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

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*Investment means **[A]** every kind of asset in the territory of one Contracting Party* 34

***[B]** owned or controlled, directly or indirectly, by an investor of the other Contracting Party* 37

***[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* 37

***[i]** the commitment of capital or other resources* 37

***[ii]** the expectation of gain or profit* 39

***[iii]** the assumption of risk* 39

***[D]** [Investments ....include* 40

(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.

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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

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[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]

Background to and entering into the Relevant Transaction

[redacted]

[redacted]

[redacted][5]

[redacted]

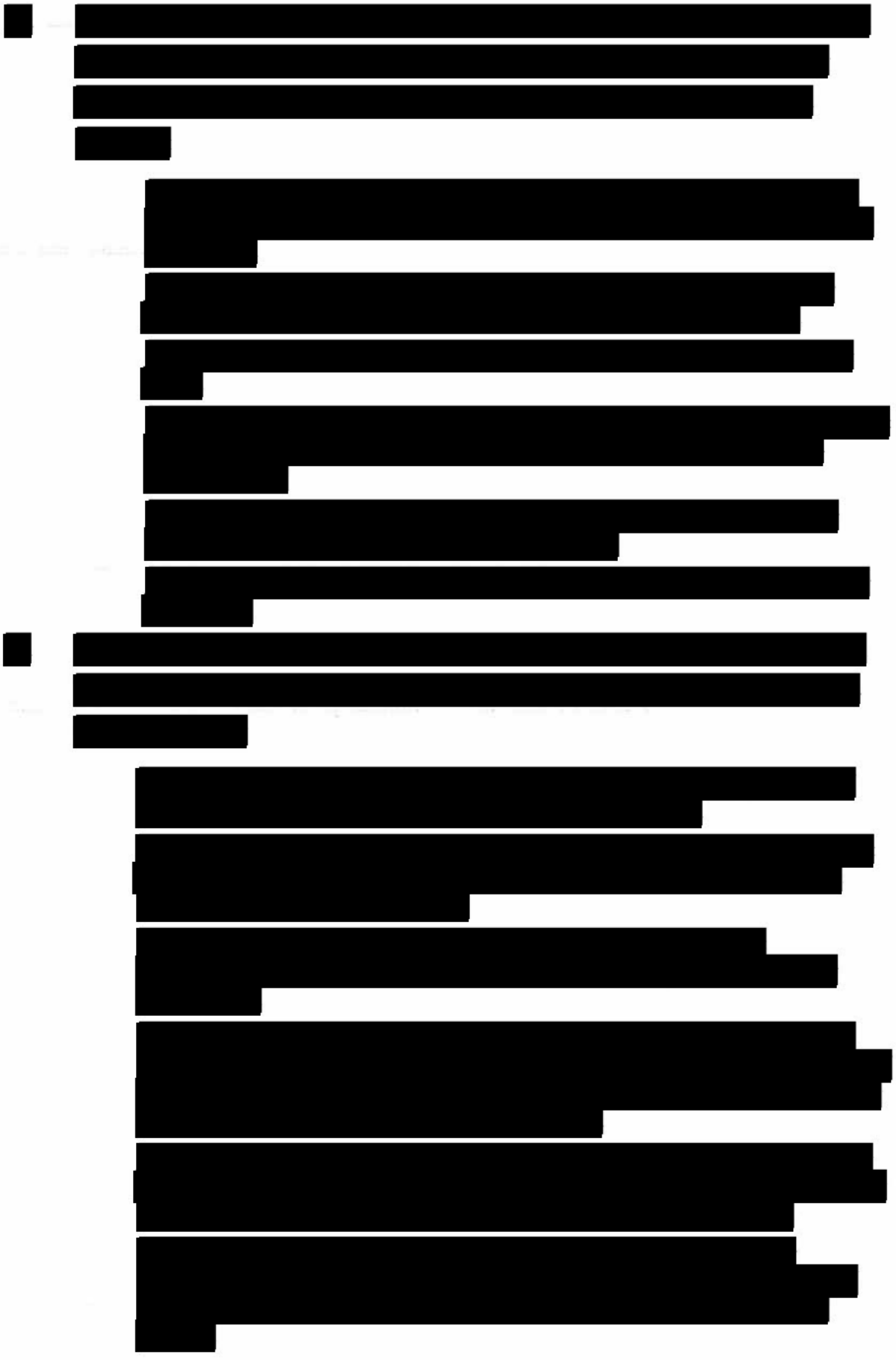
[redacted]:

> [redacted]

[redacted]

[36] Exhibit CL-002.

[redacted]



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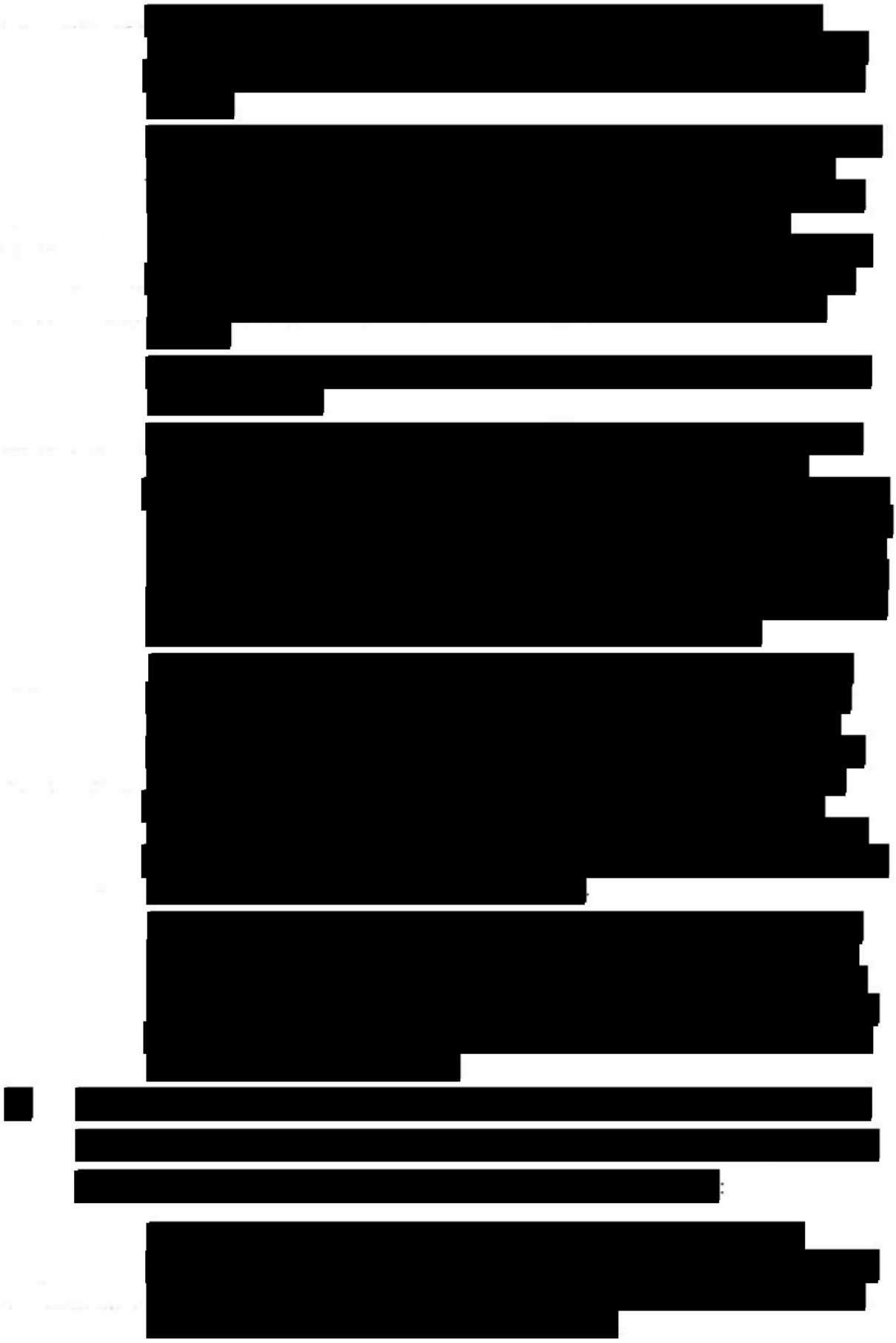

[redacted]

[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