF) Rules provides:

> *(1) Unless the parties otherwise agree, the Tribunal shall decide how and by whom the fees and expenses of the members of the Tribunal, the expenses and charges of the Secretariat and the expenses incurred by the parties in connection with the proceeding shall be borne. The Tribunal may, to that end, call on the Secretariat and the parties to provide it with the information it needs in order to formulate the division of the cost of the proceeding between the parties.*
>
> *(2) The decision of the Tribunal pursuant to paragraph (1) of this Article shall form part of the award.*

247. The Tribunal has concluded that there was no qualifying investment under the BIT and thus the Claimant did not prevail on jurisdiction *ratione materiae*. Therefore, the Tribunal rules that the Claimant should bear its own costs and fees.

248. The Tribunal's decision on the costs of the arbitration is another matter. It is based on several factors. One, the Respondent did not appear in the proceedings – conduct that should not be encouraged. Two, as noted above, the Tribunal – while lacking jurisdiction – believes that the Respondent's conduct vis-à-vis the Claimant has been reprehensible. Three, the Claimant's counsel acted professionally, competently and respectfully towards the Tribunal and its absent opponent. Based on those factors, in the exercise of its discretion pursuant to Article 58, the Tribunal decides that the costs of the arbitration should be divided equally between the Parties.

249. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in USD):

Arbitrators' fees and expenses	
Stanimir Alexandrov	183,493.82
Salim Moollan	102,035.14
Thomas Webster	127,755.24
ICSID's administrative fees	210,000.00

Direct expenses (estimated)[332]	14,379.81
Total	**637,664.01**

250. The above costs have been paid out of the advances made by the Claimant only.[333] The Respondent is ordered to reimburse Claimant in the amount of [redacted] which is 50% of the total costs of the arbitration.

VII. AWARD

251. For the reasons set forth above, the Tribunal decides by majority as follows:

(1) The Tribunal lacks jurisdiction to hear the merits of the case because of the absence of a qualifying investment pursuant to Article 1(2) of the BIT.

(2) All other claims are dismissed.

(3) The Respondent shall reimburse the Claimant the amount of [redacted], which is one half of the costs of the arbitration.

[332] This amount includes estimated charges relating to the dispatch of this Award (printing and courier).

[333] The ICSID Secretariat will provide the Parties with a detailed Financial Statement of the case account once all invoices are processed and paid, and the account is final. Any outstanding balance will be reimbursed to the Claimant.

Signed

Salim Moollan
Arbitrator

Date: November 30, 2023

Thomas Webster
Arbitrator
See the attached Dissenting Opinion

Signed

Stanimir Alexandrov
President of the Tribunal

Date: December 7, 2023

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

ALOIS SCHÖNBERGER

Claimant

and

REPUBLIC OF TAJIKISTAN

Respondent

ICSID CASE NO. ARB(AF)/19/1

DISSENT

Mr. Thomas Webster, Arbitrator

November 29, 2023

A. INTRODUCTION

1. This is a dissent (the "Dissent") with respect to the final award (the "Award") rendered by a majority of the Tribunal (the "Majority") in ICSID Case No. ARB (AF)/19/1 (the "Arbitration") between Mr. Alois Schönberger (the "Claimant") and the Republic of Tajikistan (the "Respondent" or "Tajikistan").[1] My understanding is that the Award was prepared by October 2, 2023.[2]

2. The Award deals with a dispute under the bilateral investment treaty between the Republic of Austria ("Austria") and the Tajikistan that entered into force on February 1, 2012 (the "BIT").[3] The dispute is subject ICSID's Additional Facility Rules of 2006 (the "AF Rules").

[redacted]

4. One of the particularities of this arbitration is that the Respondent did not participate in the proceedings except for an initial objection to jurisdiction. Therefore, several

---

[1] Unless otherwise defined herein, capitalized terms that are defined in the Award have the same meaning in this Dissent.

[2] In accordance with Article 52(2) of the AF Rules, the Majority signed or will sign the Award as the members voting for it. This Dissent is to be attached to the Award pursuant to Article 52(2) of the AF Rules.

As noted in para. 65 of the Award, on October 2, 2023, the President sent an email to the Parties stating that "*The award has been prepared*" offering to transmit it at that time to the Parties. Therefore, the Majority's Decision was final at that time. This Dissent was prepared thereafter. It was not transmitted to the Majority prior to being signed, as the award had already been prepared by October 2, 2023. (The version of the Award transmitted to me on November 9, 2023 apparently includes some minor corrections to the Award as previously finalized.)

[3] To the extent that other bilateral investment treaties are referred to herein, they are referred to as the "relevant BIT".

[redacted]

main issues relating to jurisdiction referred to below were raised *sua sponte* by the Tribunal.

5. This Dissent is longer than I would have liked. However, since this Dissent relates to both the analysis of the Majority Decision and my Dissenting Opinion dealing with the relevant legal authorities in the record and the factual background, it is important to set them both out in some detail. Set out below is (B) the Overview, (C) Jurisdiction Rationae Materiae with in particular a discussion of the Majority's Decision and Dissenting Opinion and (D) the Conclusion.

B. OVERVIEW

6. This Dissent relates to the Majority's determination that the Tribunal has no jurisdiction over the dispute in this arbitration ratione materiae.[6] The Majority makes this determination on the basis that, in the Majority's view, the Claimant did not make an investment within the meaning of the BIT (the "Majority's Determination"). This Dissent relates to both procedural and substantive issues relating to the Majority's Determination.

7. As discussed beginning at para. 80 below, Article 1(2) of the BIT provides a definition of the term investment. It also states that "*Investments are understood to have specific characteristics such as the commitment of capital or other resources, or the expectation of gain or profit, or the assumption of risk...*" Therefore unlike with certain other relevant BITS, the BIT in this case has a definition of an investment and a list of three criteria for what constitutes an investment.

8. In my view, the proper analysis for jurisdiction ratione materiae in this arbitration is to apply the definition and those three criteria of an investment in Article 1(2) of the BIT to determine whether or not the Claimant's Contracts and therefore the Relevant Transaction constitute an investment within the meaning of the BIT.

9. In the Award, the Majority adopts a different approach. The Majority does not analyse in any detail the BIT's definition of investment and the three criteria for investments. Although it quotes Article 1(2) and sets out the Claimant's position with respect thereto in paras. 201 to 208 of the Award, the Majority starts from the premise

[6] The Majority accepts that there is jurisdiction in this arbitration ratione personae. Therefore, this issue will not be addressed in the Dissent.

that an "*ordinary sale of goods contracts*" cannot constitute an investment under the BIT and then holds that the Claimant's Contracts are "*ordinary sale of goods contracts*" based on the Majority's view of the "*intrinsic meaning*" of investment and the "*true nature*" of he Claimant's Contracts.

10. The Majority cites no legal authority for the Majority's decision to basically ignore the definition of investment and the three criteria set out in Article 1(2) of the BIT and impose its own requirement that a contract cannot be what the Majority considers "*ordinary sale of goods contracts*". Nor does the Majority provide any definition for that term by reference to any legal authority of what an ordinary sale of goods contract is. The Majority Determination appears to be based on a pre-existing conception of (i) what that term means, (ii) how that term is part of an overriding intrinsic requirement for an investment under the BIT and (iii) the "*true nature*" of certain [redacted] purchase contracts.

11. I disagree with the Majority's position for three main reasons.

12. *First*, in my view, the Majority does not apply the terms of the BIT. The Tribunal's obligation under the BIT and the AF Rules is to apply the rules of law applicable to the dispute. To apply such rules of law, the analysis of a tribunal should be based on the terms of the BIT, the Vienna Convention, the AF Rules and the legal authorities that form part of the record.

13. In my view, the Majority Determination imposes a legal requirement which is not based on the legal authorities or the definition of investment under the BIT. This is of particular concern because the BIT does provide a definition of what constitutes an investment and the criteria therefor. To paraphrase the tribunal in *White Industries*,[7] the problem with the Majority's approach is that there is no support for it in the BIT.

14. *Second*, the Majority has failed to raise its additional requirement for an investment in advance of the hearing so as to permit the Claimant to respond. The Respondent defaulted in this arbitration and the Majority raised the issue of the ordinary sale of goods *sua sponte*.[8] If the Majority had a specific view as to this being a requirement for an investment under the BIT and as to what "*an ordinary sale of goods contract*"

[7] Exhibit CL-0018- *White Industries Australia Ltd. v Republic of India*, UNCITRAL, Final Award, 30 November 2011. ("White Industries Award")

[8] See Transcript, Day 2, p. 43 line 23 to p. 44 line 6.

was, it should have set out the two related issues prior to the Hearing so that the Claimant could address them. I do not see how a party can anticipate the imposition of a requirement not found in the language in the BIT. Nor do I understand even now what exactly the Majority means or could mean by "*an ordinary sale of goods contract*" in the context of this arbitration. And, once the Majority had decided to impose this additional requirement, there was a risk that it had prejudged the issue.

15. *Third*, applying any reasonable standard, the Claimant's Contracts were not "ordinary sales of goods". Based on the circumstances of the Relevant Transaction (as discussed beginning at para. 124 below), in my opinion, the Claimant's Contracts were investments as defined in the BIT. Even applying the Majority's requirement that the Claimant's Contracts not be "*ordinary sales of goods*" and giving that expression any reasonable meaning, I simply do not understand how one could qualify the Relevant Transaction an "*ordinary sale of goods*". I note in particular with respect to the Relevant Transaction that there are a number of uncontradicted facts that demonstrate the particularities of the Claimant's Contracts and the overall Relevant Transaction:[9]

[redacted]

[9] For a more detailed discussion see the discussion of the background beginning at para. 124 below.

[redacted]

16. For the above reasons, the Relevant Transaction was not an "*ordinary sale of goods*" whatever the exact meaning of that term may be. On the contrary. [redacted]

[redacted]

C. JURISDICTION RATIONE MATERIAE

Introduction

[redacted]

19. Unlike in most proceedings with a defaulting respondent, the Tribunal did not set out questions ahead of the Hearing so that the Claimant could address them in a second memorial, although the Tribunal did permit certain additional submissions after the Hearing.

20. As a result, the Hearing was based on the evidence and legal authorities submitted by the Claimant with its sole memorial. The Tribunal should of course test the Claimant's evidence and its legal authorities to determine whether the Tribunal has jurisdiction. However, in doing so, in my view, a tribunal should not take up the role of the defaulting respondent or rely on authorities that are not part of the record. In my view, that would be a breach of due process. In addition, to the extent that a tribunal relies on legal authorities that are not part of record, there is a real risk of surprise to a claimant. Where a tribunal simply imposes its own opinions with no legal authority, the situation is worse. Unfortunately, with great respect, for the reasons set out below, I am concerned that, unintentionally, this may be what happened in this case.

The Majority Decision

21. The Majority summarizes the reasons for the Majority Decision as follows in the Award with bracketed letters inserted for purposes of discussion:

> *210. Tribunals have ruled consistently that rights and claims under a contract may constitute a protected investment under a BIT. [FN 304[10]] But tribunals have also ruled consistently that not every type of contract constitutes a protected investment. [FN 305][11] In particular, tribunals have declined to extend the definition of the term "investment" to cover sale of goods transactions. [FN 306[12]]*
>
> [redacted]
>
> *213. **[A]** In the view of the Tribunal, whether or not a transaction constitutes an investment cannot be determined by consideration of whether that transaction meets the requirements of duration, commitment of capital, expectation of profit and assumption of risk, independently of its true nature. **[B]** Some ordinary sale of goods contracts can meet the criteria of duration (e.g., a run-of-the-mill long-term purchase contract), commitment of capital (e.g., pre-payments or advance payments for goods), expectation of profit (an attribute of any commercial transaction), and the assumption risk (e.g., the risk of the other party breaching the contract). Therefore, the fact that a transaction may meet those criteria does not automatically make it an investment transaction, i.e., an investment under the BIT.*

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[10] FN 304: "*See, e.g., Exhibit CL-0014, Saipem SpA v the People's Republic of Bangladesh; Exhibit CL-0018, White Industries Australia Ltd. v Republic of India, UNCITRAL, Final Award, November 30, 2011; Claimant's Memorial, para. 210.*"

[11] FN 305: "*See, e.g., Exhibit CL-0015, GEA Group Aktiengesellschaft v Ukraine, ICSID Case No. ARB/08/16, Award; Claimant's Memorial, para. 213.*"

[12] FN 306: "*See, e.g., Exhibit CL-0017, Romak S.A. (Switzerland) v. The Republic of Uzbekistan, UNCITRAL, PCA Case No. AA280, Award, November 26, 2009. In that case, which has been much discussed in this proceeding, the tribunal appears to be proposing a hard distinction between "investments" and "purely commercial transactions" (at para. 185). The Tribunal is not persuaded by such a distinction, as investments are very much a part of international commerce.*"

[redacted]

[redacted]

[A] In the view of the Tribunal, whether or not a transaction constitutes an investment cannot be determined by consideration of whether that transaction meets the requirements of duration, commitment of capital, expectation of profit and assumption of risk, independently of its true nature.

22. In **[A]**, the Majority set out a key determination as to the legal principles applicable. The Majority categorically rejects the Claimant's position set out in para. 212 of the Award. Para. 213 of the Award sets out no legal authority for the Majority's determination. If one refers back to the prior paragraphs of the Award, the Majority refers to one relevant award, the *Romak* award, which it dismisses.

23. I disagree with the Majority's determination in **[A]** for three reasons:

(1) Article 54(1) of the AF Rules, states that the "*Tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute*." This is a requirement that the Tribunal identify the rules of law and then apply them. In making the determination in **[A]**, the majority does not set out any basis for its determination. The Majority simply states its opinion. In my view, that does not meet the requirements of Article 54(1) of the AF Rules. It is closer to deciding the case ex aequo et bono, which the Tribunal was not entitled to do.

(2) Unlike in *Romak*, the BIT in this case sets out the criteria for an investment stating: "*Investments are understood to have specific characteristics such as the commitment of capital or other resources, or the expectation of gain or profit, or the assumption of risk...*" The Majority rejects those as the criteria focusing on the "*intrinsic nature*" of an investment with no legal authority. However, as stated in *White*

[19] FN 315: "*The Tribunal further notes that the Claimant has in any event not proven that title to the* [redacted] *had in fact passed to it upon conclusion of the sale of goods transaction (as opposed, for instance, to being dependent on the specific appropriation of generic* [redacted] *to the contract) under English law (which governed the sale contracts).*"

Industries, the duty of a tribunal is to apply the language of the relevant BIT, not to impose some overall requirement without reference to the relevant BIT. [20]

(3) Instead, the Majority bases its determination on the "*true nature*" of the transaction. The "*true nature*" of the transaction in the Majority's view is discussed below. However, to me, the Majority's reliance on this subjective term is not compelling. Nor does it relate to the language used in Article 13 and 1(2) of the BIT or the Vienna Convention. As discussed below, the Majority has simply decided – with no legal authority – to impose a further requirement in addition to the criteria for investment set out in Article 1(2) of the BIT.

[B] *Some ordinary sale of goods contracts can meet the criteria of duration (e.g., a run-of-the-mill long-term purchase contract), commitment of capital (e.g., pre-payments or advance payments for goods), expectation of profit (an attribute of any commercial transaction), and the assumption risk (e.g., the risk of the other party breaching the contract). Therefore, the fact that a transaction may meet those criteria does not automatically make it an investment transaction, i.e., an investment under the BIT.*

24. In this extract, the Majority doubles down on its analysis of why not all ordinary sale of goods contracts do not meet the requirements of an investment. As I understand the Majority's view, "*ordinary sale of goods contracts*" cannot be investments under any circumstances – whatever the wording of the BIT. Again, this is done with no authority and crucially there is no definition of what an ordinary sale of good contracts is. Finally, as far as I can determine, this point was first raised by the Tribunal in the Hearing.

[redacted]

25. The Majority refers in the footnote to an argument made by the Claimant in response to the Majority's reliance on "*ordinary sales contracts*" during the Hearing. It is an illustration of the situation in which the Claimant found itself: dealing with new arguments raised by the Tribunal during the Hearing. Moreover, those arguments

[20] As stated by the tribunal in the *White Industries Award*: "*7.3.8 The difficulty with India's position on this point is that the BIT simply does not provide that, in order to be a covered investment, the investment must be a right "in rem", or must have Douglas's economic characteristics.*".

were not raised based on authority but based on the Majority's inherent believe that there was a concept of "*ordinary sales contract*" and that the Claimant's contracts fell within that category.

[redacted]

26. For the reasons set out at para. 136 below, I disagree with the Majority's determination that the Claimant's contracts constituted the "*ordinary purchase* [redacted] whatever the Majority may mean by this term. Moreover, the central issue in my view is whether the Claimant is entitled to rely on Article 1(2) of the BIT, and the Majority's discussion deviates from a discussion of those provisions.

[E] *The Tribunal has also considered the overall circumstances of the transaction, its context, and in particular the Claimant's argument that the Respondent invited him to "invest" in Tajikistan's* [redacted] *industry...*

27. In para. 215 of the Award as set out in **[E]**, the Majority states that it considered the overall circumstances and in particular the argument that the Respondent invited him to invest in Tajikistan's [redacted] industry. As reflected in the discussion at para. 130 below, I agree with the Majority that it is essential to consider the circumstances relating to the Claimant's Contracts and the Relevant Transaction. Unfortunately, as discussed under **[F]**, the Majority ignores those circumstances.

[F] *In the view of the Tribunal, however, it is not unusual in the context of sale of goods transactions that a seller requires advance payments to finance the production of the goods in exchange for a price discount; that it might not be in a position to produce the goods without such advance payments; that it would commit to supply goods of a certain quality and quantity from specific production units; and that it would use the funds received to improve its production processes and equipment.*

28. After referring to the invitation to invest as a factor in **[E]**, the Majority ignores it in **[F]**. The Majority then sets out at some length what the Majority views as "not unusual" in what it views apparently as an ordinary commercial sale of [redacted] contract.

29. I am not aware of any support for the Majority's position in the record. It appears to reflect a personal, detailed understanding of a specific industry (sale of [redacted]) that has no support in the record in this case. For the reasons discussed beginning at para. 137 below, I disagree.

[G] *In sum, having carefully considered the nature of the [redacted] Contracts, the Tribunal concludes that they constitute an ordinary purchase of goods transaction and therefore do not qualify as protected investments under Article 1(2) of the BIT.*

30. In **[G]**, the Majority sets out its determination that because the Claimant's Contracts "*constitute an ordinary purchase of goods transaction and therefore do not qualify as protected investments under Article 1(2) of the BIT.*" As noted with respect to **[A]**, the Majority's entire analysis is based on the concept of the "*ordinary purchase of goods*". It provides no legal authority for defining let alone using this criteria. And the Majority reaches this conclusion without addressing the terms used in Article 1(2) of the BIT. For the reasons set out beginning at para. 80, I disagree.

[H] *The conclusion of the Tribunal's analysis is that there is no qualifying investment and, therefore, the Tribunal lacks jurisdiction ratione materiae under the BIT.*

31. For the reasons set out beginning in para. 80 below, I disagree with this determination.

The Dissenting Opinion

Legal authorities

The BIT and its Interpretation

32. For good order set out below are certain relevant provisions of the BIT:

> ***The REPUBLIC OF AUSTRIA and the REPUBLIC OF TAJIKISTAN,*** *hereinafter referred to as "Contracting Parties",*
>
> *[...]*
>
> ***RECOGNISING*** *that agreement upon the treatment to be accorded to investors and their investments will contribute to the efficient utilisation of economic resources, the creation of employment opportunities and the improvement of living standards;*
>
> ***EMPHASISING*** *that fair, transparent and predictable investment regimes based on the rule of law both complement and benefit the world trading system;*
>
> *[...]*
>
> ***ARTICLE 1***
>
> *Definitions*
>
> *[See para. 79 below for the definition of investment]*
>
> ***ARTICLE 11***
>
> *Other Obligations*

(1) Each Contracting Party shall observe any obligation it may have entered into with regard to specific investments by investors of the other Contracting Party.

This means, inter alia, that the breach of a contract between the investor and the host State or one of its entities will amount to a violation of this treaty.

[...]

ARTICLE 13

Scope and Standing

This Part applies to disputes between a Contracting Party and an investor of the other Contracting Party concerning an alleged breach of an obligation of the former under this Agreement which causes loss or damage to the investor or his investment.

[...]

ARTICLE 18

Applicable Law

(1) A tribunal established under this Part shall decide the dispute in accordance with this Agreement and applicable rules and principles of international law.

(2) Issues in dispute under Article 13 shall be decided, absent other agreement, in accordance with the law of the Contracting Party, party to the dispute, the law governing the authorisation or agreement and such rules of international law as may be applicable.

33. As regards the interpretation of the BIT, Articles 31 and 32 of the Vienna Convention on the Law of Treaties of 1969 (the "Vienna Convention") provide as follows:

SECTION 3. INTERPRETATION OF TREATIES

Article 31
General rule of 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 connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

[...]

Article 32
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

34. For standing under Article 13 of the BIT, a claimant must be an investor (as defined in the BIT and as to which there is no dispute) and there must be an allegation of loss or damage to the investor or to an investment (as to which there is no dispute). Issues with respect to Article 13 are to be decided under the law of Tajikistan and international law.

35. Under Article 18(1) of the BIT, any dispute shall be decided in accordance with the BIT and with applicable rules and principles of international law.

The relevant cases

36. The Claimant has cited several key arbitral awards with respect to jurisdictional issues. These authorities are discussed below. These arbitral awards discuss in particular issues of interpretation of BITs and the ICSID convention. The Tribunal is not bound by such awards but I consider them helpful in interpreting the principles of international law relevant to this arbitration. The relevant legal principles are summarized at para. 57 below.

37. In *Suez v. Argentina*[21] the tribunal decided whether it had jurisdiction with respect to certain claims. The tribunal's description of the relevant facts is brief, but it includes in particular the following:

21. ...Starting in 1990, [Argentina] also began to conclude bilateral treaties "for the reciprocal promotion and protection of investments" with various countries.

22. 2. As part of its reform and privatization program, Argentina enacted Decree No. 2074/90 of October 5, 1990 to establish a regulatory framework by which various designated public services, including OSN, would be privatized and transferred to private and foreign investors through a bidding process whereby they would be granted long term concession agreements that would require the infusion by investors of new capital and technology. The federal government actively publicized its desire to privatize these services and made significant efforts, including a road show in Brussels, to interest

[21] Exhibit CL-006- *Suez v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction (3 August 2006)

particularly qualified foreign enterprises to invest in the privatized entities, preparing and distributing a prospectus toward this end.

38. There are two relevant background facts in *Suez v. Argentina*: (1) Argentina had recently entered into BITS to encourage investments in Argentina and (2) Argentina actively sought to interest foreign investors in investments.

39. In *Salini Construttori S.P.A. and Italstrade S.P.A v. Kingdom of Morocco*,[22] the issue was whether a highway construction project amounted to an investment. The tribunal held that it did stating in part as follows:

> *51. No definition of investment is given by the Convention. [...]*
>
> *52. [...]The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction (cf commentary by E. Gaillard, cited above, p. 292). In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.*
>
> *In reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the contributions and the duration of performance of the contract. As a result, these various criteria should be assessed globally even if, for the sake of reasoning, the Tribunal considers them individually here.*
>
> *53. The contributions made by the Italian companies are set out and assessed in their written submissions. It is not disputed that they used their know-how, that they provided the necessary equipment and qualified personnel for the accomplishment of the works, that they set up the production tool on the building site, that they obtained loans enabling them to finance the purchases necessary to carry out the works and to pay the salaries of the workforce, and finally that they agreed to the issuing of bank guarantees, in the form of a provisional guarantee fixed at 1.5% of the total sum of the tender, then, at the end of the tender process, in the form of a definite guarantee fixed at 3% of the value of the contract in dispute. The Italian companies, therefore, made contributions in money, in kind, and in industry.*
>
> *[...].*
>
> *55. With regard to the risks incurred by the Italian companies, these flow from the nature of the contract at issue. The Claimants, in their reply memorial on jurisdiction, gave an exhaustive list of the risks taken in the performance of the said contract. Notably, among others, the risk associated with the prerogatives of the Owner permitting him to prematurely put an end to the contract, to impose variations within certain limits without changing the manner of fixing prices; the risk consisting of the potential increase in the cost of labour in case of modification of Moroccan law; any accident or damage caused to property during the performance of the works; those risks relating to problems of co-*

[22] Exhibit CL-0013.

ordination possibly arising from the simultaneous performance of other projects; any unforeseeable incident that could not be considered as force majeure and which, therefore, would not give rise to a right to compensation; and finally those risks related to the absence of any compensation in case of increase or decrease in volume of the work load not exceeding 20% of the total contract price.

[...]

58. Consequently, the Tribunal considers that the contract concluded between ADM and the Italian companies constitutes an investment pursuant to Articles 1 and 8 of the Bilateral Treaty concluded between the Kingdom of Morocco and Italy on July 18, 1990 as well as Article 25 of the Washington Convention.

40. *Salini* was an ICSID case and not a case decided purely under a BIT. Nor was there a definition of "investment" in the relevant case. As a result, the four criteria in Salini for an investment are not as such applicable. However, what is of interest is that a construction contract for a highway was viewed as an investment and the discussion in the award of contributions and of the risks assumed by the investor.

41. In *Romak S.A. v The Republic of Uzbekistan*,[23] Romak S.A. ("Romak") brought an arbitration against the Republic of Uzbekistan. This resulted in an award (the "Romak Award") under the bilateral investment treaty between Switzerland and Uzbekistan (the "Swiss/Uzbek BIT").

42. The basic facts in Romak are as follows. In July 1996, Romak entered into an agreement (the "Romak Supply Agreement") with an Uzbek entity (Uzdon) pursuant to which Romak was to supply the 50,000 tons of third class milling wheat. The price for the wheat was US$235 per ton on terms "*C.I.P (Carriage and insurance paid to) the Kazakh-Uzbek border station Chengeldy*." (Romak Award, para. 35) Therefore, the wheat was produced outside of Uzbekistan, title to the wheat passed at the Kazakh-Uzbek border and the purchase was subject to the INCOTERMS (CIP Chengeldy).[24]

43. Pursuant to the Romak Supply Agreement, Romak delivered 40,581 tons of wheat. However, Uzdon did not pay for the wheat. Romak brought a GAFTA arbitration which resulted in an award in its favor (the "GAFTA Award"). Romak was unable to

[23] Exhibit CL-0017- *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award, 26 November 2009 (the "Romak Award").

[24] Romak Award, para. 234.

enforce the GAFTA Award in Uzbekistan and elsewhere and brought an arbitration under the Swiss BIT.

44. The Swiss/Uzbek BIT contained a list of investments but did not contain any substantive description of what constituted an investment. Romak argued for a literal approach under which the tribunal had jurisdiction because the list in Article 1 of the Swiss BIT covered the rights that Romak had in particular under the Romak Supply Agreement and the GAFTA Award. Uzbekistan maintained that the tribunal should not adopt a literal reading of the definition section 1(2) of the Swiss BIT but limit that literal meaning by the overall meaning of the term "investment".

45. In essence, the tribunal agreed with Uzbekistan's approach stating:

> *183. The Arbitral Tribunal therefore considers that a construction based solely on the "ordinary meaning" of the terms of the list contained in Article 1(2) of the BIT, as advocated by Romak, is inconsistent with the given context and ignores the object and purpose of the BIT.*
>
> *184. In addition, for a number of reasons the Arbitral Tribunal finds that a mechanical application of the categories listed in Article 1(2) of the BIT would produce "a result which is manifestly absurd or unreasonable." Such an outcome is contrary to Article 32(b) of the Vienna Convention.*
>
> *185. First, said interpretation would eliminate any practical limitation to the scope of the concept of "investment." In particular, it would render meaningless the distinction between investments, on the one hand, and purely commercial transactions, on the other. [...]*
>
> *186. Second, the mechanical application of the categories found in Article 1(2) would create, de facto, a new instance of review of State court decisions concerning the enforcement of arbitral awards. [...]*
>
> *187. Finally, the approach that Romak advances would mean that every contract entered into between a Swiss national and a State entity of Uzbekistan (regardless of the nature and object of the contract), as well as every award or judgment in favor of a Swiss national (irrespective of the nature of the underlying transaction), would constitute an investment under the BIT. [...]*
>
> *188. Based on the above considerations, Romak's proposed literal construction of Article 1(2) of the BIT is untenable as a matter of international law. The Arbitral Tribunal must therefore explore the meaning of the word "investments" contained in the introductory paragraph of that Article. As stated above at paragraph 180, the categories enumerated in Article 1(2) are not exhaustive and are clearly intended as illustrations. Thus, for example, while many "claims to money" will qualify as "investments," it does not follow that all such assets necessarily so qualify. The term "investments" has an intrinsic meaning, independent of the categories enumerated in Article 1(2). This meaning cannot be ignored.*

> *189. In construing the term "investments," the Arbitral Tribunal will have due regard to the object and purpose of the BIT which, by referring to "economic cooperation to the mutual benefit of both States" and to the "aim to foster the economic prosperity of both States," suggests an intent to protect a particular kind of assets, distinguishing them from mere ordinary commercial transactions. However, it is also plain that the BIT's stated object and purpose sheds little light on the meaning of the term "investments," and "leaves [it] ambiguous or obscure".*

46. The tribunal held that there was no investment due to the lack of contribution, lack of duration and lack of investment risk stating in particular that:

> *222. The only possible contribution established in the evidentiary record is the actual transfer of title over the 40,581.58 tons of wheat, the delivery of which has never been contested. However, as noted above, there is a difference between a contribution in kind and a mere transfer of title over goods in exchange for full payment. Romak's delivery of wheat was a transfer of title in performance of a sale of goods contract. Romak did not deliver the wheat as contribution in kind in furtherance of a venture. Accordingly, the Arbitral Tribunal does not consider that Romak made a contribution in relation to the transaction in question.*

47. *Romak* is of interest in particular as it discusses, within the context of a sale of goods, the various requirements for an investment where the relevant BIT provided no criteria for an investment. In particular, Romak sets out what the tribunal in that case considered a normal commercial transaction: *"a mere transfer of title over goods in exchange for full payment."* In reaching that conclusion, the tribunal in Romak clearly sought to follow the BIT and the provisions of the Vienna Convention to reach its conclusion.

48. In *GEA Group Aktiengesellschaft v. Ukraine*,[25] the claimant (GEA) alleged that Ukraine breached the Bilateral Investment Treaty between Germany and Ukraine (the "German/Ukrainian BIT"). GEA was the indirect assignee through a company referred to as "KCH" of certain claims against a former state-owned entity, or kombinat, known as OJSC Oriana ("Oriana"). These claims were pursuant to an agreement dated December 13, 1995, between a predecessor in interest to KCH and Oriana under which Oriana was to be provided each year with 200,000 tons of naphtha fuel for conversion into certain products (the "Conversion Contract"). A dispute arose and the parties to the Conversion Contract entered into a settlement

[25] Exhibit CL-0015- GEA Group Aktiengesellschaft v. Ukraine, Award dated 31 March 2011.

agreement (the "Settlement Agreement") which resulted in an ICC Arbitration (the "ICC Arbitration Award").

49. GEA maintained that the Conversion Contract, the Settlement Agreement and the ICC Arbitration Award were all investments within the meaning of the German/Ukrainian BIT and the ICSID Convention. The Respondent denied that this was the case.

50. The tribunal held that the Conversion Contract and the transformed naphtha (the Products) were an investment and that the Settlement Agreement and ICC Arbitration Award were not investments within the meaning of the German/Ukrainian BIT.

51. As regards the Conversion Contract, Ukraine maintained that it was "*no more than a sales agreement, which did not confer on GEA any "rights to the exercise of an economic activity.*""[26] The tribunal analysed this issue as follows with respect to the German/Ukrainian BIT:[27]

> *146. (i) The Conversion Contract and the Products. The Tribunal accordingly starts with an examination whether the Conversion Contract may constitute an investment, together with the property rights in the products delivered under the Conversion Contract, under the BIT and/or the ICSID Convention.*
>
> *[...]*
>
> *149. The Tribunal notes that in the present case, according to the BIT itself, its terms have to be interpreted in the broader context of an investment operation, as is clear from the last sentence of Article 1(1) stating that "(a)ny change to the form in which assets are invested shall not affect their nature as investments." (emphasis added) The question therefore is whether the Conversion Contact fits within the nature of an "investment," as understood in the BIT. In this context, the Tribunal considers that, on its face, the Conversion Contract conveyed the right for GEA, through KCH, to exercise an economic activity in Ukraine at the relevant time. In addition, contrary to the Respondent's contentions, the Conversion Contract was more than just goods against a tolling fee – it established a relationship of "common interest" whereby KCH (and, ultimately GEA) would, among other things, assist with delivery of logistics and pay for Ukrainian domestic freight, resolve customs issues, and supply the Oriana plant with necessary materials.*
>
> *150. Accordingly, the Tribunal is satisfied that the Conversion Contract constitutes an investment within the meaning of Article 1(1)(e) of the BIT, in that it confers "rights to the exercise of an economic activity." Further, the Tribunal is satisfied that the Products constitute an investment under Article*

[26] Exhibit CL-0015- GEA Group Aktiengesellschaft v. Ukraine, Award dated 31 March 2011, para. 131.

[27] Beginning at para. 151 of the Award, the tribunal also analyzed Article 25 of the ICSID Convention on the basis that some authorities maintain that the provision imposes an additional requirement for jurisdiction in a case subject to the ICSID Convention.

1(1)(a), as they form an integral part of the investment under the Conversion Contract.

52. In *GEA v. Ukraine*, the tribunal started off by analysing the precise terms of the BIT to determine whether the Conversion Contract fell within them. The tribunal rejected the Respondent's argument that the Conversion was just "*goods against a tolling fee*" as it involved "*among other things, assist with delivery of logistics and pay for Ukrainian domestic freight, resolve customs issues, and supply the Oriana plant with necessary materials.*"

53. In *White Industries*,[28] the dispute related to a contract (the "White Contract") pursuant to which the claimant in that arbitration supplied equipment to and assisted in the development of a coal mine in India. A dispute arose which resulted in an ICC award in favor of the claimant. The respondent in the ICC arbitration sought annulment of the ICC award in India and the proceedings dragged on without a final decision of the Indian courts. The claimant brought an UNCITRAL arbitration that resulted in an award in favor of White Industries. The relevant BIT contained a definition of investment.

54. At para. 7.3.1 of the award, the tribunal set out the definition of investment from the relevant BIT and then stated:

> *7.3.2 The correct approach to be adopted by the Tribunal in assessing whether an "investment" has been made is to consider the plain and ordinary meaning of the words used in the BIT in their context and in the light of its object and purpose and to determine whether the matters relied on by White satisfy the definition employed in the BIT.*

55. Beginning at para. 7.3.3 of the award, the tribunal discusses India's arguments that the rights must be in rem and not in personam stating in particular as follows:

> *7.3.3 India's principal arguments against White having made an "investment" are based on the writings of Zachary Douglas, who sets out what he considers to be an appropriate general test of what constitutes an "investment". This test is said to be applicable in all investment treaty claims - regardless of whether they are brought under the ICSID Convention, the UNCITRAL or any other rules of arbitration.*
>
> *7.3.4 For Douglas, it is essential than an "investment" have certain legal and economic characteristics....*

---

[28] Exhibit CL-0018- *White Industries Australia Ltd. v Republic of India*, UNCITRAL, Final Award, 30 November 2011.

[...]

7.3.8 The difficulty with India's position on this point is that the BIT simply does not provide that, in order to be a covered investment, the investment must be a right "in rem", or must have Douglas's economic characteristics. Indeed, the BIT expressly includes in its definition of an "investment" what can only be in personam rights, namely: the "right to money or to any performance having a financial value, contractual or otherwise". And this is precisely what White had under the Contract: a "right to money" from Coal India for the performance of its obligations under the Contract.

[...]

7.4.5 As to whether White's rights pursuant to the Contract qualify as an investment, it seems evident from the Contracting Parties' definition of "investment" that they intended that the BIT would capture investments in the broadest sense. The Contract also plainly conferred on White a "right to money" for the purposes of sub-paragraph (iii), as well conferring a right to "conduct economic activity" for the purposes of sub-paragraph (iv).

7.4.6 With respect to India's contention that the Contract simply provided for payment to White for the "provision of services", this is not determinative of whether the performance of White's obligations under the Contract constitute an "investment". It is also clear White's commitment under the Contract extended far beyond the provision of equipment and technical services.

7.4.7 In these circumstances, having regard to the definition of "investment" in the BIT, which clearly include White's rights under the Contract, and the decisions of other tribunals that rights arise from contracts may amount to investments, the Tribunal concludes that the fact that White's rights under the Contract may be in personam rather than in rem does not exclude the Contract from qualifying as an investment.

56. In the *White Industries* Award, the tribunal:

(1) Relied on the wording of the relevant BIT and disregarded general requirements that the Respondent sought to invoke as having no basis in the relevant BIT. (paras. 7.3.2 and 7.3.8)

(2) Stated that it is well established that rights arising from contracts may amount to investments under BITs. (para. 7.4.1)

(3) Held that White Industries' rights under the White Contract were investments within the meaning of the relevant BIT. (para. 7.4.7)

(4) As regards the ICC award, the tribunal concluded as follows:

7.6.10 Accordingly, the Tribunal concludes that rights under the Award constitute part of White's original investment (i.e., being a crystalisation of its rights under the Contract) and, as such, are subject to such protection as is afforded to investments by the BIT.

Summary of the legal principles

57. There are a number of basic principles that I take from the above legal materials. These are as follows:

(1) The starting point for the analysis is the language of the BIT. (Article 18(1) of the BIT*; GEA v Ukraine*; *White Industries*)

(2) There is no room for applying a general requirement to the definition of "investment" that is not based on the wording of the relevant BIT. (*White Industries*)

(3) Where a case is not an ICSID case, there is no basis for applying ICSID standards; the issue is the meaning of the relevant BIT. (*GEA v Ukraine*; *White Industries*; *Romak*)

(4) The BIT is to be interpreted in accordance with principles of international law. (Article 18(1) of the BIT)

(5) A BIT should 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."* (Article 31 Vienna Convention)

(6) *"Recourse may be had to supplementary means of interpretation, ...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."
(Article 32 of the Vienna Convention)

(7) In *Romak*, the tribunal held there was no investment based on the application of Article 31(1) and 32(b) of the Vienna Convention for the following reasons:

(i) *Romak's delivery of wheat was a transfer of title in performance of a sale of goods contract. Romak did not deliver the wheat as contribution in kind in furtherance of a venture.* (para. 222)

(ii) *Romak's wheat deliveries does not reflect a commitment on the part of Romak beyond a one-off transaction, and is not of the sort normally associated with "investments"...* (para. 227)

(iii) *"230. An "investment risk" entails a different kind of alea, a situation in which the investor cannot be sure of a return on his investment, and may not know the amount he will end up spending, even if all relevant counterparties discharge their contractual obligations. Where there is "risk" of this sort, the investor simply cannot predict the outcome of the transaction."*

(iv) *"231. It is clear from the evidence in the record of this arbitration that, at the time it entered into the wheat supply transaction, Romak knew that its exposure was limited to the value of the wheat to be delivered."*

(8) In *GEA v. Ukraine*, the tribunal determined that the Conversion Contract pursuant to which a Ukrainian entity was to be supplied with naphtha for conversion into the Products was an investment. In doing so, the tribunal rejected Ukraine's argument that the contract was simply a normal sales contract based on the definition of "movable property" under the German/Ukrainian BIT noting that the Conversion Contract involved "*among other things, assist with delivery of logistics and pay for Ukrainian domestic freight, resolve customs issues, and supply the Oriana plant with necessary materials."*

(9) In summary, tribunals have held a construction contract, a tolling contract and an equipment supply contract to be investments but have held a one-off sale of foreign wheat delivered to the border of Uzbekistan not to be an investment in Uzbekistan.

Application to the facts of this case

58. As noted above, the Respondent did not participate in this arbitration except for an initial objection to arbitration. [redacted][29]

59. [redacted]

[redacted]

[redacted]

Basic chronology

The Claimant and related entities

[redacted] [redacted]

Background to and entering into the Relevant Transaction

[redacted] [redacted]

[redacted] [redacted][5]

[redacted] [redacted]

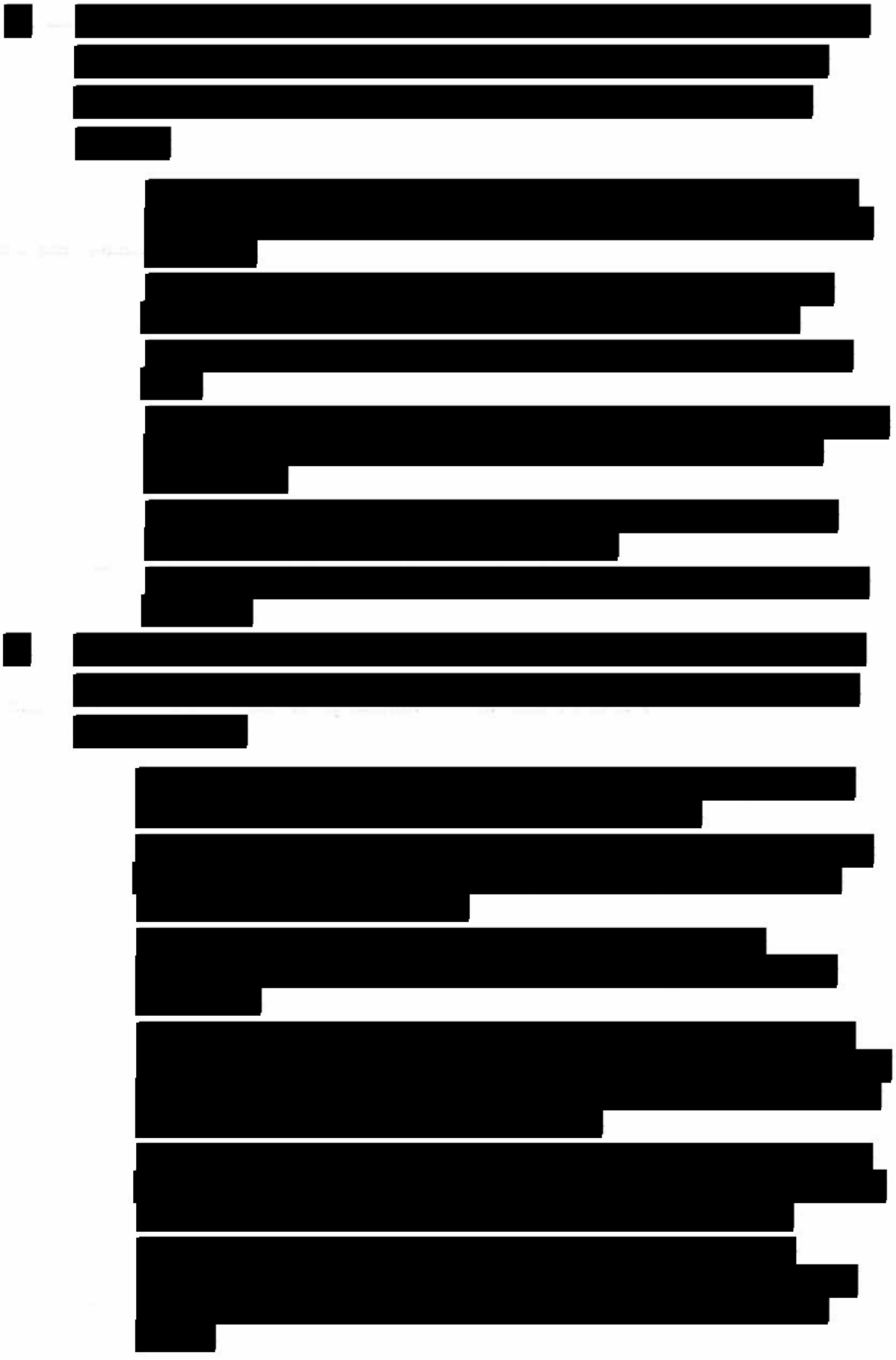
[redacted] [redacted]:

> [redacted]

[redacted]

[36] Exhibit CL-002.

[redacted]



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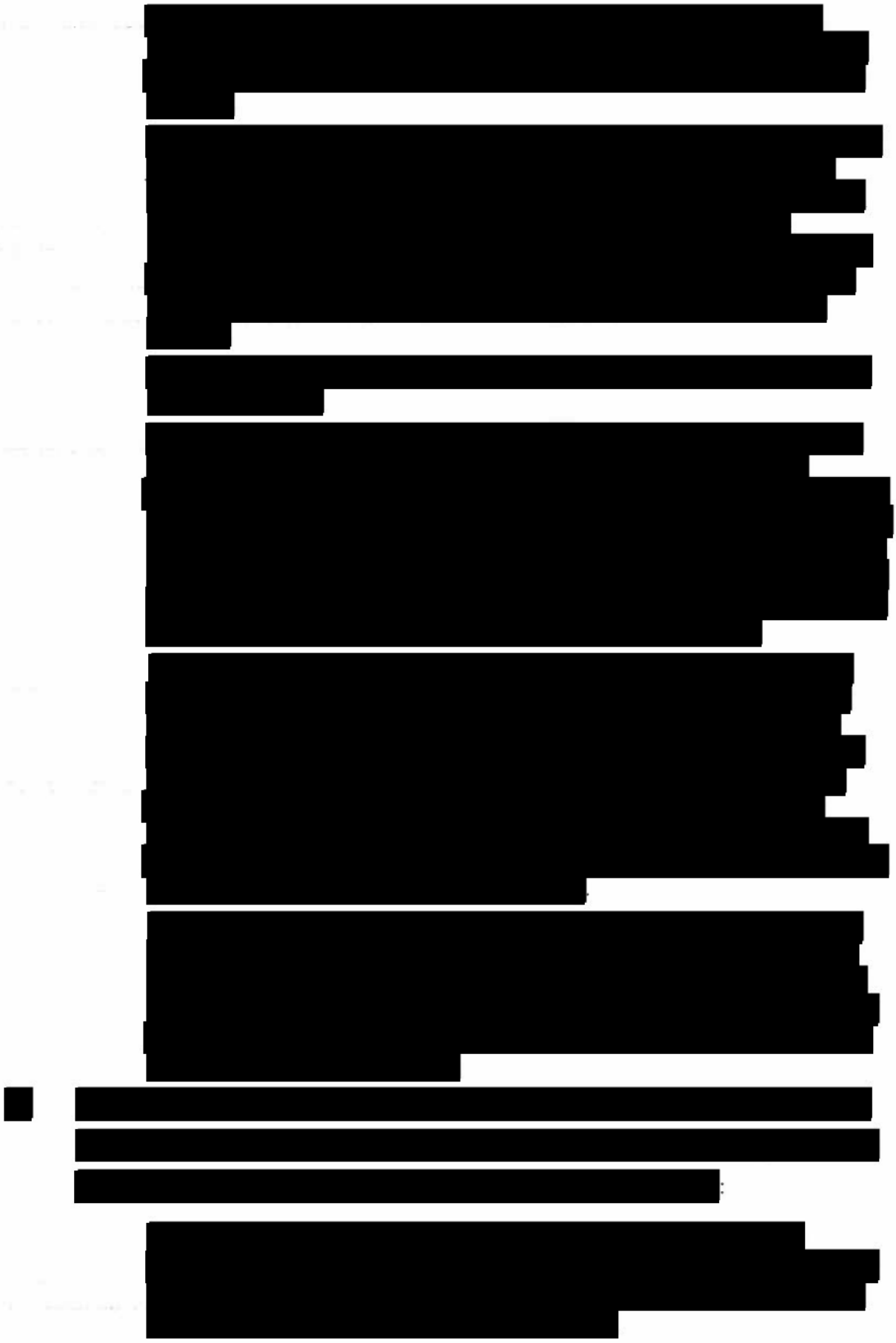

[redacted]

[redacted]

Discussion of the BIT

79. As regards investments, the BIT provides as follows:

> ***The REPUBLIC OF AUSTRIA and the REPUBLIC OF TAJIKISTAN,*** *hereinafter referred to as "Contracting Parties",*
>
> *[...]*
>
> ***RECOGNISING*** *that agreement upon the treatment to be accorded to investors and their investments will contribute to the efficient utilisation of economic resources, the creation of employment opportunities and the improvement of living standards;*
>
> ***EMPHASISING*** *that fair, transparent and predictable investment regimes based on the rule of law both complement and benefit the world trading system;*
>
> *[...]*
>
> ***ARTICLE 1***
>
> *Definitions*
>
> *For the purpose of this Agreement*
>
> *[...]*
>
> *(2) "investment by an investor of a Contracting Party" means* ***[A]*** *every kind of asset in the territory of one Contracting Party,* ***[B]*** *owned or controlled, directly or indirectly, by an investor of the other Contracting Party,* ***[C]*** *Investments are understood to have specific characteristics such as the commitment of capital or other resources, or the expectation of gain or profit, or the assumption of risk, and include:* ***[D]***
>
> *(a) an enterprise as defined in paragraph (3);*

[redacted]

(b) shares, stocks and other forms of equity participation in an enterprise as referred to in subparagraph (a), and rights derived there from;

(c) bonds, debentures, loans and other forms of debt instruments and rights derived there from;

(d) any right or claim to money or performance whether conferred by law or contract, including turnkey construction, management or revenue-sharing contracts, and concessions, licences, authorisations or permits to undertake an economic activity;

(e) intellectual property rights and intangible assets having an economic value, including industrial property rights, copyright, trademarks, trade dresses; patents, geographical indications, industrial designs and technical processes, trade secrets, trade names, know-how and goodwill;

(f) any other tangible or intangible, movable or immovable property, or any related property rights, such as leases, mortgages, liens, pledges or usufructs.

[...]

(6) "territory" means with respect to each Contracting Party the land territory, internal waters, maritime and airspace under its sovereignty, including the exclusive economic zone and the continental shelf where the Contracting Party exercises jurisdiction, in conformity with international law.

(7) "measure" means a regulatory action and includes any law, regulation, decision, procedure, requirement, or practice.

The definition and criteria for investment under Article 1(2) of the BIT

80. Article 1(2) of the BIT provides a definition of what is an investment and three criteria for an investment. In this respect, the BIT is to be distinguished from the BIT in *Romak* which simply provided a list of what would be included in the term investment. In *Romak*, it was this failure to have an overall definition and criteria that led the tribunal to use Black's Law Dictionary to define the term investment.[45] In the present case, the BIT is much more similar to the BIT in *White Industries* which provides a definition of investment.[46]

81. In my opinion, the distinction is crucial. Where a BIT has defined the term "investment" by reference to specific criteria, the role of the tribunal, as pointed out in para. 7.3.2 of the *White Industries* Award is to interpret that definition and the three criteria. The purpose of a definition and the three criteria is to avoid having a tribunal conduct the type of exercise that the tribunal in *Romak* conducted, and that the Majority has conducted in this case.

---

[45] See *Romak Award*, paras. 176 and 177 and footnotes 152 and 153.

[46] See *White Industries Award*, para. 7.3.2.

82. As stated by the tribunal in para. 7.3.2 of White Industries stating:

> *7.3.2 The correct approach to be adopted by the Tribunal in assessing whether an "investment" has been made is to consider the plain and ordinary meaning of the words used in the BIT in their context and in the light of its object and purpose and to determine whether the matters relied on by White satisfy the definition employed in the BIT.*
>
> *[...]*
>
> *7.3.8 The difficulty with India's position on this point is that the BIT simply does not provide that, in order to be a covered investment, the investment must be a right "in rem", or must have Douglas's economic characteristics.*

83. It may well be that, on a normal definition of "*ordinary sales contract*", the requirements of **[C]** are not in a *Romak*-type situation for example. However, the arbitrators should apply the BIT and the analysis in my view should start from the requirements in the BIT and not on inserting a term that is not found in the BIT.

*Investment means **[A]** every kind of asset in the territory of one Contracting Party*

84. With respect to **[A]**, "*every kind of asset in the territory of one Contracting Party*", I note that the ordinary meaning of "*every kind of asset*" is by its nature very broad.

85. In and of itself, the term "*asset*" is generally interpreted to be anything of value, whether tangible or intangible. A right to something in the future that may be of value is an asset.

86. By using the term "*every kind of asset*", the drafters of the BIT appear to have intended to cover every kind of right that could have some value, whether it is a right in personam or in rem. In my view, the drafters of the BIT sought to give this very broad term "*every kind of asset*" concrete meaning by listing the types of assets that are discussed under **[D].**

87. Therefore, in my view, "every kind of asset" includes in particular:

> *(d) any right or claim to money or performance whether conferred by law or contract*
>
> *[...]*
>
> *(f) any other tangible or intangible, movable or immovable property, or any related property rights [...]*

[redacted]

[redacted]

89. The second part of **[A]** imposes a territorial limitation. The asset must be located in the territory of a Contracting Party. To the extent that the asset is tangible property, the location of that property within the territory is easy to define.

90. With respect to debts, the general view is that such rights are located where the debtor has its place of business. [redacted] Therefore, the situs of the [redacted] Guarantees was Tajikistan.

[redacted]

[redacted]

(6) Article 11(1) of the BIT is important, as it notes that "*the breach of a contract between the investor and the host State or one of its entities will amount to a violation of this treaty.*" This clear statement of principle does not refer to applicable law, or dispute resolution provisions. It states unequivocally that the breach of a contractual obligation between a state entity and the investor is a breach of the BIT. There is no limitation as to applicable law or the place of dispute resolution.

93. As a result, I consider that [redacted] rights under the [redacted] Contracts, the [redacted] Contract and the [redacted] Guarantees represented assets located in Tajikistan and the requirements of **[A]** are met.

94. With respect to the Swiss Rules Award, which is discussed at paras. 58, 59 and 78 above, I consider that the award is also an investment as it crystallizes the investment reflected in the Relevant Transaction. [redacted] Since the debtor [redacted] is located in Tajikistan, the Swiss Rules Award is an asset located in Tajikistan.

[B] *owned or controlled, directly or indirectly, by an investor of the other Contracting Party*

95. With respect to **[B],** as discussed at para. 60 above, [redacted] t. Therefore, the Claimant is entitled to assert rights under the BIT with respect to the assets of [redacted] discussed under **[A]**.

[C] *Investments are understood to have specific characteristics such as* ***[i]*** *the commitment of capital or other resources, or* ***[ii]*** *the expectation of gain or profit, or* ***[iii]*** *the assumption of risk*

96. As noted above, this definition of investments is not found in the BIT in the *Romak* case referred to above. In addition, the description of investment in the BIT does not refer to the duration of the investment.

97. There are three alternative characteristics (i) commitment of capital or other resources, or (ii) the expectation of gain or profit or (iii) the assumption of risk.

98. Article 1(2) sets out these criteria in the alternative by the use of "or". Therefore, in the normal and ordinary meaning, if an Investor can satisfy one of these elements, it meets the requirements for an investment under the BIT.

[i] *commitment of capital or other resources*

99. The commitment of capital is usually made in cash. However, the reference to "*other resources*" would include contributions in kind (such as in the *GEA v. Ukraine* case).

100. In my opinion, the payment of a purchase price on sale of goods as in *Romak* would not be a commitment of capital for three reasons. First, the payment would be for the commodity upon delivery of the commodity. Second, the payment would be a one-off transaction that would end with the delivery of the commodity. Third, the underlying idea of "capital" implies a contribution for that is not simply the payment of the current market price for a commodity.

[redacted]

102. The issue is whether these can be characterized as capital or payment of the purchase price for a commodity. [redacted]

104. The contrast with the situation in *Romak* is stark. In that case there was one payment due on delivery of the commodity at the relevant border. The price was based on the market price. It was a one-off sale and purchase transaction for a commodity. The commodity was not located in Uzbekistan. It was not represented by warehouse

[redacted]

[49] Claimant's Supplemental Witness Statement, para. 10.

receipts issued in Uzbekistan to a local company of the claimant that was to supervise export of the commodity.

[redacted]

[ii] *the expectation of gain or profit*

106. The concept of gain or profit implies a certain amount of risk. A commodity purchase the market price would not usually involve a gain or profit on the actual commodity purchase although it would almost invariably result in a gain or profit upon resale.

107. In the present case, the situation is more straightforward. [redacted] Therefore, this requirement is met.

[iii] *the assumption of risk*

108. [redacted] I am persuaded that the relevant contracts contained obvious risks, a number of which have materialized. [redacted]

[redacted]

[redacted]

[redacted]

111. Therefore, I am persuaded that the Claimant has met the requirements set out in the description of investments in the BIT and that is the essential element. [50]

> ***[D]*** *[...] Investments [...] include*
>
> *(d) any right or claim to money or performance whether conferred by law or contract, including turnkey construction, management or revenue-sharing contracts, and concessions, licences, authorisations or permits to undertake an economic activity;*
>
> *(f) any other tangible or intangible, movable or immovable property, or any related property rights, such as leases, mortgages, liens, pledges or usufructs.*

112. With respect to **[D]**, there is a list of assets and, as discussed above, it is apparent that the [redacted] Contracts and [redacted] Contracts and the [redacted] Guarantees fall under various headings.

113. The Swiss Rules Award does not fall expressly within one of the categories in **[D]**. However, there is a line of cases including *White Industries*[51] that have held that an arbitration award crystallizes the rights with respect to any underlying investment. As a result, since I consider that the Relevant Transaction represented an investment, the Swiss Rules Award also constituted an investment.

114. Once the conclusion is reached that the Claimant's Contracts constitute an investment under a proper interpretation of the BIT, in my view that should be the end of the matter. However, for good order, set out below is an analysis of whether the Relevant Transaction is a "*normal commercial transaction*" under *Romak* or an "*ordinary sale of goods*" as invoked by the Majority, although in my view neither of those two additional requirements are applicable to the BIT.

Whether the Relevant Transaction is a "normal commercial transaction"

115. Assuming it is a requirement of the BIT that the Relevant Transaction not be a "*normal commercial transaction*" as described by *Romak*, then the issue is how to

---

[50] For good order, it appears to be that the Majority accepts grudgingly that all three criteria in **[C]** are met in para. 215 of the Award but determines that there is no investment due to the failure to satisfy the Majority's requirement that the Claimant's Contracts not be "ordinary sales contracts" as understood by the Majority.

[51] Exhibit CL-0018- *White Industries Australia Ltd. v Republic of India*, UNCITRAL, Final Award, 30 November 2011.

view the Relevant Transaction in this instance. The starting point for this analysis is the basic point found in *Romak, GEA v. Ukraine* and *White Industries*.

116. *Romak* is an illustration of what constitutes a normal commercial transaction. In *Romak*:

(1) The claimant entered into a one-off sales transaction.

(2) The claimant was selling wheat produced outside of Uzbekistan that the claimant owned at a set price.

(3) The wheat was delivered to the Kazakh-Uzbek border pursuant to the INCOTERMS (CIF Chengaldy). It is not clear whether any other activity took place in Uzbekistan.

(4) Although the claimant had envisaged some further cooperation in the Protocol of Intention, the tribunal found that the parties had never implemented it.

(5) Switzerland and Uzbekistan entered into a separate agreement regarding the sale of goods on the same day the BIT was signed.[52]

117. Due to these factors, the tribunal in *Romak* found that simply applying a literal approach to the definition of investment led to "*a result which is manifestly absurd or unreasonable.*"[53]

118. In *GEA v. Ukraine*, the tribunal found that the Conversion Agreement (which in essence was a tolling agreement) was an investment based on various factors. These included the fact that the contract included "*among other things, assist with delivery of logistics and pay for Ukrainian domestic freight, resolve customs issues, and supply the Oriana plant with necessary materials.*"[54]

119. In *White Industries*, the issue was whether a construction contract was an investment. As noted above, in the relevant BIT there was a definition of "investment" and the tribunal simply noted that:

> *7.4.5 As to whether White's rights pursuant to the Contract qualify as an investment, it seems evident from the Contracting Parties' definition of "investment" that they intended that the BIT would capture investments in the broadest sense. The Contract also plainly conferred on White a "right to*

[52] *Romak Award*, para. 182.
[53] *Romak Award*, para. 184.
[54] Exhibit CL-0015- GEA Group Aktiengesellschaft v. Ukraine, Award dated 31 March 2011, para. 149.

money" for the purposes of sub-paragraph (iii), as well conferring a right to "conduct economic activity" for the purposes of sub-paragraph (iv).

7.4.6 With respect to India's contention that the Contract simply provided for payment to White for the "provision of services", this is not determinative of whether the performance of White's obligations under the Contract constitute an "investment". It is also clear White's commitment under the Contract extended far beyond the provision of equipment and technical services.

7.4.7 In these circumstances, having regard to the definition of "investment" in the BIT, which clearly include White's rights under the Contract, and the decisions of other tribunals that rights arise from contracts may amount to investments, the Tribunal concludes that the fact that White's rights under the Contract may be in personam rather than in rem does not exclude the Contract from qualifying as an investment.

[redacted]

121. As discussed below, the Majority considers that it is part of an ordinary sale of goods contract to pre-pay for the commodity. I do not know the basis on which they arrive at that conclusion. However, in my experience pre-paying for a commodity that has yet to be produced in a very high risk country such as a Tajikistan, with no security other than a guarantee of a [redacted] bank, is not a normal commercial transaction. It is a high-risk, speculative purchase presumably (as in this case) for a very substantial discount. Therefore, in my view the pre-payment, and the risk associated with it, render the Claimant's Contracts very different from normal commercial contracts.

122. [redacted], one must consider this particular BIT and the circumstances that led to the Relevant Transaction in the light of what the signatories of the BIT could reasonably have intended when they signed the BIT.

123. In this respect, I noted four salient features regarding the background to the Relevant Transaction and four salient features with respect to the details of the Relevant Transaction.

Background to the Relevant Transaction

124. *First,* the BIT became effective on February 1, 2012. It was clear that, at that time, Tajikistan was seeking investments. In this context, it is noteworthy that the New

York Convention entered into force in Tajikistan on November 12, 2012. In 2012, Tajikistan was seeking to attract foreign investors.

[redacted]

126. I consider that the signatories of the BIT would normally have expected that financial contributions made in the context of this conference co-organized by the Respondent's state committee on investments would constitute investments.

[redacted]

[redacted]

Details of the Relevant Transaction

[redacted]

[redacted] In a normal commercial transaction, the buyer generally is not involved in any way with the how or why of production. In *Romak*, there was no production in Uzbekistan at all. Romak obtained the wheat and delivered it to the Kazakh-Uzbek border.

[redacted] In *Romak*, it appears that the price for the wheat was a normal, fixed commercial price in a normal sale of goods.

[redacted]

[redacted]

[redacted] I am persuaded that interpreting the Relevant Transaction to be an investment within the meaning of the BIT is the correct interpretation both literally and within the reasonable meaning of the BIT itself.

Whether the Relevant Transaction is an "ordinary sale of goods contract"

136. In the Award, the Majority states that:

> *216. In the view of the Tribunal, however, it is not unusual in the context of sale of goods transactions that a seller requires advance payments to finance the production of the goods in exchange for a price discount; that it might not be in a position to produce the goods without such advance payments; that it would commit to supply goods of a certain quality and quantity from specific production units; and that it would use the funds received to improve its production processes and equipment.* [redacted]

137. I disagree with this analysis because it has no basis in the record; it is based on a preconception as to what an ordinary sale of goods is that itself has no basis in the record; and it ignores undisputed facts that are part of the record in this case.

[59] Exhibit C-0024. The BIT does not refer to, let alone require, a minimum duration. Therefore, I not consider this requirement should be read into the BIT and, if it were to do so, I am persuaded that it should then take into consideration the Claimant's activities in Tajikistan since 2004.

138. In para. 216 of the Award, the Majority makes a series of statements of what is not unusual in a sale of goods transaction. I am not aware of any basis for these statements in the record and, with respect, disagree with them.

139. I do not claim to be a specialist in [redacted] purchases or commodity purchases generally. However, to purchase any commodity, it must be frequent to use a broker working with the relevant commodity market and to pay the full market price. Prior to payment, one would expect there to be a documentary letter of credit or other security so that payment would be made against shipment.

[redacted]

[redacted]

Conclusion

144. In my opinion, the Claimant's Contracts and the Swiss Rules Award fall within the scope of investments under Article 1(2) of the BIT and I respectfully disagree with the Majority's procedural and substantive approach and conclusions with respect thereto.

Place of arbitration: Paris, France

Date: 29 November 2023

Signed

Thomas Webster

Co-arbitrator